THE POLITICS OF THE SEA:

AUSTRALIA AND PAPUA NEW GUINEA

1966 - 1976

by

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This thesis is my own original work and has not previously been submitted for a higher degree to any other university or institution.

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ABSTRACT

This thesis examines the relationship between the law of the sea and the domestic and international politics of Australia and Papua New Guinea. Particular attention is devoted to its effect on the relations between both countries in the period since 1966. The central theme of the study is the impact on domestic and international politics of an Australian policy designed to increase the area and scope of national jurisdiction over adjacent waters and seabed. This policy has resulted in conflict within the Australian federal system, disputes with maritime neighbours and distant water fishing interests, and the creation of a series of problems in Australian-Papua New Guinea relations. The body of the work is divided into four chapters. These consider in turn the physical and legal maritime environment of the South East Asian - South West Pacific islands region, the domestic and international manifestations of Australian policy, the transition from a colonial to independent maritime relationship between Australia and Papua New Guinea, and the major conflict of national law of the sea policy : the Torres Strait dispute. A concluding section provides a broader perspective of the main trends in the legal - political relationship at the regional and national level in the period up to the end of 1976.

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INTRODUCTION

Changes in the pattern of sea usage in the mid-twentieth century have resulted in the development of a new law of the sea, which is of growing importance in domestic and international politics. This study examines the political responses of Australia and Papua New Guinea (P.N.G.) to these worldwide trends and to local maritime problems.

Both Australia and P.N.G. have long coastlines and numerous offshore islands, and, with their limited surveillance resources, face problems of demonstrating national sovereignty, particularly against foreign fishing incursions. The economies of both are dependent on seaborne trade, and are hence vulnerable to political or military restrictions on shipping movement. Furthermore, both lack adequate land sources of oil and gas and, to offset their dependence on seaborne imports, place considerable importance on the search for alternate supplies from the local seabed.

Although they share many common maritime problems, there are also important differences in the relationship of each to its ocean environment. P.N.G. society is much more dependent on fish as a source of food than is Australia, and is consequently more responsive to the depletion of inshore stocks and the vagaries of imported supplies. While P.N.G. is concerned with the security of its land border with Indonesia, Australia possesses only maritime boundaries and is located on the periphery of Asia and the Pacific. Australia's military alliance with the United States requires a close maritime relationship with its ally and the maintenance of an indigenous ocean fleet. By comparison, the P.N.G. decision to eschew military alliances has facilitated

concentration of the local naval effort on a policing role within the area of national sovereignty. Both nations, however, possess only a restricted ability to enforce their maritime jurisdiction by force of arms and are therefore compelled to rely in large measure on the limitation of foreign behaviour through the international law of the sea and through bilateral agreements with other countries.

Differences of a more general political nature also affect Australian and P.N.G. government attitudes towards the law of the sea. The colonial relationship affords a study of the application of metropolitan law, followed by the devolution of authority and the eventual replacement of Australian policy by an independent P.N.G. policy. The structure of the two political systems, in particular the relationship between the national and regional elements, provides important determinants of the nature and scope of national policy in each case. In a wider perspective, Australia's position as an industrialized European nation located on the edge of Asia, and P.N.G.'s status as an emergent Third World state, but with both sharing a high level of economic vulnerability to foreign maritime pressures, help to explain the differences and similarities in their attitudes towards the law of the sea.

It is sometimes argued that the law of the sea, as a component of international law, is not law at all since there is no international legislature or enforcement agency. This controversy is avoided here, but it is observed that the conventions and customary practices known as international law are by and large observed by states. The law of the sea, in particular, constitutes a body of rules which have

received almost universal support for many years. International law is effective when it is underpinned by a consensus, whether based on political, military or economic interests. In more recent years the law of the sea consensus has been weakened as a consequence of the dramatic growth in the economic importance of the oceans and their resources. A political accord which takes these changes into account has still to be worked out. The present study goes beyond a legal analysis to an examination of national and sub-national political behaviour and its relationship with the law of the sea, and hence the more encompassing title 'the politics of the sea' has been chosen.

This study examines the interaction between the law of the sea and the politics of Australia and P.N.G. It is argued that since 1966 the Commonwealth has adopted a policy of extending the scope and physical limits of maritime jurisdiction around Australia and P.N.G. The implementation of such a policy has resulted in a redefinition of the legal relationship between the Commonwealth and its regional components, to the detriment of the latter, and in disputes over the common maritime area between Australia and P.N.G. It has also led to a wider conflict of interests with the neighbouring states of both, and with those members of the international community which fish the waters of the South West Pacific.

The time frame 1966-1976 was selected in part because it is within this period that a major reappraisal of the law of the sea has taken place. Demands for change have been prompted by significant new developments in the pattern of ocean usage, of which two in particular have affected Australia and

P.N.G. Within the last decade offshore oil and gas search and the increase in foreign fishing in the waters around both countries have become factors of political importance. These changes to the local exploitation of the ocean have precipitated new developments in Australian law of the sea policy, with consequential effects on the domestic polity and on relations with foreign maritime interests and with regional neighbours. The development of Commonwealth initiatives also coincided with the era of decolonization in P.N.G. and, in the latter stages, with the emergence of an independent government at variance with the Australian approach to the Torres Strait and other law of the sea questions.

Chapter I is divided into three sections. The first two are devoted to an examination of the South East Asian and South West Pacific maritime environment in which Australia and P.N.G. co-exist. The distribution of marine resources and the pattern of their exploitation are given special consideration. The final section is concerned with a summary of contemporary sea law, with particular emphasis on the interpretations adopted by Australia and her neighbours as they sought to regulate the usage of their maritime environs. Although the general law of the sea coverage embraces the period 1945-1976, Australian responses only up to 1966 are considered in the first chapter.

The policies developed in respect of the law of the sea by the Australian Federal and State governments in the period 1966-1976 are examined in Chapter II. Discussion of the relationship with P.N.G. and the Torres Strait boundary dispute are reserved for subsequent chapters.

It is argued that the tendency of the Commonwealth to increase the spatial and juridical scope of offshore control has led to a number of significant domestic and international political consequences. In the first instance, it has afforded an opportunity for the Federal government to assert full sovereign rights over the offshore area at the expense of State rights, but this option has been only partially exercised because of a variety of legal, political and economic impediments. These constraints in turn limit the options available to the national government with regard to the external expressions of law of the sea policy. Second, extensions of jurisdiction have led to disputes with Indonesia, Japan and Taiwan but the policies adopted in the period - with some important exceptions, - have been validated by the Third United Nations Law of the Sea Conference.

Chapter III is concerned with the colonial law of the sea relationship between Australia and P.N.G. and the development of an independent P.N.G. policy. The period 1949-1972 is covered in the first section in which it is argued that the predominant feature of the relationship between the metropolitan government and the territory administration was the undifferentiated nature of the imposition of Commonwealth law, except in circumstances where discriminatory provisions were applied to protect mainland Australian economic interests. The second section embraces the period of devolution of offshore authority and the creation of an independent P.N.G. law of the sea policy. Although much of the present day domestic interpretation reflects its colonial antecedents, it is suggested that

this is more a consequence of the tardiness of Australian delegation of legislative authority than the desire of the P.N.G. government to align policy with its erstwhile colonial rules. The attitudes and policies adopted by P.N.G. towards the law of the sea in international forums constitute the third section and illustrate the emergence of a policy at variance with that of the former metropolitan government.

Evidence of the divergences between P.N.G. and Australian interpretations of the law of the sea is provided in the Torres Strait dispute, which is the subject of Chapter IV. The dispute was chosen because it illustrates aspects of the current differences between Australia and P.N.G. over the law of the sea; it also displays certain subsidiary features which are sources of potential conflict. It will be argued that hitherto an unbalanced picture of the local disputants has been presented and that little attention has been paid to the determinants and nature of P.N.G. policy in the dispute. It is hoped that this thesis will in part redress the balance. In this chapter, historical antecedents are examined more fully than in earlier chapters, since factors in the nineteenth century negotiating positions of the disputants appear relevant to the contemporary debate. The main body of the chapter is devoted to a history and analysis of the dispute since 1966. It concludes with an overview of features of the law of the sea and boundary settlement which may be relevant to any final settlement which might emerge. Throughout the discussion it is postulated that the dispute is essentially a political debate over control of maritime resources, and that it is

symptomatic of the increasing divergence of Australian and P.N.G. law of the sea policy.

The thesis concludes with a summary of the main arguments developed in the earlier chapters. It highlights the importance of domestic determinants in the law of the sea policies of both P.N.G. and Australia; a feature of particular significance in the Torres Strait dispute. In spite of these policy constraints, both governments have demonstrated a willingness to expand their sphere of maritime jurisdiction in accordance with international and regional practice. As a final point it is argued that such extensions of national control over the sea may confer financial benefits on the claimant states but these may be nullified by the destabilizing effects on international relations, particularly since UNCLOS III has failed to institutionalize these practices as international law.

The study was undertaken between March 1975 and February 1977, at a time when the law of the sea was in a state of flux, P.N.G. policy was being developed and the Torres Strait dispute was occupying the attention of negotiators in both countries. Events and decisions occuring after December 1976 have not been incorporated. Consequently, some of the arguments developed in the thesis may already require revision in the light of developments since that date.

The major source of material in both countries was legislation, government publications and interviews with government officials and other interested parties. Most interpretative material on the Australian application of sea law consists of legal analyses and a number of shorter

articles by political geographers and economists. Secondary sources on P.N.G. policy are limited to a small number of university studies, again with the emphasis on juristic interpretation. The details of events and public and government reactions were largely drawn from parliamentary debates and press reports. In P.N.G. and in the Torres Strait, much of the information was available only from oral and secondary sources. In particular, House of Assembly transcripts beyond January 1976 are not available and this imposed a reliance on press and personal reporting of statements and attitudes of the national politicians. Details of written and oral sources are set out in the footnotes and bibliography, except where it has been requested by the informant that these should not be made public. In such circumstances the details of sources has been provided separately for scrutiny by the examiners.

Much of the detail for the P.N.G. and Torres Strait chapters was derived from research in Brisbane, Thursday Island, Port Moresby, Daru and coastal villages of the Western Province of P.N.G. These areas were visited in the period November 1975 - February 1976. Interviews on the northern islands of the Torres Strait were planned, but permission to visit the area during the fieldwork period was withheld by the Queensland government.

CHAPTER I

THE REGIONAL MARITIME MILIEU AND THE LAW OF THE SEA

Since World War II Australian economic and political attention has shifted from its earlier focus on the Western Hemisphere to a greater involvement with the countries of South East Asia and the South West Pacific. One feature of this change in orientation has been the development of a post-war law of the sea policy which reflects regional interpretations of trends in the international law of the sea and patterns of maritime activity in the neighbourhood. By contrast, the government of P.N.G. has in the period since independence formulated law of the sea policies which are primarily a response to its earlier colonial relationship with Australia but also reflect its links with the South West Pacific and South East Asia. As a preliminary to a study of Australian and P.N.G. policies it is thus appropriate to examine the maritime environment of the South East Asian - Australasian - South West Pacific area, and the main features of law of the sea policy of the constituent countries. In so doing, it is argued that the predominant feature of the sea law policies of the countries of the area under study is the need to protect the adjacent maritime areas from commercial and military encroachment, both by neighbouring states and nations geographically more distant.

The first part of the chapter examines the physical configuration of the Asian-South West Pacific-Australasian island region and the maritime facilities and resources which it affords. This is followed by a consideration of

the pattern of utilization and identification of the major participants in regional maritime activity. Developments in the international law of the sea are assessed, with the major emphasis of the chapter on interpretations of particular regional interest. The Australian and P.N.G. maritime environment is briefly discussed in the regional context, and Australian law of the sea responses to local maritime developments up to 1966 are included to provide a background for the detailed subsequent coverage of post-1966 policy.

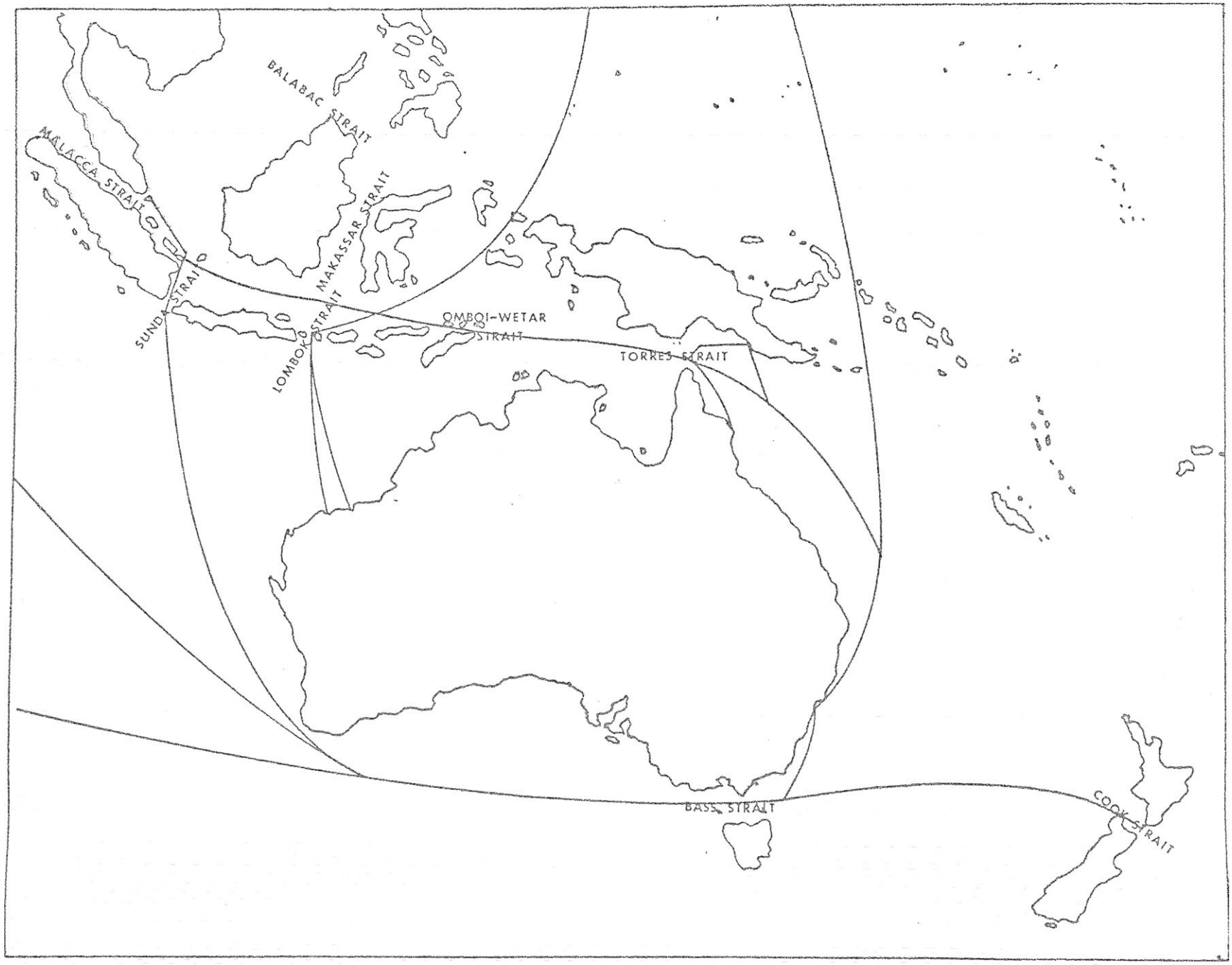
THE PHYSICAL ENVIRONMENT

The study focuses on the island nations of South East Asia and the South West Pacific: Indonesia, the Philippines, Singapore, P.N.G., Australia, Nauru, Fiji and New Zealand together with Malaysia. This Asian-Pacific littoral also contains a number of land areas not politically independent; in particular the numerous islands of the U.S. Pacific Trust Territories, New Caledonia, the Solomon Islands and the New Hebrides. None of the political entities under consideration consists solely of one area of land, but each comprises of a series of islands. This geographic configuration has an important bearing on the political and economic life of these states and territories, and the international legal status of the waterways linking the land components are of vital concern to their governments.

The scattered island nature of the region confines shipping to a limited number of sea lanes and straits.[1]

1. Detail of the shipping routes and straits were provided by M.T. Francombe, Australian Department of Transport, Coastal Surveillance Section, on 15 July 1976. Mr. Francombe has been a member of the Australian delegation to the 1974-76 Law of the Sea Conferences.

STRAITS AND SHIPPING ROUTES

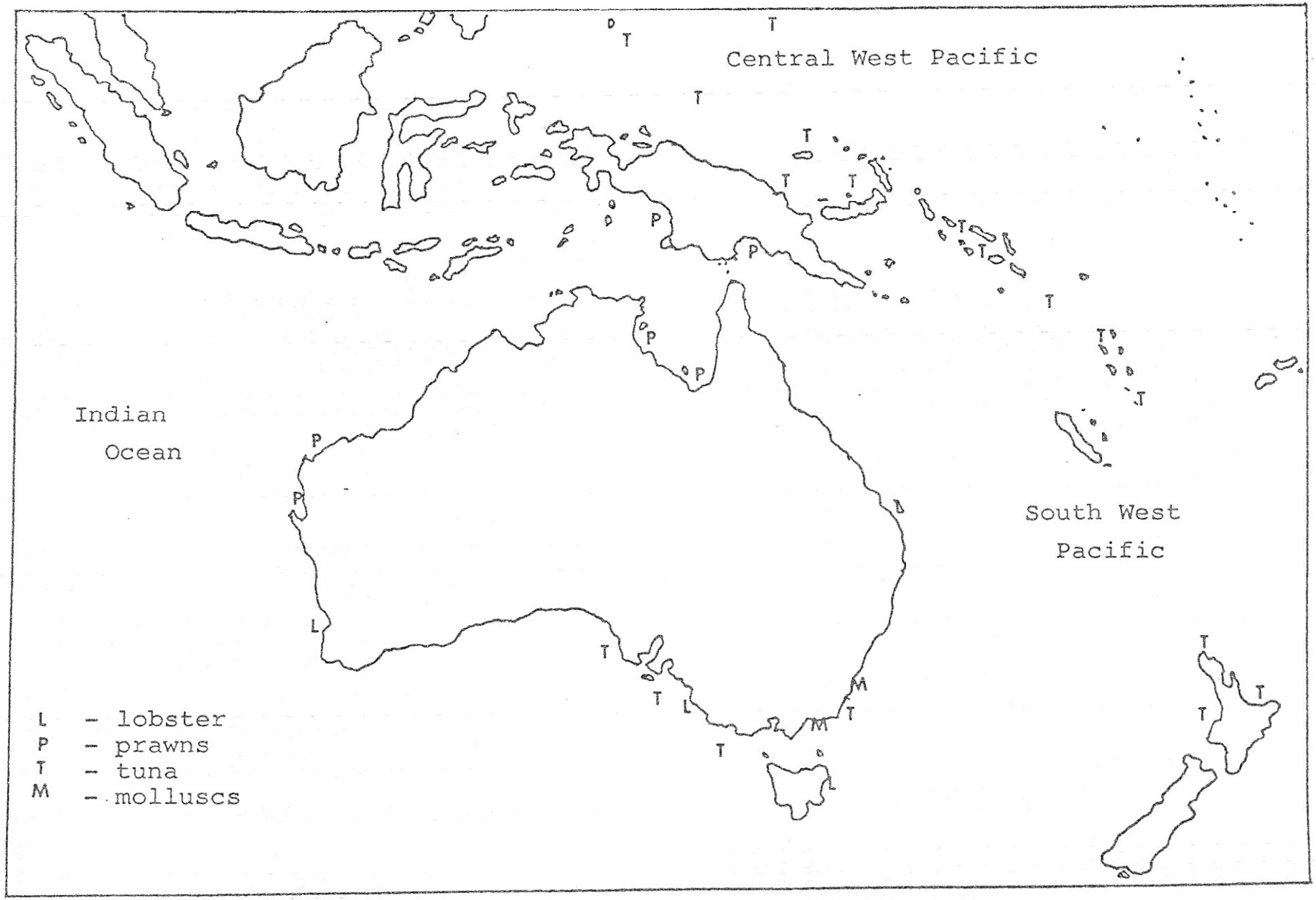


This problem is compounded by the presence of numerous navigation hazards and the paucity of accurate data on the areas less frequented by international mariners. The Malacca-Singapore straits, located between the Southern tip of Malaysia, Singapore and Sumatra provide the major channel between North East Asia and the Indian Ocean. The Indonesian archipelago also contains a number of straits of commercial and strategic significance for Australia. The three most important of these are the Sunda Strait between Sumatra and Java, the Lombok Straits to the east of Bali and the Omboi-Wetar channels located to the north of Timor. Australia and P.N.G. geographically share the Torres Strait, but its importance as a major shipping route is limited because of the shallow and hazardous channel. Of greater commercial significance for the more heavily populated south east of Australia and for New Zealand is the Bass Strait between Tasmania and the Australian mainland. In the South West Pacific, an important sea lane for the Australia-Japan trade passes through the New Ireland-Bougainville island chain in the P.N.G. archipelago.

The waters of the South East Asian-Australiasian-South West Pacific region vary in their capacity to sustain commercially exploitable fish populations. The west-central Pacific is among the world's major fisheries, but the South West Pacific is relatively under-exploited.[2] However, recent research has proved commercial quantities of migratory tuna and mackerel species along the western littoral: in the Bismarck and Solomon Seas, off the

2. S.J. Holt, 'The Food Resources of the Ocean' in D. Flanagan et.al. (edd.), The Ocean (San Francisco, 1969), p.96.

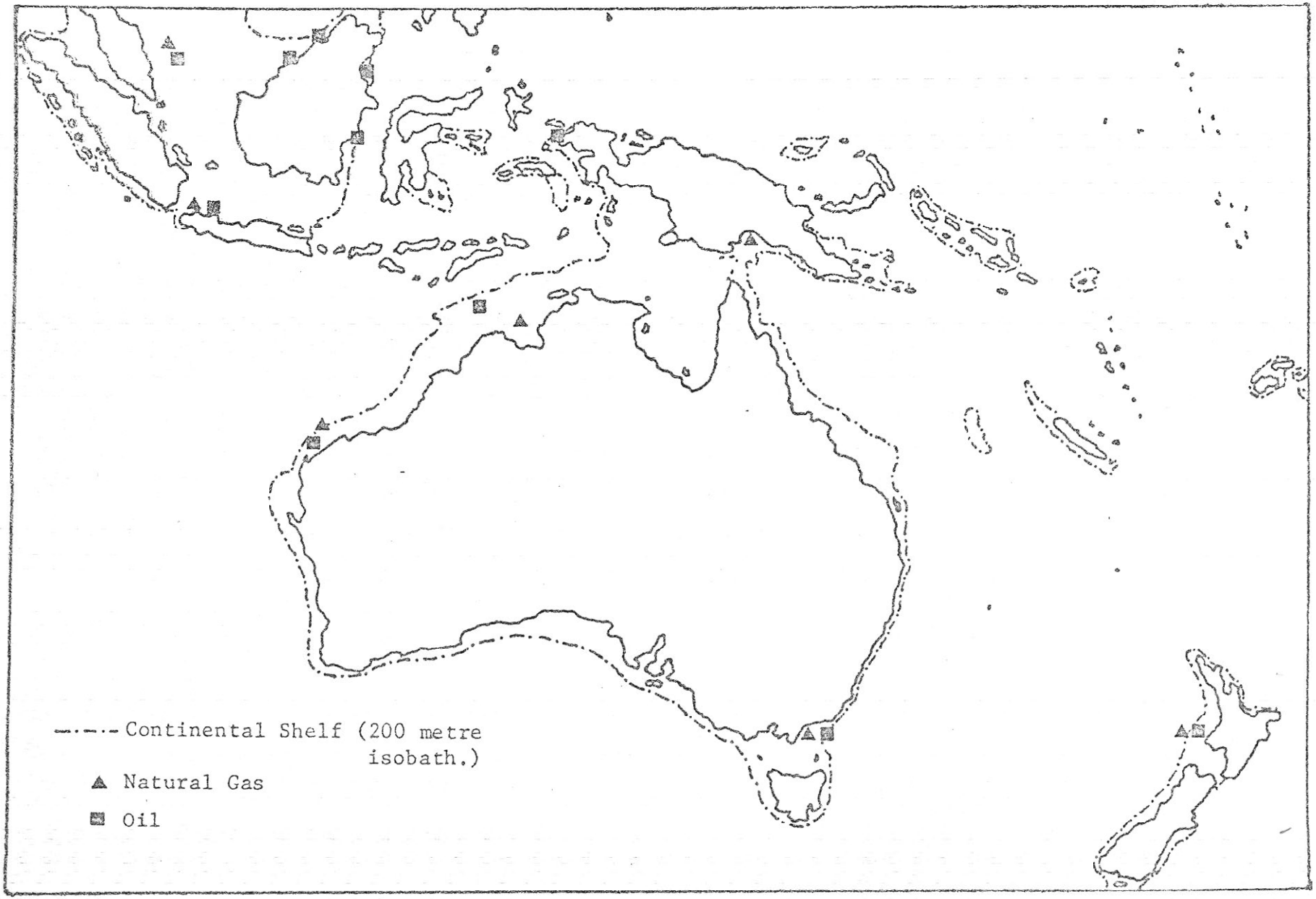
MAJOR COMMERCIAL FISHERIES



southern and eastern coasts of Australia and around New Zealand. Molluscs abound around the southern coast of Australia and a number of commercially valuable species of crayfish are distributed throughout the reefs of Australia and P.N.G. The tropical gulf areas of shallow seabed fed by large estuarine rivers provide large seasonal concentrations of prawns around areas of northern Australia and southern P.N.G. The waters to the south of Australia and New Zealand once contained large schools of whales but overhunting has seriously depleted their numbers in the mid-twentieth century.

Both the South East Asian and South West Pacific regions are characterized by shallow seabeds. Western Indonesia and the island of Borneo are surrounded by an extensive continental shelf or submarine extension of the landmass overlaid by water less than 200 metres deep. The eastern islands of Indonesia and those of the Philippines are less well endowed with shallow seabed areas. Extending south from the Aru islands of Indonesia is the largest continuous shelf area of the region. It encompasses the whole of Australia and Tasmania and extends north to embrace the island of New Guinea. Off the north west coast of Australia the shelf extends for over 300 miles towards Timor, but ends in a deep trough about 80 miles south of the island. Along most of the south east of Australia the shelf does not extend more than thirty miles from the coast. But in the Great Barrier Reef region it underlies the coral formations at a greater width, and areas of detached shelf surrounding smaller reefs and islets are numerous. Similar detached formations are to be found off the north west

CONTINENTAL SHELF - KNOWN OIL AND GAS DEPOSITS



coast and around Lord Howe and Norfolk Islands.

P.N.G. has a more limited submarine landmass except in the Gulf of Papua and adjacent to the coast of the Northern Province. Along the north coast of the New Guinea mainland the shelf is very narrow: in some places it extends less than a mile from the shore. The islands of the Bismarck Archipelago possess a number of separate continental shelves of variable width. In the Bougainville-Solomon Islands area a common shallow seabed exists. New Caledonia has a relatively wide shelf in relation to the land area, and France also has claimed a detached area to the west, the Bellona Plateau surrounding Chesterfield Island. This latter claim lies approximately half-way between the Australian mainland and the principal island of the New Caledonia territory. Fiji and New Zealand do not have extensive areas of seabed at depths less than 200 metres around their main landmass and outer islands. The smaller colonial dependencies of the South West Pacific occupy minute land areas, and their submarine extensions are insignificant in size and economic potential.

The shallow seabed has traditionally been a source of marine food for local populations, and while this significance continues, its importance has been overshadowed by the discovery that oil and gas deposits are often located in the subsoil. Known areas of hydrocarbon deposits are in the seabed of the Java and South China Seas, off the east coast of Borneo, the Papuan Gulf, the Gippsland Shelf east of Victoria and the area between Timor and north western Australia. Smaller deposits have been located off the west coast of the North Island of New Zealand. Most of

the continental shelves of the smaller islands of the South West Pacific have not been the subject of detailed examination, and hence it is difficult to assess their potential.

One additional feature of the maritime geography of the region deserves mention. All of the nations and territories, with the exception of Singapore, have relatively extensive areas of sea surrounding their landmasses, unencumbered by the claims of neighbouring states. Even where delimitation problems exist, the extent of undisputed area allows the state to derive considerable benefit from the ocean surrounds. Singapore, by contrast, is limited in the extent of its potential claims by the Malaysian peninsula and Indonesian islands. It has, nevertheless, capitalized on its location on the Malacca Straits and its proximity to the centres of oil, minerals and agricultural production to become the entrepõt centre of South East Asia.

UTILIZATION OF MARINE RESOURCES

The density of shipping traffic throughout the area of study is not generally high except in straits and approaches to major ports. The movement of raw materials, notably oil, mineral ores and the products of the tropical agriculture of the region to Japan, and the return flow of manufactured goods to the local markets of the region and the Western Hemisphere account for much of the commercial shipping movement.[3] The most heavily utilized waterway is the Malacca Strait, through which approximately 70

3. C.G.F. Simkin, 'Asia's Trade' in The Far East and Australasia 1975-76 (London, 1975), pp.83-4.

freighters pass each day. By comparison the daily average for the Torres Strait rarely exceeds 5 vessels, while the figure for Bass Strait is about 10 to 12 ships per day.[4] In the last ten years there has been a diminution in the percentage of Australian trade with the traditional Western European markets,and a dramatic increase in trade with Japan and South East Asia. In 1962-63, 40.5 percent of Australian trade involved Western European markets and suppliers. South East Asia and Japan accounted for only 21.5 percent. In 1972-73 the situation was reversed. Japan alone absorbed 35.5 percent of Australian overseas trade, and the European percentage had dropped to 28.9 percent.[5] As a consequence, rights of passage through the Indonesian, Philippines and P.N.G. archipelagos have become an important law of the sea consideration for the Australian government.

International shipping throughout the region is predominantly controlled by outside interests, notably Japan, the U.S.A., European countries and more recently, the Soviet bloc.[6] Australia and New Zealand possess modest shipping lines with some international routes, but their scale of operation is minute by comparison with the major overseas companies which determine the pattern of global freight carriage. By way of illustration, in 1973 only 0.5 percent of the total tonnage entering Australian ports was owned by Australian interests.[7] Locally owned companies

4. Francombe, 15 July 1976.
5. Australian Bureau of Statistics, Official Yearbook of Australia (Canberra, 1974), no. 60, p.324.
6. In 1973 these groups provided 60.5 percent of the world tonnage registered under their own flags but much of their shipping is registered under foreign 'flags of convenience'. By contrast only 3.2 percent of the world's fleet was registered in the developing countries of Asia and Oceania. R.R. Hirst, 'Shipping Today', Current Affairs Bulletin 52, 9 (1976), p.25.
7. Official Yearbook, p.357.

operate chiefly along the Australian coast on interstate and intrastate trade where the Commonwealth government has long applied the principle of cabotage. The development of a major Australian shipping industry capable of competing with the larger overseas concerns is hampered by many of the problems common to the less developed nations of the region. Facilities for vessel construction in Australia are limited in size and much of the equipment is obsolescent by international standards. A further limiting factor not common to the other states of the maritime neighbourhood is the high cost of Australian labour and its low productivity by the standards of major maritime nations.[8] Because of its post-colonial legacy of British ship repair facilities, and its fortuitous location, Singapore is the most important shipping centre for South East Asia and the South West Pacific.

One feature of post-colonial economic development in the South West Pacific has been the desire of governments to establish a regional shipping line responsive to the needs of small states producing limited quantities of tropical agriculture, separated by long distances and with primitive cargo handling facilities. Although a questionable proposition in terms of economic viability, a decision to establish such a line was reached at the July 1976 meeting of the South Pacific Forum. In December 1976 however, the government of P.N.G. announced its intention to establish a national line.

Throughout the whole of the area under review, with the exception of Australia and New Zealand and the island

8. Canberra Times, 8 July 1976, p.2.

of Java in Indonesia, coastal shipping is the most important means of moving goods and people. Rail, road and air services are either non-existent or unsuited to move more than a minor proportion of cargo or travellers. Even in Australia limitations in the rail network and the absence of a national pipeline grid necessitate the use of sea freight for the domestic movement of bulk commodities such as mineral ores, coal, gas and oil. Tasmania as the only island state of the Commonwealth is particularly vulnerable to the vagaries of national shipping policy, the more so because the major domestic service is a Commonwealth instrumentality. Because it lacks a railway system and the road network is inadequate, P.N.G. is even more heavily dependent on coastal and riverine shipping for the movement of goods and people.[9] As in Australia these services are predominantly in the hands of government instrumentalities and domestic companies.

Since the end of World War II the waters of the Western Pacific rim have not been the venue for naval conflict, although the navies of Australia, the U.K., New Zealand and the U.S.A. have provided support for military operations on the South East Asian mainland. In recent years these activities have been overshadowed by the rivalry between the naval forces of the Soviet Union and the U.S.A. in the Western Pacific and the Indian Ocean, and there are indications that the Soviet presence in the South West Pacific is likely to increase. The maritime geography of

9. Only 10 percent of coastal freight movement around P.N.G. is carried in overseas owned vessels. Marion M. Ward, 'Coastal Cargoes Between Main Ports' in R. Gerard Ward & David A.M. Lea (edd.), An Atlas of Papua New Guinea (Glascow, 1970), p.68.

the region under study has been an important determinant of the behaviour of the naval forces of the superpowers and of the countries of the region.

The chain of islands extending from Sumatra south east to Tasmania presents a natural barrier to the unimpeded transit of warships from the Pacific to the Indian Oceans. Apart from sailing eastwards via the southern tips of South America and Africa, or westward south of Tasmania, passage must be navigated through straits controlled by Malaysia, by Singapore and Indonesia, or by P.N.G. and Australia. The Torres Strait is generally considered too hazardous for the movement of large surface ships over 70,000dwt or submerged submarines[10] and the considerable extra distance involved in passage through Bass Strait has made guaranteed access to the straits of the South East Asian archipelago an important ingredient in the defence policies of the U.S.A. and the U.S.S.R., both of which maintain major naval bases in the Pacific Ocean.

The Soviet Union maintains a modest naval presence in the Indian Ocean which is supported from port facilities made available by Somalia, Mozambique, India and Singapore. Vessel deployment is from the European ports via the Suez Canal or the Cape of Good Hope, or from bases on the north west Pacific seaboard. United States naval forces are stationed in the western Pacific and South China Sea and forces from the main support base in the Philippines are periodically deployed into the Indian Ocean. The U.S.A. has negotiated the use of Diego Garcia Island

10. Observation by Captain R. Knox (R.A.N.), Australian Department of Defence, 13 July 1976.

in the north-central Indian Ocean as a site for the support of local naval activities. It also maintains an important naval communications facility on the north west coast of Western Australia, and is presently negotiating the placement of 'Omega' navigation aids in the south east of Australia. Although precise details of deployment are not made public, it is almost certain that nuclear missile-carrying submarines are periodically moved to and from the Indian Ocean via the South East Asian straits.[11]

France and the U.K. also maintain smaller naval components in the Pacific and Indian Oceans where they continue to have territories and dependencies. Since the early 1970's the French government has conducted periodic nuclear tests at Muraroa Atoll in French Polynesia, despite vocal opposition on the part of other nations in the region.

In the Malaysia-Indonesia-Philippines area the smuggling of arms and other forms of military aid to groups hostile to the central government has necessitated the formation of naval and coastal policing units designed to enforce government sovereignty in coastal waters. However, the sheer length of island coastline and the paucity of funds available for the creation of forces large enough to combat the problem effectively, limit the overall efficiency of such operations. Illegal fishing, particularly by Taiwanese and Japanese boats in South East Asian waters, also has been a problem in the recent past, but the heavy penalties imposed by the Philippines and Indonesian governments against offenders have encouraged them to conduct their operations further afield. One consequence has been

11. Australian Financial Review (Sydney), 25 October 1976, p.9.

that their sphere of activity has moved eastward around the Australian coast and that of the South Pacific archipelagos.[12] Commercial smuggling is also a major problem in the region, resulting not only in the loss of customs revenue but also the import and export of prohibited articles. The entry of narcotics and the export of wildlife are among the most common manifestations around Australia, and the illegal export of artifacts is a problem facing the P.N.G. government. As a consequence of these manifold forms of sovereignty infringement, Australia, New Zealand, P.N.G. and the island countries of South East Asia have greatly increased their coastal surveillance capability in the last ten years, and there are indications that the smaller Pacific nations are anxious to build up their littoral policing forces.

Two other features of Australia's naval role in South East Asia and the Pacific have been the provision of naval support for military operations in the Asian region and the supply of vessels as a form of military aid. Since the end of World War II Australia has supported land operations in peninsular and Eastern Malaysia, in Korean waters and along the coast of South Vietnam. The R.A.N. has also participated in military exercises with its regional and great power allies under the terms of the ANZUS and SEATO treaties. Operations in South East Asia have necessitated passage through the waters of Indonesia and the Philippines, and the maintenance of access rights has often been difficult, especially during the period of 'confrontation' in the 1960's when Australian forces supported Malaysia against Indonesia. Disputes have also existed between Australia and

12. Australian Department of Primary Industry, Australian Fisheries 34, 8 (1975), pp. 8-10.

the Philippines over passage through the Balabac Straits separating Malaysian Sabah and the islands of the south west Philippines. Disagreements with both Indonesia and the Philippines were exacerbated by Australia's refusal to recognise the territorial claims of both against Malaysia and failure to support their declarations of sovereignty over all waters enclosed by their outer island perimeters.

Australian naval forces are modest in size by world standards, but in terms of military capability, particularly in the anti-submarine role, they constitute perhaps the most significant indigenous force in the region.[13] The force is supported by major base and repair facilities at Sydney and Newcastle, with patrol craft bases further north at Cairns and Darwin. A further naval base is under construction at Cockburn Sound near Perth in Western Australia. Indonesia has a numerically larger force than Australia, but problems of maintenance and weapons resupply have rendered the more sophisticated elements inactive. Its fleet of 12 missile patrol boats would appear to be its most formidable operational element.[14] Malaysia, the Philippines and New Zealand possess smaller forces with the emphasis on coastal policing and anti-submarine operations. Fiji does not have a naval force and relies on New Zealand for assistance where necessary.

13. In 1975 the combat component consisted of one aircraft carrier, five destroyers, six destroyer escorts, four anti-mine vessels, four submarines (with two more on order), and twelve patrol craft. The purchase of three more light destroyers is also under consideration. The R.A.N. also has an airborne reconnaisance and anti-submarine capability. In addition, the R.A.A.F. provide two squadrons of maritime surveillance aircraft. Source: Australian Parliament, Defence Report 1975 (Canberra, 1975), pp. 39, 41 and 43.
14. John E. Moore (ed.), Jane's Fighting Ships 1975-76 (London, 1975), p.174.

The maritime component of the P.N.G. Defence Force is equipped with five patrol boats supplied by Australia in the late 1960's, a number of landing craft and a large bunkering and supply base in the Admiralty Islands, north of the New Guinea mainland. Unlike Australia, the P.N.G. government has sought to avoid military alliances, and its maritime forces have been able to concentrate their attention on the execution of national fisheries, customs and immigration law. The Force lacks a formal maritime surveillance capability and has to rely on civilian agencies and an efficient coastwatching organization, supplemented by R.A.A.F. support when required.

Australia has also supplied two 'Attack' class patrol boats to Indonesia, and smaller coastal policing vessels have been given as aid to Malaysia and the Philippines. These requirements reflect the preoccupation of South East Asian nations with the problems of smuggling and the provision of military sustenance by sea to rebel groups opposed to the central governments. While the commercial smuggling aspect is a growing problem for both Australia and P.N.G., the more recent focus of attention in the South West Pacific region has been the increasing infringement of maritime sovereignty by foreign fishing vessels.

Throughout the Asian-Pacific islands region two broad trends in fishing activity prevail. On the one hand, subsistence and small scale commercial fishing is widely practised, and provides an important ingredient in the local diet.[15] Most of this activity takes place in the

15. For example, in Indonesia fish is the main source of animal protein. Australian Fisheries 34, 3 (1975), p.4.

shallow inshore waters of the continental shelf, although some fishermen from Indonesia range as far afield as the northern and western coasts of Australia. Freshwater fishing is also of considerable importance in Indonesia and the Philippines: one third of the total Indonesia catch in 1970-71 was from inland fisheries.[16] In both countries aquaculture and mariculture are being actively sponsored by the respective governments. Much of this activity will utilize the unproductive areas of estaurine foreshores that characterize considerable areas of the littoral of both states.

On the other hand, larger scale commercial fishing activity is practised predominantly by nations from outside the region, particularly Japan, Taiwan, the U.S.S.R. and the U.S.A. Supplying both domestic needs and established export markets, these countries are prompted to fish the high seas and the maritime surrounds of the Southern Hemisphere countries because their own adjacent waters are being fished to capacity and are highly regulated by regional agreements.[17] They have constructed fleets of large, modern vessels equipped with sophisticated detection and catching gear, and supported by processing and victualling auxiliary ships which facilitate extended operations away from the home port. Much of the Taiwanese fleet which tends to fish inshore waters does not fit this model. Their smaller scale of operation has necessitated the use

16. I.P.C. Business Press, International Yearbook and Statemen's Who's Who (London, 1976), p.224

17. It has been calculated that 45 percent of the total South West Pacific catch between 1964 and 1971 was taken by vessels registered outside the region. J.V.R. Prescott, The Political Geography of the Oceans (London, 1975), p.122. It is almost certain that the percentage has increased since 1971.

of motorized junks with rudimentary, but cost effective, catching and freezing facilities. There is, however, a discernible trend among Taiwanese operators to construct larger, more modern vessels similar in design to those used by Japanese fishermen.[18] Among the nations of the region under study, only New Zealand and Singapore have shown an interest in developing an indigenous distant water fishing industry, but actual growth has been slow because it has depended on the importation of capital and technology from the countries presently dominating the activity. The more favoured method of satisfying the local fishing industry and other groups opposed to foreign fishing, has been the creation of a system of joint ventures, whereby effective control remains with the overseas company but the host nation receives significant economic benefit in the form of a share of the profits, tax and provision of shore processing facilities. It has proved an attractive inducement to the governments of P.N.G., the Solomon Islands and the New Hebrides, where the island chains form the axis for the migration path of commercially important tuna species. Fish exports resulting from a joint British-Taiwanese-New Hebrides venture comprise three quarters of the value of total exports of the condominium.[19]

Fish provides the cheapest and most readily available source of animal protein for both coastal and hinterland societies in P.N.G. However, local production for domestic consumption is estimated to be only 20,000 tons per

18. Australian Fisheries 34, 3 (1975), p.8.
19. 1972 figures were $A8,985,000 out of a total of $A12,073,000. Source: John Paxton (ed.), The Statemen's Yearbook 1974-1975 (London, 1974), p.435.

year[20] which supplies only the needs of coastal and riverine people. Most of the fish consumed in the hinterland is imported from Japan and Taiwan. A lack of sophisticated catching, processing and preservation facilities coupled with an inadequate and expensive transport network, are among the major constraints on any increase in subsistence catches and local trade. But since the early 1960's, local commercial fishing has increased considerably. Between 1967-68 and 1971-72 the contribution of marine products to the value of exports rose from 1.5 percent to 4 percent.[21]

The inshore waters yield barramundi, prawns and tropical crayfish, particularly along the western coast of Papua and in the area adjacent to the Torres Strait. Indigenous fishing companies predominate in the harvest of barramundi and crayfish which is characterized by the employment of traditional fishing techniques of the local people. Prawning operations, however, are undertaken with trawling vessels similar to those used around Australia.

Japanese and American interests control the joint venture tuna fishing operations which provide the major component of marine products exported from P.N.G.[22] Most of this catch is taken in the Bismarck Sea, but the Solomons Sea is considered another likely source. One benefit for the coastal population of parts of the Madang, New Britain and New Ireland Provinces has been the payment of royalties for the right to take tuna baitfish from traditional

20. Peter C. Pownall, 'Fisheries of Papua New Guinea', Australian Fisheries 31, 9 (1972), p.1.
21. Judy Tudor, (ed.), Papua New Guinea Handbook (7th edn , Sydney, 1974), p.49.
22. In the financial year 1971-72 tuna produce accounted for $A2,806,000 out of the total $A5,716,000 value of marine exports. Tudor, Handbook, p.49.

inshore fishing grounds.

The predominance of foreign interests in the exploitation of the major fisheries has led to the development of a vocal parliamentary lobby aimed at securing greater financial benefit for the local population from these operations.[23] In contrast to Australia, the people of the P.N.G. littoral believe implicitly in their proprietary rights to the fish stocks of their traditional fishing grounds, and these attitudes have had an important effect on the shaping of P.N.G. law of the sea policy.[24]

Although Australia has an established coastal fishing industry, it shares many of the problems of exploiting its marine resources with its northern neighbour and ex-territory. Unlike the P.N.G. situation, fish is not a prime source of animal protein in the Australian diet, but this alone does not explain the parlous state of the industry.[25]

While a large variety of species are found around the Australian coast, large commercial concentrations similar to those found in Northern Hemisphere waters are not common. The smaller concentrations often result in very large fluctuations in the size and variety of the catch and this unpredictability is a major constraint on the industry. Where larger concentrations of fish have been found in recent years off the N.S.W. coast, there has been little public demand for the species discovered. In addition,

23. The impact of the subsistence and small scale commercial fisheries lobby on the development of P.N.G. government policy is discussed in Chapter III.
24. Observation by Mr. G. Dabb, Advisor on International Law, P.N.G. Department of Foreign Affairs on 21 November 1975. This observation was reinforced by discussions with village fishermen in the Western Province between 15-26 January 1976.
25. The problems of the industry are discussed in the Bulletin, (Sydney), 6 September 1975, p.76.

Australian fishing - with some exceptions in the prawning and tuna sectors - is predominantly a small business activity, characterized by low capital availability and hence small and unsophisticated vessels and rudimentary processing and marketing outlets. Moreover, fishing is the one significant primary industry that does not attract government assistance in the form of high protective tariffs, subsidies or price stabilization schemes. One consequence is that the most depressed sector of the industry, the 'wet' fish component, has to compete with cheap and readily available imports.[26]

The most efficient and productive sectors in terms of export earnings are the luxury species: rock lobster, prawns, oysters, abalone and other shellfish. Their harvesting and production have tended to attract a greater degree of government supervision and regulation, although conflict at the State and Federal levels, particularly in the northern prawn industry, has tended to negate the potential value of greater control.[27]

Taiwanese fishing around northern Australia is a matter of increasing national 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. The increase in Soviet fishing and whaling activity in southern waters has also been viewed with concern by the Australian

26. In 1972-73, Australian fish imports totalled $A50.6 million and fish exports amounted to $A75.5 million. Of the export figure, rock lobster sales contributed 39 percent of the total and prawns 31 percent. Source: Official Yearbook 60 (1974), p. 961.
27. The problems of the northern prawning industry are analysed in an article by Professor C. Clark in the Australian (Sydney), 15 March 1976, p.2.

government.[28] In short, Australia shares with the other nations of the South East Asian and Pacific island region a general level of under-exploitation of local fish resources and a vulnerability to foreign fishing activity in the close maritime environment.

While ocean fishing in the post-war period has been characterized by the refinement of techniques and the expansion of operations into areas not earlier commercially fished, the exploitation of the seabed for mineral fuels did not begin until 1939, and it was not until 1949 that the first mobile floating rig commenced operation. Although in 1971 only 18 percent of the world's oil was obtained from offshore wells, it has been estimated that by the 1980's this figure will reach 50 percent.[29] One of the major prospective areas is the continental shelf common to Malaysia, Western Indonesia, Thailand, Cambodia, Vietnam, China, Taiwan, Korea and Japan.[30] Sites offshore from Malaysia in the northern Malacca Straits, in the Java Sea and near Brunei are currently producing oil and gas, but much of the area has still not been fully explored. However, it should be noted that the bulk of South East Asian oil is still produced from land wells. Oil comprises the single most important source of national income for Indonesia and Brunei. Singapore serves as the major refining and re-exporting centre of the region, and petroleum products are the chief export of the city-state. Although small con-

28. Australian House of Representatives, Debates 1965, No. 3, p.420 and No. 9, pp.1895-6.
29. Australian Parliament, Report of the Senate Select Committee on Offshore Petroleum Resources, Parliamentary Paper No. 201 (Canberra, 1972), Vol. 1, p.50.
30. Iaian & Keith Buchanan, 'South East Asia' in The Far East and Australasia 1975-76, p.397. The term 'prospective' is used here in the sense employed by the oil industry to refer to the likelihood of commercial oil or gas discoveries.

tinental shelf areas are present around the South West Pacific islands, the seabed east of the Bismarck-Solomons archipelago has not been widely surveyed.

Offshore oil search in Australian waters began with a seismic survey of the Gippsland Shelf off the east coast of Victoria. Small onshore fields were discovered in the early 1960's, but in 1965 the Gippsland offshore field produced oil and gas flows that indicated its potential as the major supplier of Australia's requirements. By 1970 the first sections of the field had been brought into full production. In 1973 Australia ranked sixth among the world's producers of natural gas and eighth for the production of oil from offshore fields. In that year the Australian offshore production was greater than that of the Brunei, West Malaysian and Indonesian continental shelf.[31] Additional major gas reservoirs have been discovered over a wide area of the North West Shelf, but a number of factors, includ-ind deep water, long distance from shore, an over-supplied world market and isolation from domestic markets, have inhibited development. By the end of 1973, 68.4 percent of Australia's feedstock requirement were supplied from domestic sources, and of this figure 89.3 percent was produced from offshore areas. The paucity of domestic land source alternatives has placed Australia in a position of almost complete dependence on supplies drawn from the local seabed or imported by sea from the Middle East and South East Asia. Furthermore, unless new oil reserves are proven, the degree of Australian self-sufficiency will drop to less than 30 percent by the mid-1980's.[32]

31. Comparisons cited from Offshore, 20 June 1973, quoted in Prescott, Political Geography, pp. 154-5.
32. Petroleum Information Bureau, Petroleum Search in Australia (Melbourne, 1974), p.2.

By contrast with Australia, P.N.G. has a much more limited continental shelf, both in terms of size and productive potential. One factor in its favour, however, is that the most prospective areas - those of the Gulf of Papua - are either close inshore or in relatively shallow water. On the other hand, environmental groups in Australia view drilling in the Gulf with disfavour, fearing the damage to the Great Barrier Reef which might follow a well 'blow out' in adjacent P.N.G. waters. The first gas strike offshore from P.N.G. was made in the Gulf of Papua in 1969 and subsequent testing indicated the presence of a small commercial field. However, the exploring company decided that production was not commercially feasible under the existing conditions of world oversupply. Further offshore search has also been undertaken around the Milne Bay, Northern and Bougainville Provinces but without success. The pace of offshore search since 1972 has been desultory, reflecting the comparative unattractiveness of the Australia-Papua New Guinea shelf by comparison with its South East Asian counterparts.

The presence of exploitable reserves of oil and natural gas within the land and maritime domain creates a number of problems for the countries of South East Asia and Australia. Perhaps the most important is the need to reconcile their dependence on American, Western European and Japanese technology and capital, with the desire to retain the bulk of the financial benefit within the host state. Australia does not differ from its less developed

neighbours in this regard. Sentiments of economic nationalism and hostility to foreign financial manipulation have been evident in both Australia and Indonesia since the early 1960's.[33] Whereas the size of Indonesia oil reserves has enabled the government to impose stringent financial conditions on the foreign companies without deterring their continued participation, this has not been so in Australia. A fear on the part of foreign investors of greater government involvement in the industry, coupled with high costs and less prospective offshore areas have been factors in a dramatic downturn in the rate of exploration around Australia since 1970.

Paradoxically, a tough stance by the coastal state has sometimes encouraged foreign interference in the political process as a means of ensuring investment security and instances of this tendency have been reported in Australia.[34] The other major problem for the governments of states with hydrocarbon reserves is the need to avoid a concentration of the financial benefit in the hands of a particular domestic interest group or geographic area. Again this problem

33. Peter Polomka, Indonesia Since Sukarno (Harmondsworth, Middlesex, 1971),p.122. For an example of Australian attitudes, see Chapter II, p. 86.

34. It has been reported in the press that in two instances, Australia's largest oil and gas producer, the Esso-B.H.P. consortium exerted a determining influence on the course of government actions by threatening not to develop offshore fields. Management provided by the U.S. Standard Oil (Esso) corporation has a decisive influence on the negotiating practice of the group. The first instance was in late 1966 when they successfully sought amendments to the proposed system of permit relinquishments, and the second was in 1974 when they were reported to have secured an abnormally high price for gas from the Victorian government, by threatening to sell to N.S.W. Reported comment by Dr. A. Hunter in Australian Financial Review, 20 January 1967, pp. 4 & 6 and National Times (Sydney), 23-28 February 1976, pp. 53 & 55.

is common to all of the producer countries of the area under study, but has particular relevance to Australia because of the competing State and Federal government systems. P.N.G. has so far avoided these problems only because its offshore gas discoveries have proved to be sub-commercial under prevailing market conditions. As the debate over foreign fishing indicates, economic nationalism is becoming a significant political issue in P.N.G. The devolution of authority to regional government bodies, when allied with the existing strong sense of sub-national loyalty, may create major difficulties for the National government if production of oil or gas commences.

Another more recent technological advance that may be of secondary importance to the economies of the coastal states of Asia and the Pacific is the development of techniques for the harvesting of mineral nodules from the deep ocean floor.[35] Located at depths ranging from 12,000 to 30,000 feet, the nodules are rich in phosphates, manganese, iron, nickel, copper and cobalt. Although by no means the whole of the ocean floor has been surveyed, potentially commercial deposits are known to exist between Hawaii and the Central American coast while smaller concentrations have been discovered in the Indian Ocean, south west of Western Australia and off the coast of Indonesia.

P.N.G. and New Calendonia are heavily dependent on the export of minerals from land deposits[36] and fear that large-scale production from the sea floor will depress the price of their basic commodity and ruin their economies.

35. Edward Wenk, 'The Physical Resources of the Ocean' in The Ocean, pp. 87-8 .
36. For P.N.G. in the period July 1972 - May 1973 copper sales comprised 64 per cent of the total value of exports. Tudor, Handbook, p.48.

On the other hand, nations with exploitable nodule concentrations within their maritime domain may stand to benefit from seabed mining.

However, a number of factors at present preclude exploitation of the nodules. First, the mining process is expensive and may not be able to compete economically with the mining of accessible land reserves. Second, the metallurgical techniques for the separation of the nodule components are not cost effective by comparison with the refining techniques used in land operations. Thirdly, the legal status of the deep ocean floor, and rights of commercial access, have not been resolved in spite of lengthy debate and negotiations through the United Nations since 1967 and UNCLOS III since 1974.

These patterns of sea usage and technological change have shaped developments in the law of the sea. In particular, there has been a tendency for coastal states lacking the capacity to fully exploit their maritime environment to extend their authority over wider areas of adjacent seas and seabed than hitherto sanctioned by international law. The remainder of this chapter will focus on those developments in the law of the sea which have had a significant impact on national policy in the South East Asian, Australasian and South West Pacific regions.

THE LAW OF THE SEA AND ITS GENERAL APPLICATION IN THE ASIAN-PACIFIC REGION

1. International Developments. 1945-1976.

Prior to 1945, two predominant features characterized the law of the sea: the right of states to exercise jurisdiction over a territorial sea, and the maintenance of the freedom of the high seas for commerce, communications, fishing and warfare.[37] Since the end of World War II, advances in ocean utilization technology, especially seafloor mining, and the achievement of political independence by nations which had taken no part in the earlier development of the law of the sea have led to a broadening of the range of topics considered appropriate for inclusion in this branch of international law.

The first new element was provided in 1945 by a proclamation of the U.S. government claiming rights of jurisdiction and control over the resources of the adjacent continental shelf. Similar claims by other nations, also anxious to claim the hydrocarbons of the seabed for exploitation under domestic control, were advanced in the succeeding decade. Some South American states did not limit their claims to the seabed but claimed either sovereignty or jurisdiction over the superadjacent waters. However, these wide claims to water areas did not receive international sanction in the immediate post-war period, and in some instances were actively disputed, especially by U.S., French and Soviet fishing interests.[38]

37. L. Oppenheim, International Law. A Treatise (6th edn, ed. H. Lauterpacht, London, 1947), vol. I, pp. 442-65 and 533-76.
38. George Kent, 'Dominance in Fishing', Journal of Peace Research XIII, 1(1976), p.36.

In an effort to rationalise the legal basis of post-war claims and generally to codify the law of the sea, the United Nations instructed the International Law Commission to draft a set of articles for debate at an international conference. The task was completed in 1957 and the First United Nations Conference on the Law of the Sea (UNCLOS I) was convened in February 1958.

Eighty six nations were represented at the conference. Less than a score of the participants had gained their independence since World War II. It was therefore not surprising that the decisions of UNCLOS I have been interpreted as a reflection of the determination of the established maritime trading and naval powers to maintain the status quo in regard to the regime of the water mass,[39] and to codify the continental shelf doctrine in such a way that coastal state proprietary rights over adjacent seabed resources were assured.

One innovative result of the conference was the Convention on Fishing and the Conservation of the Living Resources of the High Seas, which provided for limited control by coastal states over the exploitation of fisheries in a zone of undefined width beyond the territorial sea. The Convention, although ratified by the requisite number of signatories, has not developed into an effective means of reconciling the interests of coastal and distant water fishing nations. Three other Conventions on the Territorial Sea and Contiguous Zone, the High Seas and the Continental Shelf gained wider acceptance because they were declarations of customary practice that had received international

39. Sir Kenneth Bailey, 'Australia and the Geneva Conventions on the Law of the Sea' in D.P.O.'Connell (ed.), International Law in Australia (Sydney, 1965), p.229.

sanction in the years since World War II.[40] An Optional Protocol for compulsory dispute settlement was also negotiated at UNCLOS I, but has not proved to be effective as a means of conflict resolution in maritime matters. All four Conventions and the Optional Protocol had entered into force by 1964. Although some of the newly independent and older underdeveloped countries have ratified the Conventions in recent years,[41] it has become customary for the Third World states to argue that the 1958 decisions do not embody international equity and that they should be replaced by a new law of the sea.

Within the area under study, Australia, Fiji, and Malaysia are the only countries to have ratified all four Conventions. Indonesia has ratified only the High Seas Convention but with a reservation which set out her archipelagic claims. Singapore and the Philippines have failed to accept any of the four agreements, and New Zealand has ratified only the Convention on the Continental Shelf. Of the most important outside users of the regional maritime environment, the U.S.S.R., and U.S.A., Taiwan and the U.K. have ratified all four Conventions. Japan has formally accepted only the Conventions on the Territorial Sea and High Seas.[42] In February 1976 P.N.G. lodged with the

40. Texts of the four Conventions are contained in Australian Department of External Affairs, Conventions on The Territorial Sea and Contiguous Zone, The High Seas, Fishing and Conservation of the Living Resources of the High Seas and The Continental Shelf together with Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Treaty Series No. 12 (Canberra, 1963).
41. Figures for ratification of the Conventions by underdeveloped and newer nations are as follows: Convention on the Territorial Sea - 22, Convention on the High Seas - 28, Convention on Fisheries - 22, Convention on the Continental Shelf - 26. Information supplied by the Australian Department of Foreign Affairs, Treaties Section on 12 May 1976.
42. Treaties Section, 18 May 1976.

United Nations a formal note of rejection of all four Conventions.

UNCLOS I failed to resolve two issues of particular contemporary importance: the breadth of the territorial sea, and the spatial and jurisdictional extent of coastal state control over fisheries beyond territorial waters. A follow-up conference (UNCLOS II) was held at Geneva in 1960, but the participants were unable to reach agreement on these issues and no further definitive texts resulted. Nonetheless, a degree of fisheries regulation of the major North Atlantic and North Pacific grounds has been achieved by bilateral and regional agreements between the main participants, who also happen to be the adjacent coastal states. As has been indicated in the earlier section,[43] the desire to escape the catch restrictions imposed by the Northern Hemisphere fisheries agreements has prompted an expansion of foreign activity into the oceans of the Southern Hemisphere.

Another problem which received little attention at UNCLOS I was the question of ocean pollution. Vessel source pollution has been partially regulated through agreements negotiated through the auspices of the International Maritime Consultative Organisation (IMCO), an agency of the United Nations. Because these agreements tended to deal with the technical problems of vessel design and operation, they have not achieved the more general sanction of international law and are held to be binding only on the signatories. Nevertheless, they have served to fill one of the gaps left by the 1958 conference.

43. See p.15.

International attention was directed to a new problem of sea usage in December 1967. At the United Nations General Assembly, the Maltese delegate called for the establishment of an international legal regime to ensure that the seabed beyond the national land margins was not expropriated by national groups and exploited for warlike purposes or financial gain by those nations with the requisite technology.[44] His call was taken up by the Third World nations in the hope of regulating the future exploitation of deep sea mineral nodules and in some cases oil resources, so that the financial rewards would flow to the less developed countries. However, the deep seabed debate over questions of control and the system of mining access acquired a status out of all proportion to its short term financial significance, and the more pressing issues of fisheries management, pollution, straits access and extensions of national sovereignty did not receive wide attention until the early 1970's.

Following the speech of the Maltese delegate, the General Assembly set up a Seabed Committee with the task of defining a new regime for the seabed beyond the limits of national jurisdiction. Failure of this body to reach agreement on a proposed regime led to the acceptance of a General Assembly proposal in December 1970 that an international conference be convened to consider the issue. In 1971 it was further agreed that the scope of the conference should be expanded to consider not only the seabed problem but also the perennial problem of the extent and nature of

44. United Nations Office of Information, United Nations Monthly Chronicle IV, 11 (1967), p.27.

national maritime jurisdiction and the more recent questions of fisheries, pollution and mineral resource control. Two other issues, research and ocean technology transfer were also to be considered at the forthcoming conference, along with the need for a system of dispute settlement.[45]

A procedural session of the conference (UNCLOS III) convened in December 1973, and further substantive sessions, held in Caracas, Geneva and New York in the period from 1974 to 1976, were attended by delegates from over 150 countries. To date the conference has failed to reach agreement on the text of an all-embracing Convention covering the whole range of law of the sea issues under discussion. A further meeting is scheduled for May 1977, but the prospects for achievement of a single Convention are not considered promising.[46] A series of more restricted smaller Conventions following the pattern of the 1958 series and embodying the considerable areas of existing consensus may prove to be the more feasible alternative.

International conferences and multilateral negotiations have not been the only means of moulding the law of the sea to fit the changing patterns of maritime economic activity since World War II. Unilateral claims of national jurisdiction have been perhaps the most important determinant of the existing law of the sea. Acceptance of the continental shelf doctrine at the 1958 conference and the more recent widespread support for a 12 mile territorial sea

45. United Nations Office of Information, Yearbook of the United Nations, (New York, 1971), vol. XXV, pp. 46-7.

46. Since the Geneva session a series of Single Negotiating Texts have been produced by the chairmen of the three major committees. These have tended to highlight the areas of consensus and the contentious issues, thus proving an invaluable aid to discussions.

are examples of the gradual international acceptance of what began as a series of individual national claims not actively disputed by the global community. Even the idea of coastal resource zones extending 200 miles from the coast, which was considered an illegal exercise of state sovereignty in the 1950's, has come to receive wide acceptance in the present climate of increased distant water fishing activity.

The role of the International Court of Justice (ICJ) as an arbitrator of referred disputes has also been important in determining the detail of contemporary law of the sea. Decisions in 1949, 1951, 1969 and 1974 served to clarify, but not definitively resolve, the rights of passage through international straits, territorial sea measurement criteria, and continental shelf and national fisheries zone delimitation respectively.[47]

The international community has looked to UNCLOS III to develop and codify a new law of the sea responsive to the technological realities and the political philosophies of the later twentieth century. It seems likely, however, that national self interest and a preoccupation with the deep seabed question may jeopardize the creation of a new maritime legal order capable of providing a more equitable system of control over the shipping routes, fisheries, and mineral resources of the world's oceans. The present system of law of the sea modification through customary practice, international arbitration and local agreement is likely to persist. This being so, the tendency of coastal states to claim wider areas of maritime jurisdiction will add to the

47. The Corfu Channel Case 1949, the Anglo-Norwegian Fisheries Case 1951, the North Sea Continental Shelf Case 1969 and the Fisheries Jurisdiction Cases 1974.

difficulties of achieving global and regional political stability.

In the discussion which follows, law of the sea issues of particular concern in the regional maritime milieu are considered in more detail. In the first instance, national maritime claims to territorial waters and rights of shipping control are discussed in relation to contemporary law of the sea thinking. The subsequent section deals with the application of resource zone concepts which have developed since World War II. This is followed by a brief discussion of other problems of lesser importance to the islands of South East Asia and the South West Pacific.

2. Maritime Territorial Claims and Shipping Access

a. The Territorial Sea Concept

The contemporary doctrine of the territorial sea owes its genesis to European jurists of the sixteenth and seventeenth century, notably Gentilus, Grotius, Selden and Bynkershoek. In its present form the concept provides for almost full national sovereignty over a belt of water of uniform width measured seaward from a baseline around the whole of the national landmass including offshore islands. Waters on the landward side of the baseline are considered internal waters over which sovereignty indistinguishable from that applying to the land area is vested in the coastal state. Full sovereignty also is exercised by the littoral state over the airspace and seafloor above and below territorial waters. However, there are certain limitations imposed on the exercise of sovereignty over the waters of the territorial sea. While overflight by foreign air-

craft and fishing by foreign vessels is prohibited without coastal state approval, there exists an explicit right of 'innocent passage' for all shipping so long as it is not 'prejudicial to the peace, good order and security of the coastal state'.[48] The 1958 Convention does however endorse the right of temporary, non-discriminatory suspension of innocent passage in limited areas of coastal waters for reasons of national security. As Bailey points out, 'the text of the convention on the territorial sea and contiguous zone exhibits respectively the tensions between the authority and special interests of the coastal state on the one hand and the desiderata of the freedom of the seas on the other'.[49] Interaction between the interests of the coastal state, and the traditional concepts of freedom of shipping movement and flag state sovereignty is discussed more fully in the sections on international straits and archipelagos.

b. Measurement of National Maritime Claims

The question of defining the startpoint for the measurement of national claims seaward has occupied the attention of international lawyers since the first major law of the sea conferences of the twentieth century were held at The Hague in 1930. A closely associated problem is that of defining the physical extent of claims and the two will be considered in this section.

At UNCLOS I in 1958 it was not possible to gain international consensus for the limitation of territorial sea claims to a breadth of three miles, as proposed by the

48. Convention on the Territorial Sea, Article 14.4.
49. Bailey, International Law in Australia, p.238.

maritime powers.[50] Since the 1960 Conference where the problem was again debated, the tendency has been for nations to proclaim rights to wider areas, with 12 miles being the most common claim. Australia, Fiji, P.N.G., New Zealand and Singapore retain a three mile claim. Indonesia and Malaysia claim a 12 mile territorial zone but the Indonesian claim is measured seaward from archipelagic baselines. One of the issues of widest agreement at UNCLOS III has been the need to standardise claims at 12 miles,[51] and this position has been supported by Australia and P.N.G. However, many nations support the 12 mile position only on the understanding that rights to a resources zone beyond the territorial limits will accrue to the coastal state.

The determination of the baseline from which maritime claims are measured is of significance because particular interpretations can be utilized to increase the area of sea and seabed under national control. The further seaward that a baseline can be drawn, the greater is the area of internal waters enclosed on the landward side of the line. The historic concept of the territorial sea envisaged its measurement from the low water mark on the coast, but in the 1951 Anglo-Norwegian Fisheries Case the use of straight lines linking the headlands of deeply indented coasts, or islands lying close to the main shoreline was sanctioned by the ICJ. This doctrine was later incorporated in the 1958 Territorial Sea Convention. A further provision of the Convention has a particular applicability to countries such as Australia and P.N.G. with outlying islands

50. Bailey, International Law in Australia, p.239.
51. United Nations, Third Conference on the Law of the Sea. Informal Single Negotiating Text, A/CONF. 62/WP. 8/Part II, 7 May 1975, p.5.

surrounded by fringing reefs. Article 11 provides that where there is a reef within the territorial sea, which dries at low water, then the outermost edge of the reef, rather than the low water mark of the nearest land can be used as the baseline for measuring the extent of territorial waters.

While the concept of straight baselines is necessary to avoid undue sinuosities in the demarcation of the territorial sea in areas of broken coastline or fringing islands, a major problem has been the inability of governments to agree on a maximum length between land points or the greatest extent to which they can divert from the general direction of the coast.[52] The 1958 Convention did however limit the length of straight baselines for the enclosure of bays to a line no longer than 24 miles measured across the mouth of the bay, with the proviso that the bay could only be claimed as internal waters if the area of water encompassed was greater than that of a semicircle drawn using the baseline as the diameter. Until 1967, Australia applied the straight baseline principle to enclose bays only up to 10 miles wide. However, a number of Australian bays were enclosed by the use of another concept, that of 'historic bays' which was embodied in the 1958 Convention. These were waters that could be claimed by the coastal state on the basis of long usage or other historic demonstrations of sovereignty. Prescott lists seventeen such bays around Australia which international law recognizes as Australian historic waters.[53]

52. The problem is discussed in Victor Prescott, 'Asia's Maritime Boundary Problems', Dyason House Papers 2, 4 (1976), pp. 1-4.
53. Political Geography, p.98. The bays are: Blue Mud Bay,

c. International Straits

Since the 1949 decision of the ICJ in the Corfu Channel Case, the right of passage for all vessels through straits connecting two parts of the high seas has been part of the law of the sea. It received specific endorsement in Article 16.4 of the 1958 Territorial Sea Convention, and applies even when part or all of the strait emcompasses waters claimed as territorial seas.

In recent years where zones of national jurisdiction overlap in international straits, the adjacent countries have tended to invoke the more restrictive provisions of general territorial sea passage, as set out in the 1958 Convention, rather than the rules for straits. The problem that has arisen with acceptance of the doctrine of rights of passage through straits is that riparian countries fear that the presence of foreign warships may prejudice their security, or that commercial shipping in certain circumstances presents an environmental hazard. They have applied restrictions on vessels considered to be environmentally hazardous under the terms of Article 14.4 and Article 17 of the 1958 Convention. The Convention also provides for the passage of foreign submarines on the surface, a condition which both the U.S.A. and the U.S.S.R. find unacceptable because the location of their nuclear strike forces would be revealed. The coastal states also claim that prior notification or consent should be obtained before naval vessels transit straits under national control. A

53. Shark Bay (Western Australia), Coffin Bay, Investigator Strait, St. Vincent's Gulf, Spencer Gulf, Streaky Bay, Van Dieman Gulf (South Australia), Oyster Bay, Storm Bay (Tasmania), Broad Sound, Hervey Bay, Moreton Bay and Upstart Bay (Queensland).

further problem for the naval powers is that the right of aircraft overflight no longer exists where waters are enclosed by territorial claims and this may hamper the deployment of military forces, especially where the required aircraft are too large to be shipped on aircraft carriers.

The whole problem has been exacerbated by the extension of the width of territorial sea claims which has resulted in the enclosure of many straits previously considered as areas of high seas. The quandary has been widely debated at UNCLOS III. One compromise solution, the concept of 'transit passage', is being favourably considered by the major parties.[54] It provides for the right of the coastal state to designate sealanes to which foreign shipping can be restricted, but, subject to certain safety standards, the freedom of passage for all shipping and overflight for aircraft must be guaranteed. Failure to negotiate an arrangement acceptable to both the U.S.A. and the U.S.S.R. is likely to have a debilitating effect on the whole conference. The view of the American government is summarized by two of their conference delegates:

> '...the underlying political issue remains ... whether essential lines of communications through straits should be subject to discretionary interference by the riparian states. There is simply no possibility of a widely accepted treaty that does answer this question in the negative'.[55]

54. Single Negotiating Text, Part II, pp. 15-18.
55. J.R. Stevenson & B.H. Oxman, 'The Third United Nations Conference on the Law of the Sea : The 1974 Caracas Session', American Journal of International Law LXIX, 1 (1975), p.15.

An example of the imposition of restrictions on shipping movement is the decision by both Indonesia and Malaysia in 1972 to claim a 12 mile territorial sea and hence place most of the Malacca Strait under national control.[56] While restrictions on naval shipping have not been enforced, limitations on oil tanker movement have been applied. Tankers of 200,000 dwt or greater capacity may only use the straits in ballast or partly laden; if fully laden they must divert through the Lombok Strait. It has been estimated that 75 percent of Japanese oil supplies come from the Middle East and any diversion of tankers places an additional cost burden on the shipment of oil.[57]

Australia and the Philippines have disagreed over the passage of warships through the Balabac Strait separating Malaysian Borneo and the Sulu Archipelago, but in 1965 agreement was reached by the two governments that prior notification would be given before Australian naval vessels passed through the area. The issue of straits passage and the associated question of movement through archipelagic waters was of particular significance while Australian military forces were deployed in Malaysia and South Vietnam, but the only assertion of passage rights by Australia was in 1968, when a joint British-Australian naval force used the Balabac Strait in defiance of the wishes of the government of the Philippines.[58]

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56. Prescott, Political Geography, p.27.
57. Canberra Times, 5 November 1976, p.1. Apart from cost considerations, the problem of oil shipment through areas of strategic and environmental vulnerability has been an important factor in the tendency for Japan to seek oil sources closer to home.
58. D.P. O'Connell, 'Mid-Ocean Archipelagos in International Law' in H.Waldock & R.Y. Jennings (ed.), British Yearbook on International Law 1971 (London 1973), vol. XLV, p.33.

d. Archipelagic Waters

In 1955 and 1957, the Philippines and Indonesia respectively claimed special status for the waters enclosed by straight lines connecting the seaward limits of their land areas. They claimed that the enclosed sea area should be considered as a special regime under national control, and that the territorial sea should be measured outwards from the baselines. Within the enclosed or archipelagic waters foreign navigation was not an automatic right but could be subject to the regulation of the riparian state. Users of the Philippines and Indonesian waterways, including Australia, lodged diplomatic protests against the claims and refused to support the position of the two countries at UNCLOS I. The conference agreed that the claims could not receive formal sanction in the texts of the Conventions.[59] As a consequence the Philippines failed to ratify any of the Conventions. Indonesia ratified only the High Seas Convention, but used its instrument of ratification as an opportunity to reiterate the archipelagic claim. The status of the waters of Indonesia is of particular concern to Australia because passage is necessary for vessels plying between Australia and Singapore, Malaysia or the countries of the Gulf of Siam. Although the question of Australian passage rights has been avoided, with the exception of the Balabac Strait incident, the conflict of national views on the question has been a potentially destabilizing factor in relations between Australia and her two archipelagic neighbours.

In the period between UNCLOS I and III the archi-

59. O'Connell, British Yearbook of International Law 1971, p.20.

pelago doctrine has gained considerable international acceptance and additional adherents, particularly since a number of mid-ocean nations comprised of groups of islands have achieved independence. Fiji and P.N.G. are recent adherents to the concept in the geographic area of interest. It is also likely that the Solomon Islands, New Hebrides and New Caledonia will claim a similar status if or when they become independent. If this situation arises all of Australia's trade with South East Asia and the Far East will need to pass through archipelagic waters.

At UNCLOS III the only significant issue of contention with regard to archipelagos is the perennial problem of shipping passage. Again, submarines are a key factor in the considerations of the U.S.A. and the U.S.S.R., which utilise the Sunda, Macassar, Lombok and Omboi-Wetar routes from their Pacific bases to the Indian Ocean. It was hoped that the concept of 'transit passage' might be acceptable to the archipelagic countries but they have argued for the application of the rules of 'innocent passage' to their enclosed waters.[60] It has been reported that both the U.S.A. and the U.S.S.R. are negotiating separately with Indonesia for submarine passage rights.[61] The importance of the shipping movement issue for the major maritime powers, and the proliferation of claims to archipelago status, should ensure that the archipelago doctrine is embodied in some form in any new law of the sea Convention.

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60. Single Negotiating Text, Part II, p.43.
61. See footnote 11.

3. National Resource Zone Claims

The maritime regimes so far discussed have been areas of water over which the coastal states have claimed rights of foreign shipping regulation. It should be noted that the concepts of the territorial sea and archipelagic waters imply for the claimant state full sovereignty over all resources of the claimed waterspace and seabed. Since the end of World War II, the law of the sea also has come to embrace the idea of national rights to the living and non-living resources of other sea and seabed zones, but without full rights of sovereignty. The development of these concepts and their application in the political environment of the Western Pacific rim are considered in this section.

a. The Continental Shelf

The existence of the continental shelf as a morphological underwater extension of the landmass has been recognised since the nineteenth century. Limited national claims to shallow parts of the seabed where sedentary marine species have been harvested have long been accepted in international law.[62] However, the increased importance of the seafloor as a reservoir of hydrocarbons capable of being tapped by mid-twentieth century technology has necessitated a clarification of the legal status of the submarine area.

A series of unilateral national claims in the period 1945 to 1958 embodied the main features of what was to

62. Prescott, Political Geography, p.143.

become the doctrine of the continental shelf in the 1958 Convention.[63] The first requirement was that the submarine seabed must be an unbroken continuation of the land area of the claimant state, although the status of sections of detached shelf separated from the main area by a deeper trough remains unclear unless they surround an island, in which case rights accrue to the state exercising sovereignty over the island. Second,some limitation on the spatial extent of the claim must be set out by the claimant. The outer limit of valid claims has never been codified, and attempts to reach international agreement on the question have failed. In the 1958 Convention 'the limit ... of the exploitation of the natural resources'[64] was set as the legal extent of national rights to the seabed. As drilling technology was refined it became possible to drill in deeper water and areas claimed have tended to be extended seaward. Third, there existed a requirement in customary law of the sea for some specification of the rights claimed by the state. It has never been accepted that a claimant has full sovereignty over the seabed except for the area underlying the territorial sea. Instead, national rights are limited to the exploitation of the living and non-living resources of the seabed and the underlying sub-soil. The living resources capable of national claim were limited in the 1958 Convention to sedentary species dependent on close physical contact with the seafloor. At the Conference the Australian dele-

63. The main trends in the continental shelf debate and the legal difficulties arising from the Convention are discussed in J.A.C. Gutheridge,'The 1958 Geneva Convention on the Continental Shelf' in C.H.M. Waldock (ed.), British Yearbook of International Law 1959, (London, 1960), vol. XXXV, pp. 102-22.

64. Convention on the Continental Shelf, Article 1(a).

gation coordinated the efforts of a working group which produced the sedentary species definition now incorporated in the Convention on the Continental Shelf.[65] It might be argued that Australia's interests would have been better served by a more liberal definition, capable of including the commercially important prawn and lobster species found on the Australian shelf. The 1958 Continental Shelf Convention made specific provision for the freedoms of shipping passage, of fishing for free swimming species and of overflight in the superadjacent airspace. The right of all nations to lay pipelines and cables is guaranteed, but consent is necessary before seabed research by foreign interests is undertaken.

The Australian government laid claim to sovereign rights over the shelf surrounding the mainland, Tasmania and the P.N.G. territories in 1953.[66] The area of the claim extended to the 100 fathom water depth, and only a limited number of commercially exploited sedentary species were embraced in subsequent elaborating regulations.[67] At the time the Australian government was disputing the right of Japanese pearl-shell fishermen to operate on the Australian continental shelf, and the subsequent failure of Japan to accept the 1958 Convention may have been in part an expression of reluctance to accept Australia's claim. In 1953 Australia also demarcated the section of shallow seabed common to Australia, Indonesia and Dutch

65. Bailey, International Law in Australia, pp. 235-6.
66. Australian Government, Commonwealth of Australia Gazette 56 (1953), p. 2563.
67. The best contemporary analysis of the basis for the Australian claim is provided in L.F.E. Goldie, 'Australia's Continental Shelf : Legislation and Proclamations' The International and Comparative Law Quarterly iii (1954), pp. 535-75.

West New Guinea but not the area further to the south west opposite Timor where there was no continuous shelf at a depth of 100 fathoms.[68]

The search for offshore oil in the South East Asian and Australasian regions has highlighted a number of problems of contemporary seabed law interpretation. Indonesia, given its central location in island South East Asia, has been obliged to reach agreement on seabed boundaries with her neighbours. In the period between 1969 and 1974 the boundaries with Malaysia, Australia, P.N.G., Singapore and India were negotiated. In the South China Sea and the Gulf of Siam there has been a failure to achieve agreement on maritime boundaries, and the chief point of contention has been conflicting claims to the numerous reefs and small islands of the areas. The use and misuse of straight baselines as the basis for the measurement of seabed claims have been major factors in the failure of the nations of the Gulf of Siam littoral to settle their seabed differences.[69]

Although Indonesia, the Philippines, P.N.G. and Fiji expect to gain recognition for their archipelagic status at UNCLOS III, they have maintained their claims to their adjacent continental shelf because in many instances it will extend beyond the limits of archipelagic baselines. As indicated earlier, the problem of defining the outer limit of national claims has become more critical because the criteria of exploitability and rights to the extent of the natural prolongation of the landmass have resulted in some

68. Commonwealth Gazette 59, (1953), p. 2683.
69. Details of the South East Asian dispute are contained in Prescott, Dyason House Papers, pp. 1-4.

very wide claims, in cases such as Australia extending more than 200 miles from the nearest land. As a consequence of pressure from states with very limited or no continental shelves (this group includes Singapore), and other under-developed nations who wish to see the widest possible extent of seabed to remain beyond the limits of national jurisdiction, it is considered likely that UNCLOS III will endorse a proposal that where areas beyond 200 miles are exploited by a claimant state, then a proportion of the revenue must be surrendered to the international community.[70] This proposal has received a favourable reception from the South Western Pacific and South East Asian island nations, but not from Australia which claims rights over the resources of shelf areas beyond 200 miles from the north west coast.

b. Fisheries and the Exclusive Economic Zone

Fishing on the high seas has traditionally been an unrestricted activity, limited only by the constraints of market demand, fish availability and national fishing capability. Freedom of fishing, subject to 'the general principles of international law ... and reasonable regard to the interests of other states' is incorporated in the 1958 Convention on the High Seas.[71] Even before UNCLOS I, however, it has become obvious that some regulation of fishing beyond national maritime zones would be necessary because of the dramatic expansion in the level of post-war activity. Regional and bilateral agreements have been achieved in some areas of serious overfishing. One such area was the

70. Single Negotiating Text, Part II, p.28.
71. Article 2.

North Pacific, where catch limits have been imposed on the major participants through the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean.

The 1958 and 1960 Conferences left certain problems unresolved. Although a Convention on Fishing and the Conservation of the Living Resources of the High Seas was negotiated, it faced problems of implementation.[72] First, no agreement could be reached on the width of a national fishing zone beyond the territorial sea. Second, the system of dispute settlement incorporated in the Convention was cumbersome, and subsequently proved to be unworkable. Third, and perhaps most important, the major distant water fishing nations were reluctant to accept the idea of coastal state jurisdiction over swimming fisheries beyond territorial waters even though the negotiation of foreign fishing rights were embodied in this Convention.

One consequence of the Conference failures was that individual states continued the pre-Conference practice of making unilateral claims for fisheries zones in excess of territorial sea claims. As long as the claims were not unduly extravagant, they were usually accepted by neighbouring states and foreign fishers of the region, particularly if the right to negotiate a limited foreign access was embodied in the declaration. An alternative expedient adopted by Indonesia and Malaysia was to extend the width of the territorial sea claim to 12 miles, thus extending the width of an exclusive fishing zone. New Zealand retained a 3 mile territorial sea, but in 1965 declared a 12

72. The problems of implementing the Convention are analysed in Prescott, Political Geography, pp. 138-41.

mile exclusive fishing zone measured from the territorial sea baseline. Among the most important reasons for the continuance of the Philippines and Indonesian archipelago claims, and the acceptance of this doctrine by Fiji and P.N.G., has been the implied right to retain the enclosed fish resources exclusively for their own nationals.[73]

The decision of the U.N. to convene a third law of the sea conference in 1973 provided a further opportunity for the global community to reconsider the problem of fisheries regulation. Unlike the 1958 and 1960 conferences the older developed nations were unable to dominate proceedings, and the nations with substantive interests in distant water fishing were in a minority. It was hardly surprising that one item of widespread early agreement at the Caracas session was the right of coastal states to claim an exclusive economic zone in which they could exercise jurisdiction over all natural resources in a 200 mile belt extending seaward from the territorial sea baseline. Full sovereign rights over seabed minerals were envisaged, but it was conceded that regulated access for other nations to the fish stocks of the zone would be necessary.[74] A number of areas of disagreement remain concerning the precise nature of the new regime. One area of contention is the form of access which might be guaranteed to foreign fishing interests.[75] This latter problem is of particular concern to Japan and Taiwan because their operations in the South West Pacific and around Australia may be curtailed if the regime is adopted

73. Post-Courier (Port Moresby), 6 October 1976, p. 8.
74. Single Negotiating Text, Part II, pp. 19-26.
75. Australian Department of Foreign Affairs, Third United Nations Conference on the Law of the Sea, Third Session: Report of the Australian Delegation (Canberra, 1975), pp. 21-3.

in a final Convention. Both countries, together with the East European Bloc which is anxious to build up a significant fishing presence in the South West Pacific, want to see liberal terms of access written into any UNCLOS III Convention on fishing.

The economic zone concept, if adopted by regional states, may prove to be of only limited benefit. It would confer on coastal states a large area of water space which will require surveillance if the regulation of foreign fishing is to be effective. Given the paucity of existing surveillance and policing resources, and the general lack of capital to purchase an adequate maritime fishing or policing capacity, it may prove expedient to allow foreign fishing access on fairly generous terms in return for assistance in building up the capacity of indigenous fishing ventures. Although it is proposed that any final text would contain provisions for access to the living resources of the economic zones of coastal states for wholly or partially land-locked neighbours, no similar access to the potentially more valuable minerals and hydrocarbons is envisaged. Within the local region Singapore is the state most likely to be affected by limitations on access to the economic zones of neighbouring nations. Consequently, it has emerged as one of the most vocal members of the land-locked and geographically disadvantaged group at UNCLOS III whose opposition to a number of key issues threatens to limit the success of the Conferences.

In the light of the possibility that no final agreement may be achieved at UNCLOS III, a number of the Pacific states are considering the need for either unilateral or

regional action to declare a 200 mile economic zone around their islands. Action to implement these plans has been deferred pending the outcome of the May 1977 meeting of UNCLOS III.[76] Whatever the outcome of this meeting, the right of coastal states to exercise jurisdiction over their adjacent fisheries has already become widely accepted.

4. Delimitation of Areas of National Jurisdiction

Among the sections of the 1958 Conventions and the 1969 North Sea Continental Shelf decision of the ICJ that are of particular importance in the local maritime environment are the provisions for the resolution of conflicting national claims. Two of the Conventions and the Court decision emphasise the importance of bilateral negotiations as the desirable basis of settlement. While the Conventions also sanctioned the use of median or equidistance lines as a means of delimitation where no other basis of agreement exists, the 1969 Court guidelines stressed the more general employment of standards of equity, taking into account all relevant political, social and economic circumstances.[77] Even so, negotiation between the interested parties was seen as the preferred method of settlement. As it is almost certain that maritime claims within the region will be extended seaward in the near future, disputes are bound to arise which will test the existing imprecise parameters for boundary settlement.

One additional problem which has been raised at

76. The attitudes and actions of the members of the South Pacific Forum are examined in Chapters II and III.
77. Prescott, Political Geography, p.168.

UNCLOS III is the right of states to claim maritime zones around very small or uninhabited rocks, islets or cays.[78] This question has particular significance for the South Pacific nations and for Australia and P.N.G. because of the presence of atolls and sand cays surrounding their main landmasses. Contemporary law of the sea doctrine permits the country which exercises sovereignty over these offshore land areas to claim a territorial sea and continental shelf in the manner prescribed for mainland claims. But at UNCLOS III it has been suggested that while a territorial sea may be allowed in future, there should be no claim to resource zones around either uninhabited islands or those not capable of supporting economic life. Embodiment of this doctrine in a new Convention may require the surrender of small areas of existing claims in the region, unless there is a provision for no derogation from rights already recognized by the international community.

5. Other Contemporary Law of the Sea Problems

a. Status of the High Seas

The 1958 Convention on the High Seas was essentially a declaration of the rules of customary usage. It reiterated the freedoms of overflight, navigation, fishing and the laying of pipelines and cables on the underlying sea floor. It also defined the high seas area as 'all parts of the sea that are not included in the territorial sea or the internal waters of a State'.[79] The Convention also

78. Australian Department of Foreign Affairs, Third United Nations Conference on the Law of the Sea, Second Session : Report of the Australian Delegation (Canberra, 1974), pp.27-8.
79. Article 1.

provided for a contiguous zone of up to 12 miles width measured from the territorial sea baseline, in which the coastal state could exercise jurisdiction over customs, fiscal, sanitary and immigration matters of local concern, but this area was legally defined as high seas. Because of its non-controversial nature the High Seas Convention gained the explicit or tacit support of most of the states of the Western Pacific and archipelago Asia. Australia, Fiji, Malaysia and Indonesia have all subsequently ratified the Convention. The Philippines based its refusal to endorse the Convention on the failure of the 1958 and 1960 conferences to give international sanction to the archipelago concept.

Contemporary attitudes to the status of the high seas as expressed at UNCLOS III reflect little change from the 1958 position, despite the proliferation of new states since that date. Belief in the basic freedom of activity has been reiterated, and the only changes of significance relate to the limits of the high seas. The draft texts so far produced indicate that the exclusive economic zone should not be considered part of the high seas, and the text on archipelagos makes a similar exemption.[80]

One additional issue of concern for the nations of the Western Pacific is the need for some regulation of the harvest of the highly migratory fish species. This is a subject of particular interest to P.N.G., the Solomon Islands and the smaller states and territories because of the interest of Japan, the U.S.A. and the U.S.S.R. in the exploitation of these species. No regime satisfactory to

80. Single Negotiating Text, Part II, p. 30.

both the coastal states and the foreign fishers has so far been negotiated.

Another issue, less directly related to the law of the sea conferences, is that of de-escalatation of the naval rivalry on the high seas by the superpowers. In the late 1960's and early 1970's it was the hope of the less developed nations of the Indian Ocean margin that the build-up of naval forces,which had been the main expression of superpower rivalry in the Atlantic and North Pacific Oceans, might be avoided in their region. Despite a resolution of the Conference of Non-Aligned Nations in 1970 and a subsequent U.N. resolution in 1971, a gradual buildup of both United States and Soviet forces has been reported[81] while France and the United Kingdom continue to maintain naval presences in the Indian Ocean. One means of hindering the deployment of forces from the North Pacific bases of the U.S.A. and the U.S.S.R. would be the imposition of restrictions on the movement of warships through the straits of South East Asia. It seems likely, however, that the superpowers will negotiate reasonable terms of access through the straits and archipelagic waters, and in any event the existence of Bass Strait provides an alternative, if longer, route. Futhermore, any attempt to circumscribe the naval activity of foreign fleets on the high seas is likely to be opposed on the grounds that such activity is a legitimate exercise of the freedom of the high seas. Any restrictions which might eventuate will result from political constraints rather than prohibitions imposed by the law of the sea.

Regional discussions among the South Pacific nations

81. Canberra Times, 17 April 1976, p. 4.

have also indicated the desirability of avoiding great power rivalry in the area, but this issue has been overshadowed by their opposition to French nuclear testing. Again it has been recognized by all parties that the law of the sea is not a suitable medium for the restriction of great power naval activities, and that concessions to local opinion are unlikely to follow unless they coincide with the interests of the power concerned.

b. Exploitation of the Deep Seabed

The question that has excited most debate in the U.N. deliberations on the law of the sea is that of control and exploitation of the deep seabed beyond the limits of national jurisdiction. As indicated earlier the 1958 definition of the limits of the continental shelf has facilitated national claims for exploitation rights beyond the 200 metre water depth, as technology has provided the capability to extract minerals from the deeper seabed. The major concern of the less developed states is that the deep seabed should be exploited under a system of international control which will allocate the financial benefits in favour of the poorer and geographically disadvantaged countries. The debate has centred on three issues: the rights of national access, the terms of exploitation and the protection of the interests of land producers of the harvestable mineral commodities.[82] Only the last mentioned issue is of particular concern in the region because the economies of P.N.G. and New Caledonia are heavily dependent on copper and nickel

82. Report of the Australian Delegation, Second Session, pp. 11-2.

respectively, and both fear competition from seabed mining. However, existing technological constraints preclude the economic competition of deep sea miners with land producers and the short-term commercial significance is not great. Instead it is suggested that the importance of the debate for the countries of the regions under study is that failure to resolve seabed issues may prevent the incorporation of areas of widespread agreement, such as the archipelago and economic zone concepts, into a new codified law of the sea. One possible means of overcoming this obstacle would be to forgo the present UNCLOS III preoccupation with the achievement of a single, comprehensive Convention, and to devote attention to the negotiation of a series of more limited texts on the subjects of more general consensus.

c. Pollution Control

The need for widespread ocean pollution control has been recognised by the international community since the early 1950's. The International Maritime Consultative Organization took the first step towards the global regulation of the problem with the negotiation of the International Convention for the Prevention of Pollution of the Sea by Oil in 1954.[83] This agreement and its subsequent amendments limit the amount of allowable oil discharge from ships within a zone extending 50 miles from land in the whole of the local region with the exception that between 1954 and 1970 a 150 mile zone was applied to the area from Thursday Island in the Torres Strait south around the

83. In amended form, it is incorporated as the Schedules to the Australian Pollution of the Sea by Oil Act 1960-1972.

coast to the 20 degree latitude on the West Australian shoreline. Since 1970 the special zones have been discarded, and a uniform 50 mile zone of limited discharge around all land has been accepted by the Convention signatories. One major limitation of the 1954 Convention and the prevailing doctrine of the law of the sea is that only the flag state can take disciplinary action against a pollution offender beyond the limits of the territorial sea. This limitation of the powers of an aggrieved coastal state served as a further justification for the extension of territorial sea claims.

The 1958 Conventions made only passing references to the need for pollution control.[84] It was not until the magnitude of the problem of pollution from tanker accidents and deliberate discharge became widely publicized in the mid 1960's that pressure arose to give the coastal state the right to exercise pollution jurisdiction over waters adjacent to its coastline. The right to apply local pollution controls beyond the territorial sea and in international straits enclosed by territorial waters gained momentum with a number of unilateral claims in the early 1970's. The Malacca Strait application has previously been discussed, and can be related specifically to the grounding of a number of tankers in the restricted navigation channel.

The right of the coastal state to exercise jurisdiction over pollution by foreign vessels has been a subject of considerable debate at UNCLOS III. Even the major maritime powers have come to accept the general principle

84. For example, Articles 24 and 25 of the Convention on the High Seas refer only to the need for states to take action against infringements by their citizens and to cooperate with international organizations to prevent pollution.

of coastal state supervision of adjacent waters, but they argue that rather than permit a proliferation of national regulations, internationally accepted standards should apply. One position gaining some acceptance proposes the application of international regulations but with a limited coastal state discretion to apply local law in conditions of particular threat.[85] Even so, the question of respective states' rights remains as one of the most intractable problems of the conference. Because of the hazardous nature of many of the sea lanes in South East Asian and South West Pacific waters, and the dependence of coastal populations on the sea for food, the nations of the region support this idea of coastal state discretionary powers. The major concern expressed by nations dependent on the carriage of their trade by foreign bottoms is that unduly strict anti-pollution rules are likely to result in higher freight costs, a situation which the countries of the regional maritime milieu can ill afford.

SUMMARY

The geographic features and pattern of utilization of the South East Asian, South West Pacific and Australasian maritime environments exhibit a number of common and disparate features. The limited number of international shipping channels, and the need for mariners to use the shortest practicable sea routes have heightened the importance of the legal status of straits and archipelagic waters, both for commercial and naval shipping. With the exception of coastal shipping and fishing, and inshore policing operations, maritime activity in the areas under study is domin-

85. Report of the Australian Delegation, Third Session, p.31.

ated by countries geographically further afield: notably Japan, Taiwan, Western and Eastern European nations and the U.S.A.

The largest known commercial concentrations of fish stocks are to be found in the Indonesian-Malaysian-Philippines waters, and these are predominantly exploited by local fishermen, but in the waters further to the east and south there is significant competition from Japanese, Taiwanese and more recently Russian fishermen. These groups are particularly anxious to exploit the less surveyed and exploited migratory fish species, and their competition with the comparatively underdeveloped local fishing industries has led to friction between the governments of the coastal and distant water fishing states.

With the exception of the islands of the South Western Pacific, the area under study is characterized by areas of extensive continental seabed. The shelf area common to Indonesia and the states of Borneo is not fully explored but is considered to be a major reservoir of hydrocarbons, while the shared Australia-P.N.G. shelf is generally thought to contain smaller oil and gas reserves. The exploitation of these mineral resources is also dependent on foreign capital and expertise, but the nations which exercise sovereign rights over the offshore deposits have instituted systems of control designed to retain effective management and secure financial benefit from these operations.

The inherent conflict of interests between the regional and non-regional states has been a major factor affecting the application of the law of the sea in the region since World War II. The desire of coastal states to

exercise control over the use of adjacent maritime areas stems largely from their wish to retain financial benefits for their own communities and to limit the deleterious consequences of foreign maritime activity in the region. These goals have been achieved by the expansion of the scope of local jurisdiction and increases in spatial extent of control over the waters and seabed surrounding the littoral state. Within the physical area of study these extensions have taken the form of archipelago claims by Indonesia and the Philippines in the 1950's, more general claims to the shallow seabed surrounding the countries of the region, and in some instances extensions of territorial sea claims. In more recent times, and particularly at UNCLOS III, the concept of a general resource zone extending up to 200 miles from the coast has gained widespread support, but there is a strong possibility that this and other features of a new law of the sea may not be codified because of the inability of the conference to resolve the question of deep seabed mining access. The ways in which Australian and P.N.G. law of the sea policies have responded to these regional patterns of sea and seabed usage are considered in the following chapters.

CHAPTER II

AUSTRALIA : THE EXPANSION OF MARITIME JURISDICTION

As the previous chapter indicated, the period 1945-1966 saw major changes to the policy of the Australian government relating to seabed claims. It was in this period that the Commonwealth laid claim to the submarine prolongation of the landmass out to a depth of 100 fathoms and sought unsuccessfully to have a wide range of marine organisms included as sedentary species. There was no change to the long-standing attitude that the territorial sea width should remain limited to three miles. No extension was undertaken to the area in which jurisdiction over foreign fishing was exercised. During the period the only other notable feature of Australian law of the sea policy was the opposition to the Indonesian and Philippines assertions of rights to control shipping within their archipelagic waters. In the period since 1966 the whole basis and nature of the Australian law of the sea regime have undergone a marked change. In this chapter these changes are analysed and their impact on domestic and foreign policy assessed.

The chapter is divided into two sections focusing on domestic and international aspects respectively. The first deals with the relationship between the Federal government, the States, and the commercial interest groups which exploit the Australian marine environment. It is argued that the period 1966-1976 has been characterized by an increase in Commonwealth offshore rights at the expense of earlier State claims, but that the Commonwealth

has been reluctant to reduce the States' administrative role for a variety of legal, economic and political reasons. One effect of this continued State role in offshore jurisdiction has been the limitation on the scope of Federal government actions in the pursuance of international law of the sea policy.

The most significant international consequences of Australian law of the sea policy have stemmed from the Commonwealth decisions to increase the physical extent of jurisdiction over the adjacent seas and seabed, and actions to circumscribe foreign activity in the new areas of national interest.

These manifestations of national policy have been disputed by Indonesia and Japan and the political impact of the disagreements are discussed in the latter section of the chapter. It is also argued in this section that the actions taken to extend Australian maritime jurisdiction have been broadly in accordance with international practice, and with one significant exception have been vindicated by international and regional consensus, expressed at UNCLOS III and the South Pacific Forum respectively.

THE DOMESTIC IMPACT OF LAW OF THE SEA CHANGES : 1966-1976.

In international law the powers exercisable by a nation by virtue of its sovereignty have never been precisely defined.[1] Because the sea area has a certain international character, the problem of defining coastal state sovereignty over adjacent waters is further complicated.

1. L. Oppenheim, International Law. A Treatise, (8th edn, ed. H. Lauterpacht, London, 1967), vol. I, pp. 289-94.

In the case of Australia as in other federal systems the issue has been rendered more complex by a conflict of claims between the States and the Commonwealth. Two legal questions dominate the debate over government rights to offshore areas around Australia.[2] The first is the nature of the authority which the pre-Federation colonies could exercise over adjacent waters and seabed, and second, whether such rights were retained by the States after Federation, or passed to the Commonwealth. To facilitate analysis of these questions, rights to the territorial sea, fisheries jurisdiction and the seabed are considered separately.

1. The Territorial Sea

In the period 1876-78 the British government asserted that national sovereignty ended at the low water mark, but that jurisdiction over both nationals and foreign citizens extended to the edge of a three mile territorial sea.[3] When the Australian colonies were established the limits of sovereignty were defined by the Crown as coastlines and islands, with the exception of South Australia where the definition included bays and gulfs. It could thus be argued that only in this latter case were sea areas encompassed in the limits of sovereignty. Even so, it became the practice of colonial governments to adopt the Imperial precedent of exercising jurisdiction rather than

2. The problems are analysed in detail in D.P. O'Connell, 'Problems of Australian Coastal Jurisdiction' in C.H.M. Waldock (ed.), British Yearbook of International Law 1958 (London, 1959), vol. XXXIV, pp. 199-259.
3. O'Connell, British Yearbook of International Law 1958, p. 201.

full sovereignty over the adjacent territorial sea. O'Connell is of the opinion that 'Colonial legislatures had competence over territorial waters because they were exercising over them the protective jurisdiction necessary for "peace, order and good government" of the colonies, not because the waters were within their boundaries'.[4] It is likely that proponents of the view that States have offshore rights of sovereignty may have confused the exercise of jurisdiction with the fuller proprietary powers implied in the concept of sovereignty.

After Federation the States accepted that powers in the territorial sea over matters listed in section 51 of the Constitution passed to the Commonwealth.[5] On the other hand they argued that in accordance with constitutional practice all residual powers remained with the State. In particular, the regulation of intra-State shipping remained under State control because under section 51(i) of the Constitution, Commonwealth powers over trade and commerce were limited to that 'with other countries, and among the States'.

State authority over offshore waters was increased in 1967 by a decision of the Federal government to apply the baseline provisions of the 1958 Territorial Sea Convention.[6] Until this time the territorial sea baseline had been the low water mark and straight baselines had only been utilized to enclose bays up to ten miles in width.

4. D.P. O'Connell, 'Australian Coastal Jurisdiction', in D.P. O'Connell (ed.), International Law in Australia (Sydney, 1965), p. 253.
5. O'Connell, British Yearbook of International Law 1958, p. 254.
6. Australian House of Representatives, Debates 1967, no. 10, p. 2444.

The 1967 decision authorized the enclosure of bays up to 24 miles wide and the use of the lines to encompass fringing islands. One important consequence of this action was that it increased the area of internal waters under State control, because all waters on the landward side of the territorial sea baseline were considered to be part of the State domain.

A number of reasons for the ten year delay in implementing the 1958 Convention can be advanced. Reluctance may have stemmed from the belief that such an extension of the limits of State sovereignty could be considered a breach of section 123 of the Constitution, which required the consent of the State before any changes to its boundaries were implemented. One further reason was advanced by the Commonwealth government in 1970.[7] Article 5.2 of the Convention on the Territorial Sea requires the sovereign state to maintain the rights of innocent passage in areas of hitherto territorial sea which have become internal waters by the application of straight baselines. As the Commonwealth and not the Australian States were the responsible sovereign government in international law, it implied the need for a system of dual jurisdiction over foreign shipping in the recently enclosed waters.

The dilemma of the Commonwealth government was exposed by the Opposition in paraliament. If the Commonwealth was to extend territorial sea jurisdiction from 3 to 12 miles then the problem of respective State and Commonwealth powers over the outer 9 miles would need judicial resolution.[8]

7. Debates 1970, no. 5, p. 1281.
8. Debates 1967, no. 10, p. 2733.

The Commonwealth chose to avoid the problem by limiting jurisdiction to the control of fisheries in the outer zone, and to this date the width of the territorial sea remains at 3 miles.

The first major challenge to the rights of the States in the territorial sea was the introduction of the Territorial Sea and Continental Shelf Bill in Federal parliament in April 1970.[9] The Bill asserted the sovereignty of the Commonwealth over territorial waters, subject only to the right of 'innocent passage'. While it allowed the continuance of State jurisdiction in matters not reserved for the Commonwealth, it proclaimed the primacy of Federal law in matters of concurrent jurisdiction.

Assertion of Commonwealth sovereignty over the territorial sea and the continental shelf was a product of the personal style of government practised by the Prime Minister, Mr. John Gorton.[10] It is believed that his decision to introduce the Bill was influenced by the pronouncements of eminent Australian jurists in 1969. Both Sir Percy Spender[11] and the Chief Justice, Sir Garfield Barwick,[12] questioned the validity of the argument that the States had inherent rights in the territorial sea. Gorton also shared with the Leader of the Opposition a distaste for the bureaucratic inefficiency and duplication which occurred in the

9. Debates 1970, no. 5, p. 1282.
10. Gorton's style of government and his relations with his Ministry and the bureaucracy are described in Alan Reid, The Gorton Experiment (Sydney, 1971).
11. P.C. Spender, 'The Great Barrier Reef : Legal Aspects', Papers of the Australian Conservation Foundation, The Future of the Great Barrier Reef (Parkeville, Victoria, 1969), special publication no. 3, pp. 36-7.
12. Bonser v. La Macchia (1969) 43 A.L.J.R. 275, at p. 281.

exercise of concurrent Commonwealth and State powers.[13] But perhaps the most important consideration was the need to clarify the status of the territorial sea for the exercise of international relations. This problem had been raised in April 1968 when the Queensland government threatened to take action under State law against foreign fishermen operating in the territorial sea.[14]

Gorton's personal views on the need to assert Commonwealth power in offshore waters were not shared by an influential group within the parliamentary Liberal Party. A number of his ministers, including Mr. McMahon, Mr. Fraser and Mr. Fairbairn were under pressure from the State Liberal Parties to oppose this centralization of Federal power, but personal animosity towards Gorton was also a significant factor in their opposition.[15] As indicated earlier, it is possible that the Bill would have been supported by the parliamentary Opposition if it had been put to the vote, but it is also likely that some government members would have voted against it.[16] Because a vote might have publicly exposed the dissension in government ranks, the Bill was delayed until Gorton retired from office in 1971. His successor, Mr. McMahon, further delayed the vote by referring the Bill to an interminable series

13. The problem of Federal and State duplication of anti-pollution laws and the tardiness of the states in providing matching legislation to give effect to Commonwealth acceptance of the Convention on the Prevention of Pollution of the Sea by Oil are described by Mr. Whitlam in Debates 1965, no. 3, p. 462.
14. Letter from the Acting Premier of Queensland to the Prime Minister quoted in the Courier-Mail (Brisbane) 24 May 1968, p. 8.
15. Reid, The Gorton Experiment pp. 77-8.
16. Australian Financial Review (Sydney), 29 March 1972, pp. 1 and 18.

of conferences with State governments until the defeat of the McMahon government at the 1972 elections.

The Labor government which took office in December 1972, unlike its immediate predecessor, was not reluctant to pass legislation asserting Commonwealth primacy in the territorial sea. It introduced the Seas and Submerged Lands Bill in early 1973, which became law in December 1973 after some modifications in the Opposition controlled Senate. The provisions of the Act followed those of its forerunner of 1970. In addition to declaring Commonwealth sovereignty over the territorial sea, it asserted that all internal waters accumulated since Federation were vested in the Federal government. By this expedient the question of respective rights raised by the introduction of straight baselines in 1967 was answered in favour of the Commonwealth. The Act also provides, section 123 of the Constitution notwithstanding, for the Federal government to determine the breadth of the territorial sea, the use of baselines and hence the limits of bays and enclosed waters. It does, however, contain saving provisions for the continuance of existing State legislation '...except in so far as the law is expressed to vest or make exercisable any sovereignty or sovereign rights otherwise than as provided for by the preceding provisions...'.[17]

State governments were not mollified by the saving provisions in the Act. All of the States, including Tasmania and South Australia which were ruled by Labor governments, challenged the validity of the Seas and Submerged Lands Act in the High Court. Such a move had been fore-

17. Seas and Submerged Lands Act 1973, section 16(b).

shadowed by both Mr. Gorton and Mr. Whitlam when they had introduced their respective legislation. Both felt that only a definitive judgement of the High Court would settle the question of the legal extent of Commonwealth and State government powers in the territorial sea. The Court decided the issue in December 1975. It was held by a 5-2 majority that the Commonwealth assertion of sovereignty over territorial waters was a valid exercise of the powers of the national government.[18]

While the attitudes of the States indicated a bi-partisan approach to the question of offshore jurisdiction, there is evidence of differences of attitude at the Federal level. These differences revolve not so much around the philosophy of Commonwealth primacy, to which both the Liberal-Country Party coalition and the Labor Party appear committed, but concern the extent of State participation in offshore administration. Whereas the Labor Party have appeared anxious to minimize the States' role in offshore matters, the Liberal-Country Party grouping have indicated an acceptance of a continuing State role in maritime jurisdiction.

This fear of the intentions of the Labor government was probably heightened by the Labor government decision in November 1973 to establish a system to monitor the location of merchant shipping around the Australian coast.[19] Ostensibly the scheme was to facilitate search and rescue operations but its potential for a broader regulation of

18. New South Wales v. The Commonwealth (1975)50 A.L.J.R. 218.
19. Australian Department of the Media, Australian Government Digest 1, 4 (1974), pp. 1673-4.

activity could not be overlooked. Although the scheme was voluntary when established, there were plans to make compliance compulsory for all Australian ships.

The Labor government foreshadowed additional steps to implement the powers conferred by the Seas and Submerged Lands Act. Deficiencies in the system of Australian control over criminal offences at sea were highlighted in parliament by reference to a comment by the Chief Justice, Sir Garfield Barwick.[20] Referring to an earlier smuggling case the Chief Justice had said that 'The circumstances of the case point up the need for the parliament to exercise its legislative power...It is...inappropriate that... the power of a court in Australia should be derived from and be limited by Imperial legislation'. The Whitlam government promised a full review of the problems of extra-territorial maritime criminal law, and in addition planned to extend national jurisdiction, as limited by Article 24.1 of the Territorial Sea Convention, to a contiguous zone beyond territorial limits. These proposals had not been implemented when the Labor government lost office in November 1975 and have not been acted upon by their coalition successors.

It is in the realms of fishery and seabed control that the differences in attitude between the parties at the Federal level to State participation in offshore control are most evident. This, and the more general aspects of the Federal-State debate over offshore law of the sea rights are analysed in the subsequent discussion.

20. Australian Department of the Media, Australian Government Weekly Digest 1, 20 (1975), pp. 648-9. The case referred to is R. v. Bull (1974) 48 A.L.J.R. 232.

2. Fisheries

As part of the general jurisdiction exercised by the Australian colonies over the territorial sea it was accepted by the British government that the colonial authority extended to fisheries control.[21] The validity of continued State control over fisheries appeared to be recognized by the drafters of the Constitution. Section 51(x.) limits the authority of the Commonwealth to 'Fisheries in Australian waters beyond territorial limits.' After Federation it had been accepted by governments at the State and Federal level that the 'territorial limits' were the outer edge of the territorial sea. Consequently, the Fisheries Act 1952 which provided for a 200 mile zone around the Australian coastline in which the activities of Australian fishermen could be regulated, specifically excluded the territorial sea from the provision of the Act. Since 1967, however, the belief that States have an inherent right to control inshore fisheries has been eroded by judicial scrutiny and by the expansion of Commonwealth administrative machinery into fisheries regulation.

The major extension of Commonwealth power over fisheries was enacted in the 1967 amendment to the Fisheries Act 1952-1966.[22] A 12 mile declared fishing zone measured from the territorial sea baseline was the main provision of the amendment, and it was designed to curtail foreign

21. For example, section 3 of the Queensland Pearl-Shell and Beche-de-mer Fishery Act 1881-1886 refers to the limits of the colony's fishery jurisdiction as '... within one league to the seaward from any part thereof [the Colony of Queensland]'.
22. The amendment was foreshadowed in an announcement of the government's intentions by the Minister for Primary Industry, Mr. C.F. Adermann on 15 March 1967. Debates 1967, no. 4, p. 664-5.

fishing close to the Australian coast. One feature of the definition of the zone was that its measurement began at the baseline of the territorial sea. While foreign fishing was regulated throughout the whole zone, the Commonwealth did not attempt to usurp State control within territorial waters. In practice, even foreign activities were often policed by State officials acting with authority delegated from the Federal government.

Much of the opposition to the application of State laws in the territorial sea derives from commercial fishermen. Because of the constitutional guarantee on the freedom of commerce between States, fishermen from one State can operate in the waters of another State without the need to abide by the regulations imposed in the State of their activity. While the home state's fishermen are curtailed by local law, the inter-state fishermen can profit from the lack of effective regulation over their activity. Disputes between fishermen from northern New South Wales and Queensland over the exploitation of the prawn beds of southern Queensland are common. A similar situation exists where unregulated New South Wales fishermen are depleting the abalone reefs of north eastern Victoria.[23] One expert considers that the inability of the Queensland government to control the operations of fishermen based interstate has been a major factor in the overexploitation of the prawn beds in the Gulf of Carpentaria.[24] As a consequence those fishing interests who are disadvantaged by the variations in States' fishery regulation are anxious

23. Australian (Sydney), 9 October 1971, p. 17 and Courier-Mail, 6 November 1975, p.3.
24. Comment by Professor C. Clark, the Australian, 15 March 1976, p.2.

to see the imposition of a uniform set of laws. Rather than attempt to gain the compliance of all States to pass matching legislation, the fishermen have advocated the imposition of a uniform Commonwealth code.

Fishermen pressing for greater Commonwealth fisheries power were disappointed by a decision of the High Court in 1969. In the Bonser v. La Macchia Case the Chief Justice said '...in my opinion the constitutional power (of the Commonwealth) does not extend to fisheries within three nautical miles of the seashore.'[25] Even so, he expressed doubts as to whether the territorial limits of a State were the outer edge of the territorial sea or the low water mark,[26] and this reservation had an important influence on the subsequent actions of the Prime Minister, Mr. Gorton.

Gorton hoped that if the Territorial Sea and Continental Shelf Bill was passed by parliament it would then be challenged by the States. He and his advisers felt that the High Court would rule that the territorial limits of the States were the low water mark, and as a consequence Commonwealth fisheries legislation could be applied uniformly outwards from the coast.[27] It is debatable whether it was envisaged that State legislation would also continue to apply, but if so then section 109 would have assured the primacy of Commonwealth law if a conflict became evident. In anticipation that the Bill would be passed into law, fishermen from Tasmania in March 1970 sought Federal financial assistance to initiate the High

25. 43 A.L.J.R. 275, at p. 281.
26. 43 A.L.J.R. 275, at p. 278.
27. Sydney Morning Herald, 6 March 1970, p.2.

Court challenge.[28] As the Bill did not pass into law, however, the Commonwealth could not support the move.

The decision of the High Court in the Seas and Submerged Lands Case resurrected the question of fisheries control rights in the territorial sea. The December 1975 ruling stated that the limits of State sovereignty were the low water mark, and this when read in conjunction with section 51 (x.) of the Constitution would indicate Commonwealth responsibility for all offshore fisheries. This opinion has been disputed by the Minister for Primary Industry in the Coalition government. He has stated that as the 1975 decision did not rule specifically on fisheries, the 'territorial limits' for the activity were still considered to be three miles from shore.[29] This statement accords with an earlier decision of the Fraser government which indicated that it is planning to make greater use of the State administrative machinery to implement Federal law in offshore areas. On this occasion in February 1976 the Minister for Primary Industry stated that 'It is my intention to initiate discussions with State ministers to ensure that to the maximum their departments will be responsible for the administration of fisheries jurisdiction to the limit of Australian jurisdiction.'[30] Since it is possible that Australia will claim a 200 mile economic zone, the February 1976 speech would indicate a greatly extended physical area and scope of jurisdiction for the States. Whether the States will act merely as executors

28. Mercury (Hobart), 5 March 1970, p.5.
29. Australian Department of Primary Industry, Australian Fisheries 35, 9 (1976) p.25.
30. Australian Fisheries 35, 3 (1976), p.2.

of Commonwealth policy or will be able to apply local legislation remains to be seen. Either option would appear to be open to the Commonwealth.

In the meantime fishermen continue to challenge the validity of State fisheries law. One fisherman in South Australia has attempted to capitalize on the status of waters enclosed by straight baselines. Under State law he has been charged with committing offences in the waters between the mouth of St. Vincent's Gulf and Kangaroo Island and he has asserted that this area is now beyond the limits of the State.[31] A challenge in Western Australia was decided in favour of the State when the High Court upheld the application of State law that is not inconsistent with Federal law and does not make any claim to State sovereignty over the waters concerned.[32] It is apparent that the Coalition government is not anxious to assert its fisheries authority and it appears that the existing system of day to day control over Australian fishermen is likely to remain with the State governments.

3. The Continental Seabed

State governments in Australia have not only claimed rights to coastal waters but also to the underlying seabed. The rationale for these claims was based on the need for the colonial governments of northern Australia to regulate the harvest of pearls, pearl-shell and edible sea slugs from the adjacent seabeds. Initially the regulation was

31. Advertiser (Adelaide), 28 April 1976, p. 1.
32. Australian Financial Review, 17 May 1976, p.7.

limited to the seafloor within the territorial sea[33] but the scope of operations beyond the three mile limit around northern Australia required a spatial extension of legislative powers. The problem was overcome by the establishment in 1885 of the Federal Council of Australasia, a legislative body with extra-territorial authority exercised on behalf of the Crown. The Council passed legislation granting jurisdiction to Queensland and Western Australia to regulate the harvest of sedentary species throughout the whole continental shelf of their respective colonies.[34] Authority was, however, limited to the control of British subjects who constituted the majority of the fishermen. As the Constitution sanctioned the continued operation of Council legislation in the post-Federation period, these State powers continued to apply until replaced by Commonwealth legislation in 1952.

Two actions by the Commonwealth in 1952 indicated its intention to assert rights of sovereignty over the seabed. The first was the proclamation of sovereign rights to the continental seabed and that of outlying islands and territories.[35] The extent of Commonwealth claim to the seabed of the territorial sea was not specifically indicated. Second, by the passage of the Pearl Fisheries Act 1952-1953 the Commonwealth indicated an intention to replace State jurisdiction over the outer continental shelf, even though administration of the provisions of the Act was left to the states. These actions were initiated not so much to limit State powers over the territorial seabed but to create a

33. See footnote 21.
34. For example, the Queensland Pearl-Shell and Beche-de-Mer Fisheries (Extra-Territorial) Act 1888.
35. Australian Government, Commonwealth of Australia Gazette 56 (1953), p. 2563. The Commonwealth Pearl Fisheries /

legal machinery which could be used to regulate Japanese pearl fishing on the outer shelf.[36] As the States were not considered international entities, the application of their law in the offshore areas could validly have been questioned by the Japanese government.

The dispute over Japanese fishing lapsed in the mid-1950's with the collapse of the market for pearl-shell and the subsequent validation of the Australian claim to the continental shelf at UNCLOS I. In the mid 1960's a new problem of continental shelf fishing was posed by the removal of giant clams from northern reefs by Taiwanese fishermen. Because this species was not protected under the limited provisions of the Pearl Fisheries Acts the Commonwealth government decided to introduce replacement legislation. The Continental Shelf (Living Natural Resources) Act 1968 empowered the Federal government to control all aspects of sedentary fish harvesting by both nationals and foreign fishermen. Again the Commonwealth appeared reluctant to usurp the authority of the States, particularly over the territorial seabed. The area of applicability of the Act was described in accordance with the 1958 Convention definition which refers to '...the seabed and subsoil of the submarine area adjacent to the coast but outside the area of the territorial sea...'.[37] This history of reluctance to

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Act (No. 2) 1953 set the limit of the national claim at a depth of 100 fathoms.

36. Australian Department of External Affairs, Current Notes on International Affairs 26, 1 (1955), p. 31. Speech by the Federal Minister for Commerce and Agriculture, Mr. J. McEwan on 6 January 1955.

37. Australian Department of External Affairs, Conventions on the Territorial Sea and the Contiguous Zone, the High Seas, Fishing and Conservation of the Living Resources of the High Seas and the Continental Shelf together with Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, Treaty series No. 12 (Canberra, 1963), p. 24, Article 1.

assert Commonwealth authority at the domestic level over the whole of the shelf probably reinforced a belief among politicians that fisheries rights within the territorial sea resided with the States. Because at this time the definition of 'territorial limits' had not been decided by the High Court the States considered that their fisheries jurisdiction was justified by section 51(x.) of the Constitution. It should be noted that the Constitution did not differentiate between sedentary and swimming fisheries in its reference to legislative rights.

Recognition that parts of the Australian seabed were a reservoir of oil and gas posed a much greater problem for Commonwealth-State relations than the less important question of sedentary fisheries. To cater for offshore oil exploration the States provided the legislative initiative by the passage of specific laws designed to regulate the new activity. In addition to establishing machinery to control the industry, claims for the exercise of State sovereignty over the continental seabed were advanced. For example, the South Australian Mining (Petroleum) Act Amendment Act, 1963 made no distinction between the territorial and outer seabed but claimed rights 'to the full extent of the legislative power of the State.' The Queensland Mineral Resources (Adjacent Submarine Areas) Act 1964 claimed State proprietary rights over the seabed to the edge of territorial limits, and sovereign rights over the outer seabed within the limits imposed by the 1958 Convention.[38]

Apart from the constitutional and international

38. Cited by O'Connell, International Law in Australia, pp. 261-2.

implications of State claims to offshore rights, the Commonwealth was concerned at other aspects of the State initiative. It was recognized by the national government that a legal climate conducive to active exploration was necessary and there was concern that some explorers would be inhibited by doubts as to the validity of State legislation. Furthermore, the lack of uniformity of the existing system was recognized as an impediment to the most efficient operation of the offshore industry.[39] The financial implications of State moves to control the industry were also an important consideration in the Commonwealth's decision to participate in the control of seabed drilling. From January 1964 until November 1965 the Federal and State governments held discussions on the problem, and a system of proposed complementary legislation was agreed to in late 1965.

A joint administrative arrangement was envisaged with the application of a uniform exploration and production code around the whole of the Australian coast. The question of respective legal rights to the seabed was deliberately left in abeyance in order to avoid protracted litigation which might inhibit exploration. Primary responsibility for the administration of the scheme was to remain with the States, who would be able to utilize their existing bureaucratic infrastructure and coordinate onshore and offshore activities. Commonwealth participation was provided by a State obligation to consult on all matters touching on Federal legislative powers, and there was a general power of Commonwealth veto incorporated in the interim agreement. The area of applicability of the scheme was defined as all areas seaward of the coastline, and there

39. Debates 1965, no. 20, pp. 2741-4.

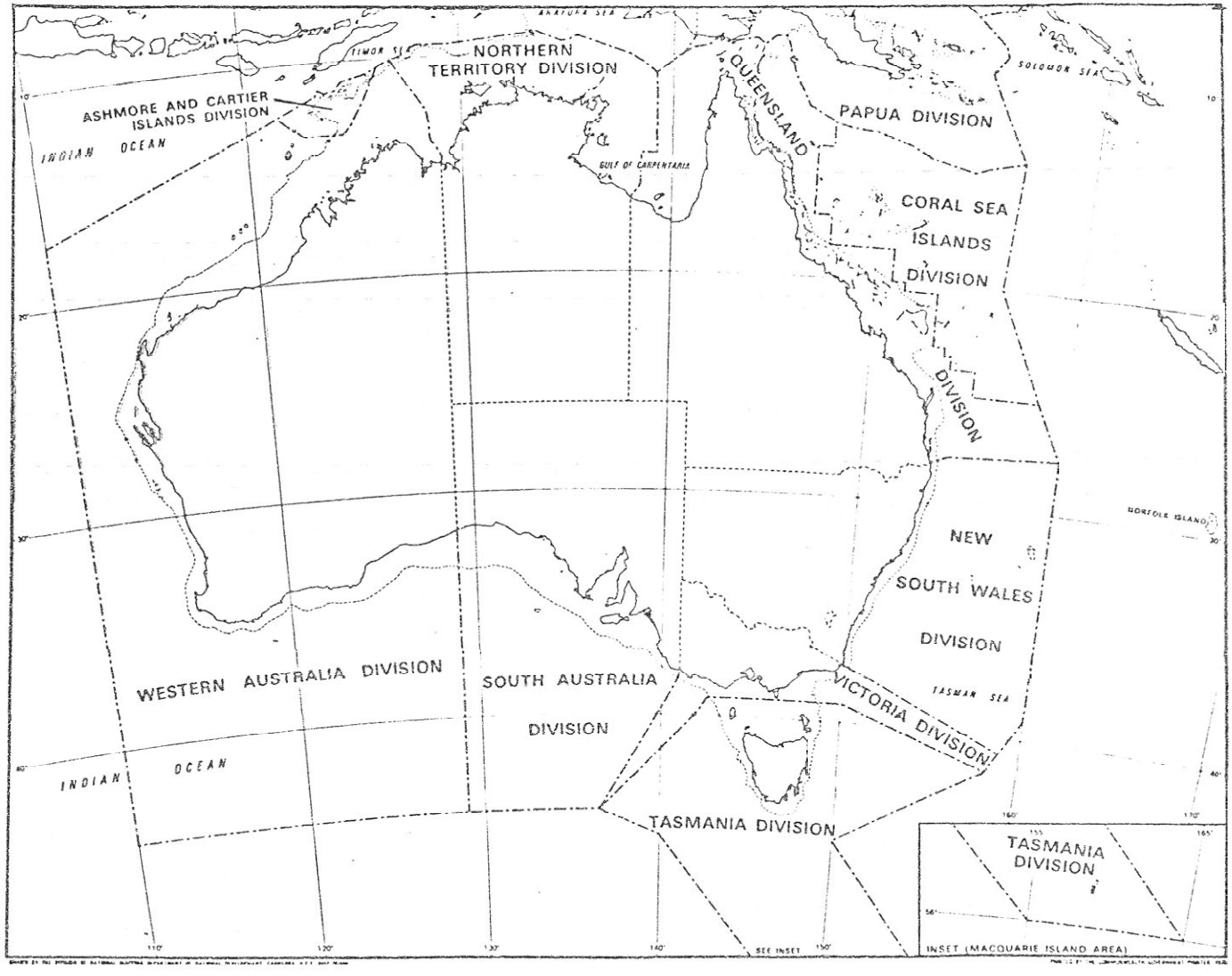
was no provision for differentiation of the status of the territorial seabed and the outer continental shelf.[40]

Two problems delayed the implementation of the proposed scheme. The first was the need to reach agreement on the seabed boundaries between the states.[41] All of the states with the exception of Western Australia disputed the initial boundary proposals of the Commonwealth. The debate centred on whether median lines equidistant from the territorial sea baselines of the states should be employed or whether special provisions might be utilized. South Australia argued the latter case by suggesting that since the seabed is a natural prolongation of the landmass then the seabed boundary should be a continuation of the land boundary. Victoria and the Commonwealth argued for the application of the median line principle. Both States were preoccupied with this aspect of the agreement because the area offshore from their land boundary was considered a likely source of oil and gas.[42] It was not until April 1967 that the differences were resolved with the boundaries reflecting a compromise between the two negotiating positions.

The second dispute concerned the terms for development of the proven oil and gas field off the east coast of Victoria. The company which had developed the field, a joint Australian-American consortium (Esso-BHP), objected to some features of the proposed scheme which were less

40. Australian Department of the Interior, Australia in Facts and Figures 88 (1965), pp. 64-5.
41. Australian, 5 October 1966, p. 2.
42. Age (Melbourne), 19 March 1966, p. 8 and Australian, 12 December 1966, supplement p. 12.

SEABED DIVISION - PETROLEUM (SUBMERGED LANDS) ACT.



advantageous than the existing agreement between the company and the Victorian government under the terms of State legislation. The company position was supported by the Victorian government because any changes to the earlier undertaking could have been considered a breach of faith, and furthermore the group had threatened to terminate the development of the field.[43] The Labor governments of Tasmania and South Australia objected to the prospect of preferential terms for Esso-BHP and threatened to withdraw from the Commonwealth-State scheme if the company position was upheld. In December 1966 the Commonwealth announced a compromise solution which satisfied most of the company's demands but only partly mollified the dissident States. When the Commonwealth threatened to legislate unilaterally to establish the amended scheme the States reluctantly agreed to the new provisions.[44] The scheme was given effect by the passage of the Commonwealth Petroleum (Submerged Lands) Act 1967, and mirror legislation by the States. The Commonwealth legislation, however, was passed only after the government had agreed to a Senate enquiry into the constitutional and administrative implications of the Act.

The Senate enquiry extended from 1967 until 1971 and raised serious doubts about the practical and constitutional implications of the joint system of offshore control. It was argued by a prominent Liberal backbencher, Mr. W.C. Wentworth, that the cumbersome system for amending the scheme,

43. K.Y. Cho, Political and Administrative aspects of Australia's Offshore Legislation (paper delivered at Australian Political Studies Association Conference, 14-17 August 1972), pp. 4-5.
44. Australian, 19 January 1967, p.3.

which required the consent of all parties, or the use of the Commonwealth veto could render the scheme inoperative.[45] This latter problem was to feature in relations between the two tiers of government in subsequent disagreements over the operation of the scheme. In the final report the Committee were critical of a number of the constitutional features of the offshore arrangement. The extent of powers delegated to the states, and the implied Commonwealth abdication or voluntary limitation of seabed rights was a matter of particular concern. Another problem emphasized was the failure of the scheme to define the precise legal rights of the states and the Commonwealth over the seabed. In an ironical vein the Committee concluded that,

> '...the Committee does not regard the legislation as being inconsistent with the "proper responsibilities" of the Commonwealth and States because, as a result of the decision to avoid litigation which would have resolved the matter, it cannot be said what is the measure of those proper constitutional responsibilities.'[46]

Since 1967 the pattern of Commonwealth-State relations in seabed matters has been coloured by the offshore oil agreement. In some respects, particularly in a legal sense, Commonwealth rights over the seabed have been reinforced, but in the economically significant realm of oil and gas extraction the status quo has been maintained to the advantage of the States.

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45. Sydney Morning Herald, 1 November 1967, p.2.
46. Australian Parliament, Report from the Senate Select Committee of Off-Shore Petroleum Resources, Parliamentary Paper No. 201 (Canberra, 1972), vol. 1, p.7.

Proposals to drill for oil on the Great Barrier Reef constituted the first threat to the joint system for the control of seabed petroleum exploration. Throughout 1968 an Australia-wide environmental lobby advocated that drilling of the Reef should be prohibited because it constituted a threat to the aesthetic value of the area.[47] Prior to this campaign much of the Queensland offshore area had been apportioned to exploration companies, and even though no further permits were granted after October 1968 the problem of existing permits remained. Restriction on the right of permit holders to conduct drilling operations was considered a breach of contract by the companies and litigation was under consideration.[48] While this problem was appreciated by both the State and Federal governments, they initially disagreed as to the best course of action. The Country Party-Liberal coalition in Queensland advocated that drilling should be allowed, subject to environmental scrutiny by the State Mines Department. Their counterpart coalition at the Federal level, under the leadership of Mr. Gorton, opposed further drilling on environmental grounds and his views prevailed.[49] On 29 January 1970 both governments agreed to the establishment of a Royal Commission to investigate the environmental impact of drilling and oil spillage. Earlier it was agreed that drilling would only be permitted on areas above the high tide mark (which were considered part of the State) and within the territorial sea. Although this was a significant

47. The range of environmental problems and attitudes are considered in the Australian Conservation Foundation, The Future of the Great Barrier Reef.
48. Australian, 25 August 1969, p.3.
49. See footnote 48.

compromise of the Commonwealth position, the basic aim of preventing further drilling in the seabed was achieved.[50]

The Royal Commission report was released in November 1974 and while the Commissioners could not agree on a final verdict, the tenor of the report was not conducive to further offshore oil search.[51] Even so, there remained an influential environmental lobby which wanted to see the Reef area placed under Federal control as an environmentally protected zone. They distrusted the development oriented philosophy of the Queensland government and felt that a Federal government was less likely to authorize further drilling. To pre-empt any Commonwealth move, the Queensland Premier on 18 November 1974 proposed the creation of an 'international marine park' which was to extend up to three miles from the mainland and all islands of the Reef. It was envisaged that the park would be under Queensland sovereignty in accordance with the State government assertion of sovereignty over the territorial sea. The Commonwealth produced a counter proposal on 25 November 1974, and after consideration it was accepted by Queensland. In the following June the Commonwealth Great Barrier Reef Marine Park Act 1975 became law. The Act provided for the designation of specified areas of the Reef to be incorporated into the park. Initially the Queensland government had proposed the inclusion of the Torres Strait but the Commonwealth Act specifically excluded the area from its provisions. One feature of the Commonwealth-State agreement which preceded the legislation was the Commonwealth acceptance of future oil drilling in areas where it

51. Detail of the findings of the Great Barrier Reef Petroleum Drilling Royal Commission is contained in Australian Fisheries 34, 3 (1975), pp. 32-3.

50. Australian, 1 September 1969, p.2.

was assessed that environmental damage would be minimal. Although the Act asserted the primacy of Commonwealth interest in the Reef area, it also indicated a willingness to accede to State demands on the sensitive issue of drilling rights.

Another issue of dispute between the Federal and State governments concerned the mining of seabed resources other than oil or gas. In March 1969 discussions between both levels of government were undertaken and the Minister for National development, Mr. D. Fairbairn, offered the states control over the mining of the territorial sea with Federal control extending over the shelf beyond. The states wished to establish a system similar to that applied to offshore oil but the Prime Minister would not agree to this proposal, and furthermore disagreed with Fairbairn over the offer of State jurisdiction in the territorial sea. The dispute was one of the factor's contributing to the relinquishment of the Prime Ministership by Mr. Gorton in 1971. In a more immediate sense it was a significant element in the Liberal Party revolt against Mr. Gorton in mid-1970 over his attempts to secure the passage of the Territorial Sea and Continental Shelf Bill.[52]

Although the attempts of Mr. Gorton to proclaim Commonwealth sovereignty over the whole of the continental shelf were forestalled by party pressures, the Labor Opposition were in sympathy with the philosphy espoused in the Territorial Sea and Continental Shelf Bill. This

52. The Gorton-Fairbairn dispute over the question of seabed minerals was brought into public view in a speech by Fairbairn in parliament on 8 May 1970. Debates 1970, no. 7, pp. 1897-901.

was evident in their adherence to the provisions of the Bill in the form of their own legislation, the Seas and Submerged Lands Act 1973 which was introduced in the first parliamentary session after the Labor Party were returned to office. On this occasion the Liberal Party supported the general principle of the Bill, but were opposed to the Mining Code relating to seabed minerals other than hydrocarbons, but this was deleted after further opposition by the Senate.[53] However, the clauses of the Act saving State legislation which did not conflict with Commonwealth law allowed the continuance of the joint system of control over offshore exploration and mining under the terms of the Commonwealth and State Petroleum (Submerged Lands) Acts.

This was in spite of earlier opposition to the offshore petroleum agreement by the then shadow Minister for National Development, Mr. R. Connor.[54] Connor was committed not only to asserting the principle of Commonwealth primacy over the seabed but also to the establishment of machinery for the management of the area. Since he had been thwarted in his earlier plans to abolish the offshore petroleum regime and to introduce a system of Commonwealth control over the mining of other seabed minerals, he proposed to introduce new legislation.

Connor's plan was given legislative effect by the passage of the Petroleum and Minerals Authority Act 1973. The Act had been introduced in mid-1973 and was disputed

53. Canberra Times, 23 August 1973, p.1.
54. Debates 1972, no. 20, pp. 2780-1.

by the Opposition parties in the Senate who were in a position to veto the Bill. Continued Senate threats to forestall the legislation was one of the major factors in the government decision to hold a general election in May 1974.[55] Although they did not secure control of the Senate at the election, the Bill was passed in a joint sitting of parliament in August 1974.

The Petroleum and Minerals Authority Act empowered the Commonwealth to engage directly in the search for and extraction of hydrocarbons in the seabed around Australia. It was criticized by the States and the oil industry as the first step towards nationalisation of the fuels sector.[56] Connor argued that the Authority would be used to reduce the level of foreign participation in the industry. He proposed that the Authority should obtain offshore permits to the areas periodically relinquished under the terms of the Petroleum (Submerged Lands) Acts. Once this had been achieved it was suggested that the Authority would enter into joint ventures with operating companies for exploration and production.[57] As a means of thwarting the Commonwealth plan the governments of Western Australia, South Australia, Tasmania and Victoria in late 1974 and throughout 1975 proceeded to renew the permits of the companies presently holding exploration rights. It is significant to note that the Labor governments of South Australia and Tasmania participated in this opposition to Labor policy at the Federal level and that the actions of the State

55. Australian Government Digest 2, 3 (1974), p. 589.
56. Australian, 31 July 1974, p.9.
57. Debates 1973, no. 18, pp. 2194-8.

governments constituted a breach of the 1967 agreement, which required Commonwealth consultation prior to the re-issue of permits.[58] Connor was placed in a difficult position. Only at the risk of dismantling the joint system of offshore control with the attendant likelihood of a complete loss of investor confidence, could he challenge the actions of the States. The minister chose to let the reissued permits stand.

Connor's reaction to the reissue of permits by the States was further hampered by a challenge from the four non-Labor governments to the validity of the Petroleum and Minerals Authority Act. In June 1975 the Act was declared invalid by the High Court, not because it was an illegal exercise of Commonwealth power, but because of a constitutional technicality relating to its passage through parliament.[59] Plans for the new Bill to reconstitute the Authority were negated by the dismissal of the Labor government in November 1975. Had the Whitlam government survived to establish a new Authority, underpinned by the High Court decision of December 1975 in the Seas and Submerged Lands Act Case [60] which upheld the Commonwealth claim to sovereign rights over the whole of the seabed, then it is possible that the offshore petroleum arrangement might have been dissolved.

By comparison, the coalition government which took office in December 1975 has adopted a less combative approach to the states. Even so, it is committed to upholding

58. Australian Financial Review, 3 December 1974, p.8.
59. The history of the case and the decision are discussed in Australian Law Journal L, 1 (1975), pp. 8-9.
60. 50 A.L.J.R. 218.

the Court decision in the Seas and Submerged Lands Act Case and the government of Mr. Fraser has shown no willingness to grant title over the territorial seabed to the states, as requested by Western Australia. It is, however committed to the continuance of the present system of offshore control, with the retention of a major share of the administrative responsibility by the states.[61] An important part of the Fraser strategy for stimulating the national economy is to encourage the development of the North West Shelf gas deposits, and any disruption to the existing system of offshore administration would hinder the achievement of this objective.

Thus the domestic application of law of the sea doctrine by the Commonwealth has been constrained by State reluctance to accept limitations on their exercise of jurisdiction in the Australian offshore areas. One reason for this reluctance has been the concern of the State governments about the potential effects on the local economy of foreign encroachments into the Australian maritime environment, either by claims to areas of sea and seabed or by commercial activity in the offshore waters. These aspects of foreign relations have been exacerbated by measures taken by the Commonwealth to extend Australian control over wider areas of sea and continental shelf in the period under review. Nonetheless, it can be argued that the influence of State governments, commercial interests operating in Australia and, in recent years, the environmental lobby have played a more significant role in the determination of Australian law of the sea policy than

61. Australian Financial Review, 11 November 1976, pp. 1 & 12.

the reactions of countries which have disputed Australian maritime claims. As the deliberations at UNCLOS III and the South Pacific Forum have indicated, the nature of Australian extensions of offshore jurisdiction in the period 1966-1976 have for the most part been in accordance with international practice, and this has strengthened the Commonwealth negotiating position in the disputes which have arisen.

AUSTRALIAN LAW OF THE SEA POLICY AND INTERNATIONAL RELATIONS

Discussion of the international manifestations of Australia's law of the sea policy can be considered under two categories: those steps taken to formally extend national jurisdiction, and the espousal of policy through international and regional forums. Although the settlement of regional disagreements following Australian claims overlaps in time with the expression of national attitudes at UNCLOS III and the South Pacific Forum, the extensions of jurisdiction were undertaken in the period 1967-1970 and the analysis therefore follows a general chronological pattern.

1. The Extension of National Jurisdiction

a. The Declared Fishing Zone

Since the mid-1960's the activities of Japanese, Taiwanese and Russian fishing vessels around the coast have been a matter of increasing concern to Australian fishermen and governments at both the Federal and State level.[62] The period of increased foreign activity

62. Debates 1965, no. 1, p.50.

coincided with the growth of the local fishing industry as a significant export earner, particularly through the harvest of luxury species: lobsters, prawns and edible shellfish.[63] Following the precedent set by many other nations, including the U.S.A. and New Zealand, it was decided to proclaim an exclusive fishing zone extending for 9 miles beyond the territorial sea, around all Australian land territory.[64] From 30 January 1968 the zone as described in the Fisheries Act 1967 came into effect.

Within the 'declared fishing zone' all foreign fishing was prohibited unless specific provisions to the contrary were sanctioned by the Commonwealth government. Initially only artisanal fishing by Indonesians around the Ashmore and Cartier Islets and reefs off the north west coast was approved, but the government realized that some accommodation would have to be reached with the major foreign group affected by the decision: the Japanese tuna long-line fishermen. The Japanese government objected to the Australian claim and their attitude was summed up as follows, 'Australia has made moves for a 12 mile limit, but Australia cannot do this unilaterally. As far as Japan is concerned, the territorial limit of Australia is three miles.'[65] Although negotiations for Japanese access to the zone began in February 1968 they were conducted against a backdrop of hostility to foreign fishing from State governments and Australian fishing interests generally.

63. Between 1962-63 and 1967-68 the value of marine exports rose from $A13,977,000 to $A34,787,000. Figures derived from Australian Bureau of Census and Statistics, Official Yearbook of the Commonwealth of Australia (Canberra, 1966), no. 5 pp. 1009-10 and no. 56, pp. 900-1.
64. Debates 1967, no. 4, p. 665.
65. The Japanese Consul in Brisbane, Mr. Tameo Hondo quoted in Canberra Times, 15 December 1967, p. 2.

In mid 1968 there was an outcry from Australian fishermen operating in the prawn beds of the Gulf of Carpentaria, against supposed poaching by a large Russian trawler. But because the Soviet vessel worked outside the 12 mile limit when under observation, there was little that the Australian government could do under international law.[66] It was suggested by a Federal Labor parliamentarian from North Queensland that the Gulf should be enclosed by Australia as a 'historic bay', with the consequent right to exclude foreign fishermen.[67] The Liberal-Country Party government rejected the suggestion on the grounds that Australian exploitation of the waters only dated from the early 1960's and that a 340 mile closing line would be a rather extravagant interpretation of the 1958 Territorial Sea Convention. In an analysis of the problem O'Connell suggested that international law (and more specifically the U.S.S.R.), might accept the imposition of an Australian conservation regime in the Gulf. He based his premise on the fact that the Soviet Union had imposed a similar regime on two areas of its coastline, and hence would be unlikely to dispute a similar Australian claim. He also suggested that Australia could argue that the production of prawns is intimately associated with the flooding of the tidal rivers of the area and that this linking with the land domain may confer a right of management.[68]

The Queensland government favoured a more confrontationist approach. In April 1968 the Acting Premier wrote

66. Sydney Morning Herald, 3 July 1968, p. 9 and Australian, 8 July 1968, p.3.
67. Debates 1967, no. 10, p. 2730.
68. Australian Financial Review, 24 July 1968, p.6.

to the Prime Minister stating:

> 'If foreign fishing vessels fish in our [my emphasis] territorial waters contrary to the laws of Queensland, the State will be constrained to exercise its powers of law, including the seizure and forfeiture of any offending vessel and the arrest of its crew.'[69]

Such direct action by a State government against foreign nationals at sea was opposed by the Prime Minister, Mr. Gorton, but the States prevailed on the Commonwealth to adopt other measures to hamper foreign fishing around Australia.

Following a meeting in September 1968 of the Commonwealth and State ministers responsible for fisheries, the Fisheries Act was amended to effect the closure of all Australian ports to foreign fishing vessels, except those under special Commonwealth licence, from 31 January 1969.[70] Research and whaling ships were excluded from the provisions of the amendment. Further government action was directed solely at the Japanese fishing interests. Japanese joint ventures with Australian concerns were prohibited,[71] and Australian fishermen were stopped from selling their catch to foreign processing vessels on the high seas.[72] It can be conjectured that these measures were designed to impress on the Japanese government that future access to Australian fishing waters would be on very stringent terms. Nonetheless, by the end of September 1968 the question of Japanese fishing rights in the Australian fishing zone was resolved and an agreement was drawn up.

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69. See footnote 14.
70. Australia in Facts and Figures 99 (1968), p.71.
71. Australian Financial Review, 31 October 1968, p.8.
72. Canberra Times, 10 May 1969, p.3.

The agreement was initialled on 19 September 1968 and came into force on 24 August 1969.[73] It made no derogation of the official position of either government regarding Australia's claim, but accepted the prohibition of Japanese fishing within the declared fishing zone except as prescribed. 'Long-line' tuna fishing at a rate not exceeding the 1963-67 average was permitted in the 12 mile zone around the south and east coast of Tasmania, along the east coast of Victoria and as far north as Sydney on the New South Wales coast. Fishing around Lord Howe and Norfolk Islands was sanctioned. Offshore from Queensland the area of permitted Japanese operations extended along the outer edge of the Great Barrier Reef as far north as Cape Grenville and around Polkington Reef, an Australian territory east of the Milne Bay District of P.N.G. In the Indian Ocean fishing was permitted around Christmas and Cocos (Keeling) Islands and along the Western Australian coast between Carnavon and Dampier. The rationale behind the agreement was that Japanese operations would be gradually phased out before the agreement expired in November 1975, unless alternative arrangements were negotiated in the intervening period.[74] During the period of the agreement it was accepted by the Australian government that the ports of Brisbane, Freemantle, Hobart and Sydney would be open to the Japanese tuna boats.

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73. Australian Department of External Affairs, Agreement Between Australia and Japan on Fisheries, Treaty Series No. 22 (Canberra, 1970).
74. Australian Financial Review, 28 November 1968, p. 10.

Two features of the agreement served to advance Australia's maritime interests. In the first instance, it gave a degree of international credence to the extension of Australian fisheries jurisdiction. Regardless of the formal attitude of the Japanese government as to the legality of the Australian claim, their de facto acceptance of terms and limitations on operations tacitly acknowledge the Australian position. Second, within the allowed areas of Japanese operation there was little competition with Australian fishermen. The Australians favoured the 'poling' method of catching tuna, which was generally practiced in deeper waters beyond the fishing zone.[75] Furthermore, the Japanese were excluded from those inshore areas around the southern and east coast considered by local fishermen as the prime fishing grounds.

Government attention since the early 1970's had been focused on the other group of foreign fishermen allowed to operate within the 12 mile zone - the Indonesian fishermen of the North West Shelf. There was little concern on the part of the West Australian and Commonwealth governments as long as Indonesian activities were centred on the outer islets and reefs, but from 1973 onwards there were frequent reports of fishing around the Bonaparte Archipelago and the adjacent mainland.[76] Although the Indonesians provided little competition for Australian commercial fishermen, their presence near the mainland was considered a health and quarantine hazard and a breach of Australian immigration law. The problem was discussed between Prime Minister Whitlam and President Soeharto in

75. Australian Fisheries 35, 1 (1976), p.2.
76. West Australian (Perth), 1 May 1974, p. 1 & 5 September 1974, p.5.

October 1974 and was followed by a Memorandum of Understanding in March 1975. It was agreed that all Indonesian fishing within 12 miles of the Australian mainland and close islands would be prohibited, but that fishing for all but sedentary species could be conducted around Ashmore and Cartier Islands, and Scott, Browse and Seringapaten Reefs. The details of the Understanding and provision for Australian policing and judicial action against offenders were embodied in the Fisheries Act 1952-1975. Rather than take legal action against the fishermen, whose actions were more often in ignorance of government attitudes rather than wilful breaches of the ageement, a joint RAAF-RAN surveillance and information operation was mounted between March and October 1975, and the extent of infringement has been subsequently diminished.[77]

b. The Continental Shelf

The problem of Taiwanese fishing around Australia, particularly the harvest of clams from the reefs, has proved to be more intractable than that of Indonesian fishing. In the 1960's the provisions of the Pearl Fisheries Act 1952-1953 were found to be not suited for the protection of reef molluscs from foreign harvesting. As a consequence, the Commonwealth passed the Continental Shelf (Living Natural Resources) Act 1968 as a means of prohibiting the unlicenced removal of any sedentary species from the continental shelf and reefs. The Taiwanese government did not voice objection to what would appear to be a legitimate exercise of sovereign rights, but their fishermen have persistently defied the provisions of the Act. Bilateral negotiations at a government level between

77. Australian Fisheries, 34, 8 (1975), pp. 8-11.

Australia and Taiwan since December 1972 have been hampered by Australia's policy of non-recognition of the Nationalist regime. Throughout the period under review, R.A.N. patrol boats have been employed in the detection and arrest of offenders, but it is suggested by Australian fishermen and government officials that the majority of offenders escape detection.[78]

While the assertion of Australia's rights to control the harvest of the living resources of the seabed has not been challenged, the extent of the seabed claim for the mining of hydrocarbons has been disputed by the Indonesian government. This dispute followed the delimination of the outer areas of Western Australian, Northern Territory and Queensland responsibility under the terms of the Petroleum (Submerged Lands) Acts. In contrast to an earlier delimitation in 1953 which was limited to the shallow seabed common to Indonesia, the island of New Guinea and northern Australia, the 1967 division encompassed the area from the Torres Strait to south of Timor. Whereas the earlier delimitation only encompassed water depths down to 100 fathoms, the Australian claim in 1967 over part of the seabed of the Timor Sea involved areas of much greater depth.

The Australian claim which embraced the whole of the North West Shelf was based on the 'exploitability' criteria set out in the Convention on the Continental Shelf. Rather than have to revise the outer boundaries of the national claim as drilling in deeper water became

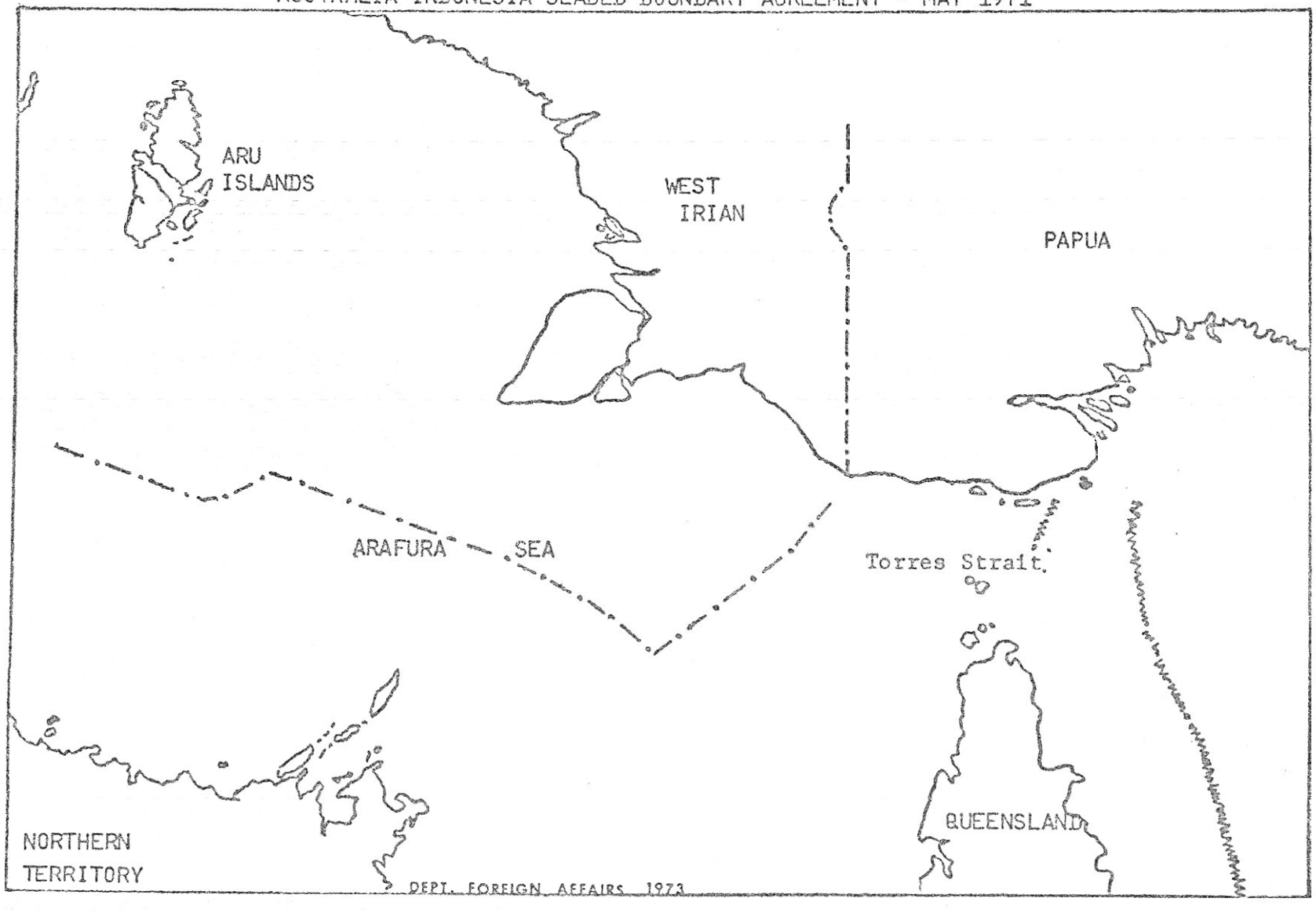
78. Interviews with officers of the Queensland Fisheries Service and the Commonwealth Fisheries Division in Cairns, 4 December 1975.

feasible, the 1967 claim was envisaged as the maximum spatial extent of Australian jurisdiction over seabed resources. Because the area included seabed at depths much greater than the 200 metre isobath mentioned as one criterion for demarcation in the Convention, the Commonwealth ceased to use the term 'continental shelf' and substituted the phrases 'continental margin' or 'submarine area' which implied areas of greater depth. By 1970 the Australian claim was being defended by the government by recourse to the 'exploitability' criteria and to the 'natural prolongation of the landmass' doctrine supported by the ICJ in the North Sea Continental Shelf Case.[79] In addition the Australian claim probably took into account the ability of explorers to conduct seismic and aeromagnetic surveys over seabed areas which were expected to be exploitable in the near future. When these preliminary surveys indicated the potential of the North West Shelf as a major source of oil and gas, the determination of the Australian government not to accede to Indonesian demands for change to the boundary was reinforced. Even so, the government was obliged to weigh these factors against the need to maintain good relations with Australia's populous neighbour, and it was decided to hold discussions of the problem, commencing in March 1971.

At the negotiations both parties sought to advance their position by reference to contemporary interpretations of the law of the sea. Indonesia argued that in the vicinity of Timor the shelf area had been common to both countries until a time in the geologically recent past when a fault, the Timor Trough, had physically divided

79. Debates 1970, no. 20, pp. 1307-9.

AUSTRALIA-INDONESIA SEABED BOUNDARY AGREEMENT - MAY 1971



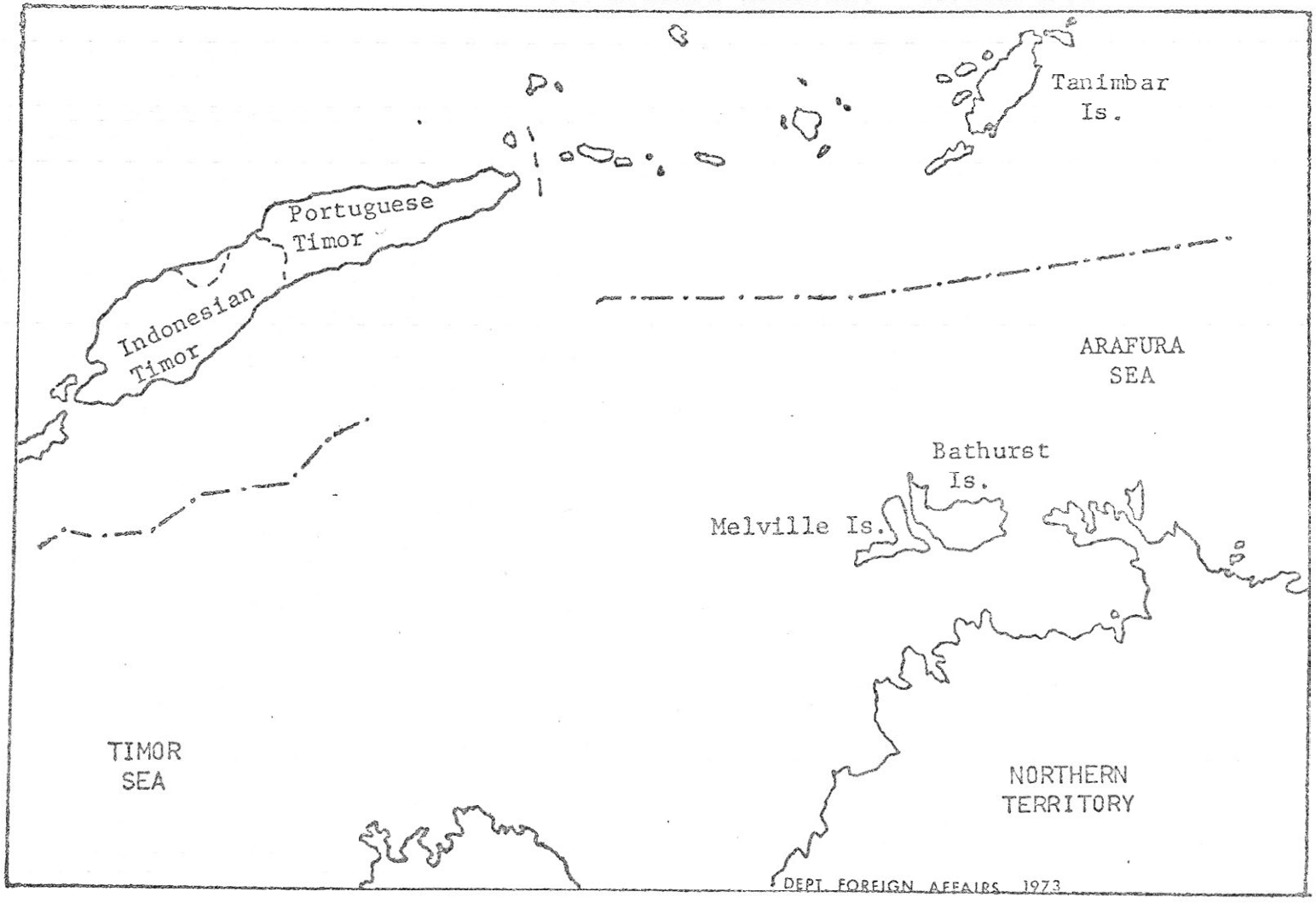
the area into unequal proportions. Consequently the Indonesian government held that the area should be treated as a common shelf and divided on the principle of equidistance. This proposal was not acceptable to the Australian government as it would have meant the cession of much of the outer area claimed in the 1967 legislation. Australia argued rather that two separate submarine areas existed and that it was difficult to describe the 10,000 feet deep Timor Trough as a 'fault'.[80] It was not until mid-1972 that agreement was reached on the delimitation of the Timor area, but this settlement was facilitated by agreement in May 1971 over the less controversial section between Australia and West Irian.

The seabed east of the Aru Islands and between the New Guinea and Australian mainlands is generally shallower than 200 metres. Agreement was also facilitated by the fact that no exploration permits had been issued close to the centre of the common shelf. Both governments settled on a line of equidistance as the most equitable means of dividing the area and this line generally conformed to the earlier demarcation of 1953. It was further agreed that if pools of oil or gas were discovered astride the new boundary then further negotiations for joint exploitation and revenue sharing would be undertaken. The agreement was initialled by both parties on 18 May 1971 but did not enter into force until the contentious area to the south west and a small sector near the Indonesian-P.N.G. border had been settled.[81]

80. The law of the sea interpretations of the two governments are discussed in J.V.R. Prescott, The Political Geography of the Oceans (London, 1975), pp. 191-4.

81. Details of the first agreement are set out in Australian Department of Foreign Affairs, Agreement between /

AUSTRALIA-INDONESIA SEABED BOUNDARY AGREEMENT - OCTOBER 1972



Apart from differences of approach between the Australian and Indonesian governments, negotiations over the Timor Sea sector were hampered by an Australian domestic dispute. Throughout May and early June 1972 the government of Western Australia opposed any suggestion by the Commonwealth that small portions of the 1967 claim might be ceded to Indonesia.[82] The problem was compounded by the earlier joint government decision to issue exploration permits up to the outer edge of the 1967 boundary, and any variation to the existing contractual arrangement might have been construed as a breach of faith. As a consequence, the fate of the permits in the disputed area became a major feature of Commonwealth negotiations, both with Western Australia and with Indonesia. In spite of threats by Western Australia to withdraw from the 1967 offshore agreement, the Commonwealth proceeded to negotiate for the transfer of small portions along the outer boundary of the original claim. In October 1972, final agreement between Indonesia and Australia was achieved, and after ratification by both governments came into effect in November 1973.[83]

The second agreement provided for the cession of approximately 1,800 square miles of seabed to Indonesia.[84] In turn the Indonesian government undertook to issue

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the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, Treaty Series No.31 (Canberra, 1974).

82. Advertiser, 10 June 1972, p.14.

83. Australian Department of Foreign Affairs, Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971, Treaty Series No. 32 (Canberra, 1974). The amended boundaries were given domestic legislative effect by the passage of the Petroleum /

new exploration licences in the ceded area on terms no less favourable than those in force in other offshore areas under Indonesian control. One particularly important proviso inserted at Australia's insistence was that of mutual recognition of the sovereign rights of each party within the new boundary, and the repudiation of any subsequent claims to the resolved area. Both accepted that the portion opposite Portuguese Timor could not be delimited because of the unwillingness of the colonial power to negotiate, but it was acknowledged by Australia and Indonesia that any subsequent settlement should follow the pattern of the October 1972 agreement. It was also incorporated into the agreement that if subsequent agreement with the government of East Timor was under consideration, then Australia and Indonesia must consult before a final settlement.[85] The effective incorporation of East Timor into Indonesia in 1975-76 should facilitate negotiations over this outstanding area but at the time of writing no new agreement has been announced.

Although the Australia-Indonesia seabed agreement resulted in the relinquishment of some areas at the northern extremity of the North West Shelf, in the long term Australia's interests may have been advanced by the settlement. All areas up to a 200 metre depth were retained by Australia and the sections ceded were all at a water depth beyond the capacity of technology to exploit in the near future. Even

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(Submerged Lands) Act 1967-1973 and the Continental Shelf (Living Natural Resources) Act 1968-1973.

84. Debates 1972, no. 19, pp. 2286-8.

85. Article 3.

if oil or gas were discovered in these sectors, the cost of recovery would probably preclude commercial exploitation unless the find was of major proportions. As the Minister for Foreign Affairs in a speech to the House of Representatives pointed out on 10 October 1972,[86] the agreement placed greater emphasis on political expediency and notions of equity rather than the maintenance of a rigid position in international law. In the interests of good relations with a maritime neighbour, Australia moved from the earlier position of reluctance to discuss the division of what was seen as essentially Australia's continental margin, and whereas initially Indonesia had disputed the claim, recognition was now formalized. Indonesia's formal relinquishment of any further claim in the area may well prove to be the major advantage gained by Australia, particularly in the light of subsequent Third World pressure at UNCLOS III for the limitation of national claims to a distance of 200 miles from the coastline. In some parts of the North West Shelf the seabed area to which Australia has sovereign rights extends for almost 300 miles, and there are indications that the outer margin may contain untapped oil and gas reservoirs of considerable magnitude.[87]

c. Acquisition of the Coral Sea Territory

In September 1969 the Australian government made another de facto seabed claim by the incorporation of a number of small islets and cays east of the Great Barrier Reef, as a territory of the Commonwealth.[88] For a number of years previously some of the islands had been used as

86. Debates 1972, no. 19, pp. 2286-8.
87. Canberra Times, 26 May 1976, p.3.
88. Coral Sea Islands Act 1969.

meteorological and weather stations, and they were frequently visited by ships of the RAN. The first indication of the formalization of the national claim was contained in a November 1968 supplement to the Australia-Japan Fisheries Agreement which accorded Japanese recognition of Australian sovereignty over the islands. From a law of the sea perspective the significance of the acquisition derives from the maritime zones which Australia has been able to claim around each island. Each has a three mile territorial sea and a 12 mile fishing zone, but the area of greatest extent and significance is the continental seabed which is extensive in comparison to the size of the landmass. At UNCLOS III, however, doubts have been raised as to the validity of maritime claims around uninhabited islands[89] and the Australian regime in the area may be affected by the Conference outcome.

d. Extension of Pollution Jurisdiction

Another move to extend Australian maritime jurisdiction, which foreshadowed one of the major issues of concern at UNCLOS III, was the decision in 1970 to unilaterally extend the sphere of vessel source pollution control. Although a signatory of the IMCO pollution Conventions,[90] the Australian government was hampered by a number of factors in its efforts to control shipping pollution. In the first instance, the retention of a narrow territorial sea limited the area in which the national government could take action against foreign offenders. Second, the system of permissive State jurisdiction over domestic maritime matters

89. See Chapter I, p.51.
90. Australian acceptance of the 1954 Convention and the subsequent 1960 amendments is embodied in the Pollution of the Sea by Oil Act 1960-1965. The original and amended texts of the Convention on the Prevention of Pollution /

in the territorial sea, slowed the legislative reaction time of the Commonwealth by requiring the passage of complementary State law.[91] Third, because the IMCO Conventions sanctioned action only by the flag state against pollution offenders beyond the territorial sea, there was little that Australia could do to take action against foreign shipping outside the three mile limit.

The problem was crystallized in March 1970 with the grounding of an oil tanker in the Torres Strait. 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.[92] It also brought forth an outcry from Australian environmentalists who were concerned about reef damage in the area. The Commonwealth government responded with the passage of the Navigation Act 1912-1970. The Act conferred wide discretionary powers on the Commonwealth to take action to prevent or abate pollution, and the area of jurisdiction was not limited to the territorial sea as was the Pollution of the Sea by Oil Act 1969-65, but was extended to encompass any reef forming part of the continental shelf of Australia. Within the tropical waters of Australia, particularly along the north eastern seaboard,the area of national pollution jurisdiction over foreign vessels was thus considerably extended. This anti-pollution measure was an indication of the position Australia was later to adopt at UNCLOS III

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of the Sea by oil are appended as schedules to the Act.

91. A detailed exposition of this problem was provided by the then Deputy Leader of the Federal opposition, Mr. Whitlam in Debates 1965, no. 3, p. 462.

92. E.K. Fisk & Maree Tait, 'Rights, Duties and Policy in the Torres Strait' in E.K. Fisk et.al.(edd.), The Torres Strait Islanders (Canberra, 1974), vol. v, p.18.

and reflected the demand for local laws to protect environmentally sensitive maritime areas.

The decision to increase the national zone of anti-pollution jurisdiction in March 1970 marked the end of unilateral actions by the Australian government to extend its sphere of maritime authority. When it became evident in 1970 that the U.N. would sponsor an international appraisal of the law of the sea, Australia pursued its national interests through international and regional forums. The two main venues where Australian policy has been advanced in the period 1970-1976 have been the preparatory and plenary sessions of UNCLOS III and the South Pacific Forum. The role of the Commonwealth government, as an advocate for both national and regional interests, is considered in the discussion which follows.

Two features characterize Australian law of the sea policy as expressed at international forums. The first is a desire to validate the national maritime claims given legislative and practical effect in the period 1967-1970. The second is to further the extension of jurisdiction, on the basis of international, or in some circumstances, regional consensus.

2. Australia's Role in UNCLOS III Preparatory and Plenary Debate

In an address to the General Assembly on 3 December 1970, the Australian Ambassador to the U.N., Sir Laurence McIntyre, set out the view of his government towards revision of the law of the sea. In many respects it reflected the fact that a coherent national policy had not been developed,

and that considerable reliance was still placed on the validity of doctrines embodied in the 1958 Conventions. While he stressed the importance of the forthcoming conference, he also indicated that Australia was not in favour of a review of those issues settled at UNCLOS I. Instead, he suggested that only the unresolved problems of the 1958 and 1960 conferences and the more recent subjects of concern should be discussed at UNCLOS III. McIntyre also counselled caution and the need for careful preparation, and spoke of the difficulties in defining national policy when faced with a lack of technical data on many aspects of maritime usage.[83]

The statement by McIntyre should be viewed against the backdrop of Australian domestic dispute over the question of offshore sovereignty and the impending discussions with Indonesia on the seabed boundary. The desire to avoid debate on the legal regime of the continental shelf probably reflected the fear of the Federal government that Third World voting predominance at an international conference might overturn the contemporary philosophy of national rights to the edge of the continental margin, and replace it with a more restrictive definition of seabed rights. Such a restriction of the area of national claims would have had the effect of enlarging the international seabed, the commercial exploitation of which was a major concern of the less developed countries.

In addition to maintaining the status quo as regards the seabed regime, other sometimes conflicting considerations had to be taken into account by policy makers in Australia. It was generally agreed that a pivotal

93. Current Notes 41, 12 (1970), pp. 623-6.

feature of Australian policy should be maintenance of the freedom of shipping movement, on account of the nation's dependence on seaborne trade. Balanced against this consideration,however, was the desire to foster relations with the South East Asian states,which tended to favour some restrictions on shipping movement in areas close to land for reasons of security and as an anti-pollution measure. As indicated by the passage of the Navigation Act 1912-1970, Australia shared the regional concern about the dangers to reefs and tropical fisheries posed by oil pollution, and consequently favoured a zone of national jurisdiction wider than hitherto sanctioned by the IMCO Conventions. Another major concern voiced by Australia was the need for the coastal state to have the right to manage fish stocks in adjacent waters and regulate the access of foreign distant water fishers. This latter position was also endorsed by the other countries of the South East Asian and South West Pacific environment. On issues of less direct concern to Australia, the Federal government has supported compromise positions which it feels are most likely to gain widespread acceptance, in the hope that achievement of an overall Convention will be facilitated.[94]

a. Freedom of Shipping Movement and Pollution Jurisdiction

On 17 August 1971 Australia's basic position on shipping movement was elaborated at the Seabed Committee.[95] It was stressed that the existing system of unilateral claims to territorial seas of varying widths and degrees

94. Confidential Source. See appended list.
95. Current Notes 42, 8 (1971), pp. 423-5.

of national control was unsatisfactory, and that there was an urgent need for a rationalization of both questions, particularly in limited sea lanes. It was indicated that for the present Australia would retain a three mile territorial sea, but was prepared to accept an international limit of 12 miles if three conditions were met. First, a satisfactory regime of passage through international straits must be devised and accepted both by coastal states and the maritime powers. Second, the question of extended rights of fisheries control should be divorced from territorial sea considerations. Finally, states must retain the right to claim a territorial sea narrower than 12 miles if they so desired. Throughout the subsequent UNCLOS III deliberations this basic position has been maintained by the Australian delegation.[96]

The problem of passage through the waters of straits, archipelagos and resource zones was of considerable importance to Australia because of the volume of trade which has to pass through the waters of Indonesia, the Philippines and P.N.G., and reliance on Middle East oil supplies passing through the Straits of Hormuz. The Commonwealth supported the concept of 'transit passage' which was proposed as an alternative to the imprecisely defined 'innocent passage' of the Convention on the Territorial Sea.[97] The new concept provided for the right of the coastal state to designate special channels for foreign navigation and to set standards for safety, traffic control and anti-pollution measures. Within the lanes the coastal state was obliged to guarantee the right of passage of all types of vessels and a right of

96. Australian Department of Foreign Affairs, Third United Nations Conference on the Law of the Sea, Fourth Session: Report of the Australian Delegation (Canberra, 1976), pp. 24-6 and 34.
97. Current Notes 42, 1971), p. 425.

overflight. The flag state was required to ensure that the movement of its shipping was expeditious and to prohibit stopping except for reasons of vessel safety.

After the Geneva session in 1975 the concept was incorporated into the negotiating texts for the regimes of straits and territorial seas, but contrary to Australia's desires,it was not incorporated in the proposed system of archipelago passage. Instead,the older idea of 'innocent passage' with the implied wider rights of the coastal state was retained. One technicality which concerns the status of the waters of the proposed exclusive economic zone has become a matter of some concern for the Australian delegation. Although it is envisaged that within the waters of the resources zone the freedom of passage would be guaranteed by the claimant state, Australia had hoped that this freedom would be legally reinforced by the retention of high seas status for the zone. This position has not been accepted in the negotiating text.[98]

Pollution control in coastal waters has been a subject of particular concern for the Australian delegation. At the 1971 session of the Seabed Committee the Australian position was put as follows,

> '...my delegation would like to see the development of rules of international law that would ensure that a coastal state has the right to exercise effective control over ships on the high seas in a broad band contiguous to its territorial sea to prevent pollution of its

98. Report of the Australian Delegation, Fourth Session,p.34.

coastline and damage to the marine environment'.[99]

At the Caracas session in 1974 the Australian position was elaborated by the suggestion that the 'broad band' could correspond to the proposed 200 mile economic zone.[100] Also, the Federal government has sought the modification of the present system whereby the crew or owners of an offending vessel are held liable for pollution offences committed within the territorial sea. Instead, it has been suggested by Australia that the flag state should be the liable party.[101]

In keeping with the desire to maintain the maximum freedom of shipping movement, Australia has supported the application of international standards by the littoral state within the pollution control zone but believes that it should retain the right to apply domestic regulation in areas or circumstances of particular environmental threat. Because the problem of pollution control is one of the subjects on which little consensus has been achieved, it is difficult to predict whether final agreement will be reached, and if so, whether the terms will be acceptable to Australia. As the Torres Strait grounding and subsequent government reaction in 1970 indicated, the Commonwealth may well be prepared to act unilaterally to provide for the protection of the Australian coastal environment from vessel source pollution.

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99. Current Notes 42, 8 (1971), pp. 417-8.
100. Australian Department of Foreign Affairs, Third United Nations Conference on the Law of the Sea, Second Session : Report of the Australian Delegation(Canberra,1974),Annex F,p
101. Confidential Source. See attached list.

b. Seabed Rights

Addressing the Seabed Committee in August 1971, the Australian delegate summarized the government's position as follows:

> 'The new Convention must either reaffirm, or add to, the present limits of national jurisdiction...or offer persuasive inducement to States to accept a change in the law...particularly if any changes were to involve some diminution, or renunciation of present rights.'[102]

At the time Australia was not prepared to state a definite position as to what should be the widest extent of national rights, but in the concurrent discussions with Indonesia, rights to the edge of the geological continental margin were argued as a national prerogative. This view was clearly enunciated at later sessions of UNCLOS III and Australia reinforced its claim by reference to a recent hydrographic survey which had mapped the outer limits of the Australian margin.[103] In the months preceding the Caracas session the Commonwealth conducted an international lobby to try to gain support for the national viewpoint, but with only moderate success.[104] At Caracas the Australian position was supported by 45 other countries and was clearly a minority viewpoint.

The Australian attitude to continental seabed rights did not receive support from its regional neighbours who tended to support the majority position. This proposed full sovereign rights over the seabed out to a distance of

102. Current Notes 42,8 (1971), p. 413.
103. Report of the Australian Delegation. Second Session, Annex D, p.4.
104. West Australian, 26 January 1974, p. 28.

200 miles, but with the proviso that the coastal state could exploit the natural prolongation of the landmass beyond that distance so long as a proportion of the revenue derived from the outer area passed to the international community. To date, this latter proviso has been opposed by the Australian government, because of its belief in the exploitability of oil and gas in the outer area of the North West Shelf. There are, however, indications that a system of royalty payment may ultimately prove acceptable to the Commonwealth, particularly as the amount envisaged is minor by comparison with the possible total return from drilling beyond the 200 mile limit.[105]

The second feature of the proposed international seabed regime which is of interest to Australia is the suggested system of delimitation between countries. In particular, the government is concerned that the principle of equidistance, rather than the 'natural prolongation' approach, has received wide support.[106] However, the revised negotiating text produced after the New York session in 1976 also made provision for delimitation in accordance with existing agreements, and it is likely that this proviso will be exploited by Australia in negotiations with Indonesia over the undefined seabed limits south of Timor. Because no formal seabed agreement exists between the governments of P.N.G. and Australia, any re-division of their common seabed in the Arafura or Timor Seas could be expected to reinforce the present arrangement where a generally equidistant

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105. Confidential Source. See appended list.
106. United Nations, Third Conference on the Law of the Sea. Informal Single Negotiating Text, A/CONF. 62/SP.8/Part II, 7 May 1975, p.28.

division has been effected under the terms of the Australian Continental Shelf (Living Natural Resources) Act 1968-1973 and the Petroleum (Submerged Lands) Act 1967-1973.

Unlike the government of P.N.G., Australia is not unduly concerned about the fate of the deep seabed regime for the mining of mineral nodules. Although Australia is a land based producer of many of the commodities which may be derived from the seabed, the national economy is not as dependent as that of P.N.G. on the mining of copper. Australia's main concern in the seabed debate has been the risk of pollution from deep seabed mineral mining, and the need for a clear enunciation of coastal state rights to be protected from environmental damage after mining or drilling accidents.[107]

c. Fisheries Jurisdiction

The decision of the Commonwealth to extend Australian fishing jurisdiction in 1967, both over swimming and sedentary species, indicated a desire to exercise control over fishing in a zone beyond the territorial sea. In the preparatory sessions leading up to the plenary UNCLOS III meetings, the Australian delegation supported the extension of fisheries control over a wider area than the existing 12 mile zone. Because the domestic fishing industry was predominantly limited to inshore operations and did not have the capacity to fully exploit coastal stocks, a philosophy of management rights with limited foreign access was developed in cooperation with New Zealand.[108] The joint pro-

107. Current Notes 42, 8 (1971), p. 417.
108. Australian Department of Foreign Affairs, Report of the Australian Delegation to the Fifth Session of the/

posal has found wide acceptance among underdeveloped coastal states and reluctant recognition from the distant water fishing nations, and may be considered as Australia's major contribution to UNCLOS III.

In August 1972 the Australia-New Zealand proposal was presented to the Seabed Committee. It suggested that the coastal state exercise jurisdiction over all resources in a zone beyond the territorial sea. In relation to fisheries, the optimal yield had to be determined and the coastal state was to have preferential access, but where optimal utilization was beyond the capacity of the domestic industry then foreign fishermen could harvest the balance of the pre-determined catch limit. In January 1973 the Australian Prime Minister, Mr. Whitlam, announced support for a 200 mile width for the resources zone.[109] At the later sessions of UNCLOS III the proposal was initially opposed by the distant water fishing nations, but they have subsequently indicated a willingness to accede to the proposal, so long as some guaranteed rights of access are incorporated into the text. This proviso is considered likely to be accepted by the Australian government. Even so, implementation of the system around Australia is likely to pose a number of problems for Federal and State governments.

A variety of administrative problems are immediately evident. In the first instance, Australia, in common with most coastal states with underdeveloped maritime industries, does not have the fisheries research capacity to identify the maximum sustainable yield of all of the commercial

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United Nations Enlarged Committee on the Peaceful Uses of the Seabed (Canberra, 1973), Annex VIII, p. 1.

109. See Footnote 108.

species of its surrounding waters. There is the likelihood of disputes between the coastal state and the potential foreign fishers over the permissible yield, and some system of independent survey and adjudication would appear necessary if the scheme is to be successful. Second, the countries of the region, including Australia, lack the maritime policing resources to ensure foreign compliance with the proposed regime. The construction of additional surveillance vessels and aircraft will place a considerable strain on national budgets, in many cases already strained by disproportionate defence spending. It might be more practicable initially to limit the zone to the areas most actively fished by local operators, with progressive application to the remaining areas around the coastline as research and policing facilities are expanded to cope with their new requirements. In spite of these considerations, there are indications that national proclamations over a 200 mile resource zone will soon become common practice. Regional plans for the establishment of exclusive economic zones and Australia's role in the preliminary deliberations are discussed in a later section.

In addition to questions concerning the establishment of exclusive economic zones in the South West Pacific region, other fisheries matters under discussion at UNCLOS III are of significance in Australia-P.N.G. maritime relations. One early decision of the Australian government was to reverse its previous opposition to the archipelago concept.[110] This reversal of policy was influenced by a desire to cement relations with Indonesia, and was facilitated by the

110. Report of the Australian Delegation, Fifth Session of the Enlarged Seabed Committee, p. 22.

unhindered passage of Australian shipping through the archipelagic waters. Australia has also sought international acceptance for the application to P.N.G. of the archipelago concept,[111] which implies the right to exclude foreign fishermen from the waters enclosed by baselines linking the island extremities. In one area of fisheries control, however, there is disagreement between the governments of Australia and P.N.G. This relates to the management of the harvest of highly migratory species such as tuna, which comprise the bulk of P.N.G. fish exports. Whereas the Australian government believes that an international body, comprised of the nations along the migration path and the foreign fishing interests, should determine and police the catch limits, the P.N.G. government argues that the countries along the migration route should play the dominant role in both activities.[112] Again, this difference of emphasis illustrates the relative importance of the fishing industries in both countries; in particular P.N.G.'s dependence on tuna as one of the comparatively few sources of export income.

Another problem for both governments and others of the South Pacific, if the economic zone concept is established in the region, is that of port access for foreign fishing fleets. Since the 1968 announcement of the closure of Australian ports to foreign fishermen, there has been representation from Eastern and Western European countries to rescind the decision [113] and to facilitate the development of bases for the harvest of the hitherto underexploited

111. Report of the Australian Delegation, Second Session, p. 25.
112. Comment by Mr. G. Dabb, Adviser on International Law, P.N.G. Department of Foreign Affairs, 21 November 1975.
113. Comment by Mr. A. Rowe, Australian Department of Primary Industry, Fisheries Division, 28 May 1976.

resources of the South Pacific. Australia, rather than the smaller nations of the region, is the natural choice as a base for fishing operations because of its political stability and more sophisticated technical infrastructure and port facilities. To date, no plans to revoke the earlier decision have been announced by the Commonwealth government, but if guaranteed rights of foreign access to exclusive economic zones is one of the preconditions for acceptance of the concept, then foreign pressure for port rights in Australia is likely to increase.

d. Islands and Maritime Claims

One additional matter of interest to both Australia and P.N.G. which has been debated, as yet inconclusively, at UNCLOS III is the status of maritime claims around islands. The trend of Conference thinking is that not all naturally occurring features above the high water mark should be considered as land capable of generating resource zones, even though the right to a territorial sea may be recognized. In common with the other states of the South Pacific, Australia does not support this position because of the number of small territories under Australian sovereignty which do not support human habitation or economic life; these being the criteria applied in the negotiating text.[114] While acceptance of the text as it stands may limit the area of economic zone that may be claimed in the future, existing seabed rights around such cays and islets may be protected if the final text provides for no derogation from

114. Single Negotiating Text, Part II, p.47.

existing claims, as requested by the Australian delegation. As will be indicated in the chapter on the Torres Strait, the status of maritime zones around uninhabited islands is an important consideration in discussions over the future boundary in the area.

3. The South Pacific Forum and the Law of the Sea

Maritime matters have been an important item on the agenda of Forum meetings since its inception in 1971. Earlier attention had been focused on the desire for a regional shipping line and opposition to nuclear tests in French Polynesia, but since the convening of the first plenary session of UNCLOS III in 1974 the law of the sea has been a major topic of Forum debate.

Australia's participation in law of the sea debates at the Forum meetings has been characterized by a commitment to the broad aims of the smaller nations of the South Pacific; particularly their desire for the application of resource zones around each country, either in the form of a 200 mile economic zone, or by the use of archipelagic baselines to enclose waters under national jurisdiction. Although subscribing to these aims, Australia has counselled the need for delay in their application, citing the possibility that the proposed zones may gain wider international acceptance if they are embodied in the text of any Convention produced as a result of UNCLOS III.[115]

While advocating the need to avoid unilateral declarations of jurisdiction over resource zones, the Australian government has also expressed concern at the interest shown

115. Post-Courier (Port Moresby), 6 October 1976, p.8.

in the South Pacific by the Soviet Union and the Eastern European fishing interests.[116] Poland and the U.S.S.R. have made overtures to Tonga and Western Samoa in the hope of securing the port rights denied by Australia since 1968. In return,they have offered general aid, including assistance for the development of the local fishing industries. Australian concern not only is directed to the possibility that the present port limitations on foreign exploitation of the South Pacific fisheries will be circumvented, but also that the Soviet bloc fishing expansion may be the harbinger of a more general escalation of military and commercial activity in a region long dominated by Western European, Japanese and U.S. interests. One means of limiting the extent of Eastern European fishing in the region would be the application of national resource zones around each country, which would have the effect of bringing the most important fishing grounds under regional control.

At the July and October 1976 Forum sessions attention was focused on fishing matters. The first meeting agreed that all nations of the region were entitled to a 200 mile economic zone, and that there was a need for regional consultation before any one nation became committed to a fisheries agreement with foreign interests. Australia was a particularly strong advocate of the latter proposal and it foreshadowed the possibility of outbidding foreign interests by the provision of Commonwealth aid to develop the indigenous maritime industries.[117] One form of aid which was sought from Australia and New Zealand was

116. Post-Courier, 29 July 1976, p.4.
117. Canberra Times, 29 July 1976, p.1.

the provision of surveillance and policing aircraft and ships. The need for regional cooperation in the reporting of fishery zone infringements was also stressed.

The July meeting decided to convene a further session in October 1976 to consider the international progress towards the achievement of their goals at the August session of UNCLOS III. As the international conference had been unable to produce a definitive Convention, P.N.G., Fiji and Tonga argued for the unilateral proclamation of resource rights in a 200 mile zone around their respective coastlines. The Australian delegation supported the idea of preparatory legislation and preliminary discussions on the division of the areas between neighbouring states, but suggested that the implementation of the zones should be delayed until after the May 1977 session of UNCLOS III.[118] Australia argued that if this procedure was adopted then the restraint exercised by the countries of the region would be evidence of their desire to act within the framework of international consensus. The Australian advice was accepted, but the meeting reiterated its commitment to the achievement of the following: a 200 mile economic zone around each country with special rights of enclosure over the waters of states claiming archipelagic status, a policy of coordinated negotiation with distant water fishing nations over access to the region, and guaranteed rights of navigation and overflight across the resource zones.[119]

Apart from Australia's opposition to the immediate proclamation of national resource zones, the only other

118. Canberra Times, 14 October 1976, p. 3.
119. Canberra Times, 15 October 1976, p. 8.

significant difference in law of the sea attitudes expressed at the October meeting was the Commonwealth claim to resources of the continental margin where it extended beyond 200 miles. The other nations of the region chose to remain uncommitted on this question. They did not in fact possess continental margins wider than 200 miles and so had no direct interest in the problem, but they also were anxious not to alienate Australia, particularly as it had supported the archipelago concept and their position on other questions such the right of all islands to generate resource zones.

CONCLUSION

Since 1966 Australian governments have been faced with a number of problems resulting from the changing pattern of sea and seabed usage and the dispute between the Commonwealth and States over offshore rights. The discovery of offshore oil in 1964-65 raised the problem of whether the State or the Commonwealth should control the exploration and production activity. Under considerable pressure from the States and the oil companies, a compromise was reached whereby the States retained effective control of the administration and the Commonwealth was limited to the exercise of powers vested in the constitution. The operation of the system came under attack from a number of domestic sources anxious to see the Commonwealth adopt a more dominant role, particularly the Federal Labor Party, but these groups were unable to secure the amendment or demise of the joint system of offshore control.

In the more general areas of territorial sea control and the regulation of fisheries there was also conflict between the Commonwealth and State governments. The Commonwealth in 1967 and 1968 extended its degree of involvement in the fishing industry by both extending the physical area of jurisdiction and increasing its regulatory role. Even though the right of the States to exercise fishery control beyond the low water mark was seriously questioned by judicial decisions in 1969 and 1975, the Commonwealth, for the sake of administrative convenience and because of a reluctance to unduly antagonize the States, has allowed the continuance of State fishery regulation in the territorial sea and seabed.

From the viewpoint of relations between the two tiers of government, the most significant feature of the period has not been the increased Commonwealth involvement in administrative activity beyond the low water mark, but the 1973 enactment of the Seas and Submerged Lands Act and its subsequent validation by the High Court in 1975. While in the short term the Commonwealth is content to allow the continuance of State law in shipping, fishery and offshore oil search regulation, the Court's assertion of Commonwealth primacy in the offshore area should facilitate the adoption of a much more dominant role by the Commonwealth in both domestic and international law of the sea matters.

The decisions of the Federal government to extend the physical area and scope of control over the adjacent sea and seabed resulted in disputes with Japan and Indonesia. Japan protested the assertion of Australian rights to a 12

mile declared fishing zone but subsequently agreed to negotiate terms of limited access for a section of her tuna industry, and in so doing gave de facto recognition to the Australian claim. Throughout the period, Australian fishing interests have frequently expressed a hostility to foreign commercial fishing in the waters around Australia but the government has chosen to seek international consensus before further extending the zone of national fisheries jurisdiction.

Following Indonesian protests at the extent of the Australian seabed claim embodied in the Petroleum (Submerged Lands) and Continental Shelf (Living Natural Resources) Acts, the Commonwealth agreed to negotiate a seabed boundary in the Arafura and Timor Seas. Although the decision to negotiate was a reversal of an earlier stance of the government, and some seabed areas were ceded to Indonesia, the agreement served Australia's interests in that it provided a formal division of the area accepted by both parties. One of the more significant features of the negotiations was the attempt by Western Australia to frustrate Commonwealth efforts by recourse to the long standing domestic debate over the division of sovereignty within the Australian Federal system. It was instances such as this which illustrated the weaknesses inherent in a system which allowed the exercise of State jurisdiction in an international arena, and prompted the Gorton and Whitlam governments to seek a legal validation of the primacy of Commonwealth law in offshore matters.

This decision was also necessitated by Australia's participation in the international and regional debates

concerned with the restructuring of the law of the sea. The general national policy of seeking extensions to the area of fishery and pollution jurisdiction, while at the same time pressing claims to the existing extensive rights to the adjacent seabed, has been accepted by the States and by the international community generally, except that seabed rights beyond 200 miles from the coast are questioned by the latter group. On the law of the sea matters of less direct importance to Australia, a policy of caution and the search for the most widely acceptable compromise has characterized the Australian position. In the South Pacific Forum, the major venue for the regional debate, Australia has generally supported the demands of its island neighbours for extended zones of national jurisdiction but has suceeded in influencing the advocates of immediate action, such as P.N.G., to delay their claims in the hope that UNCLOS III will provide international sanction for their demands. As the latter part of the chapter has indicated, there is a growing divergence in the law of the sea policies of P.N.G. and Australia, and this feature of the relationship, together with a more embracing consideration of the impact of Australian law of the sea policy, is undertaken in Chapter III.

CHAPTER III

PAPUA NEW GUINEA : MARITIME COLONIALISM

Commonwealth law of the sea policy in the period 1966-1976 was not only directed to the definition of a relationship with the constituent States of Australia and with the other nations of the region. Another major feature of the execution of national policy was the application of a maritime regime to the waters around P.N.G. This chapter examines the interaction between the two polities, both in the period of colonial tutelage and in the fifteen months since independence.

Throughout the period under review there is evidence of a conflict of interests between the Commonwealth government and authorities in Port Moresby in the application of offshore policy. Until independence in 1975, the application of the law of the sea by the metropolitan government took little account of the special interests of the territory. Where special provisions were enforced they were as much a means of protecting the commercial and environmental interests of Australia as they were a recognition of the special maritime circumstances of P.N.G. In the immediate post-independence period, P.N.G. national policy followed its colonial antecedents, but it is now evident that a more independent approach reflecting local conditions is emerging.

It is thus necessary to examine the application of Australian legislation and government directives and to assess their impact during the period of before independence and their role in post-independence policy. The latter

part of the discussion is devoted to the emergence of P.N.G. policy initiatives as expressed in external policies, particularly through regional negotiations, the UNCLOS III conferences and the South Pacific Forum. Particular attention is focused on the implications for relations between Australia and P.N.G. of these new policy directions, although the most important issue, the Torres Strait dispute, is discussed in the following chapter.

THE APPLICATION OF AUSTRALIAN MARITIME JURISDICTION

In accordance with the common practice of colonial powers, the Australian government applied laws with international implications uniformly to its own territory and to its colonial possessions. Whereas in Australia the States played an important role in offshore regulation by the application of local laws and the administration of Federal legislation, there was only a limited degree of devolution of such authority to the P.N.G. Administration. Instead, legislation and policy were applied through the Department of External Territories, and the local administration tended to act as an executive agency with little local initiative. Some devolution of authority is evident in the period up to 1966, but between 1966 and 1972 there was a tendency to increase the degree of Commonwealth superintendence over the waters and seabed around P.N.G. These features of the colonial relationship in the period up to 1972 are analysed in the first section of the chapter.

1. Control of the P.N.G. Seabed

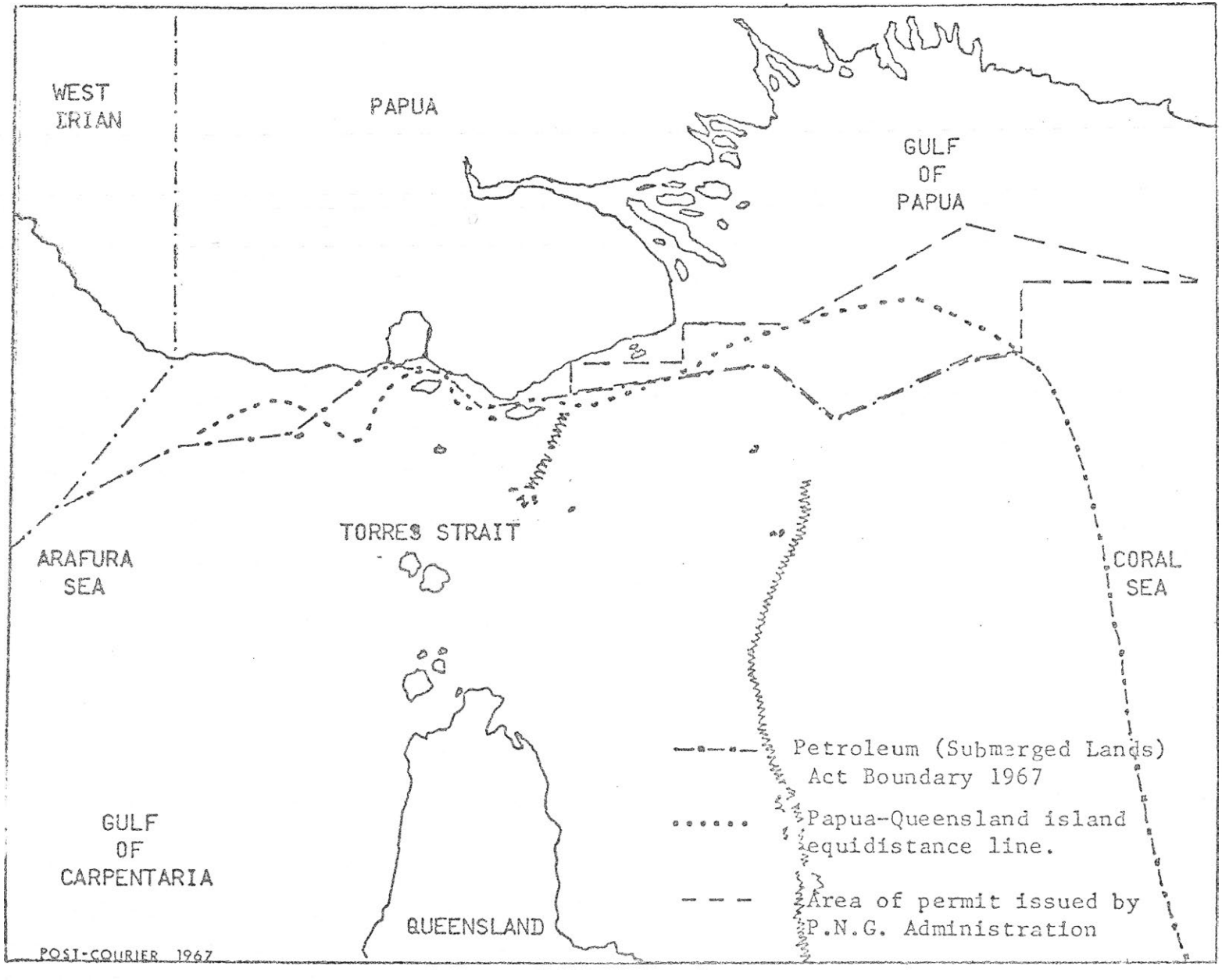
Sovereign rights over the continental shelf adjacent

to the land area, defined in the Second and Third Schedules of the Commonwealth Papua New Guinea Act 1949-1975, were claimed by Australia at the same time as similar claims for the Australian shelf were advanced.[1] However, a differentiation was made between the shelf around the Trust Territory and that around Papua, on the grounds that Australia's sovereign rights to the seabed of the former existed as a consequence of its status as the Administering Authority. No such distinction was proposed in the case of Papua where rights of sovereignty indistinguishable from those exercised around mainland Australia were claimed. This differentiation reflected the legal distinction between Papua and New Guinea, and until 1966 separate Ordinances were passed by the Port Moresby Administration for the implementation of Australia's authority in both territories. In most instances the legislation was identical in substance and only differed in form; this was the case with Ordinances related to shipping, fishing and seabed matters.

In common with the practice of the Australian States, the P.N.G. Administration issued offshore oil exploration permits under the provisions of local legislation until the mid-1960's.[2] In the original Ordinance, which primarily related to onshore operations, the area of applicability was defined to include '...that portion of the sea-bed adjoining the coast of the Territory extending to the outer edge of the continental shelf.'[3] It should be noted that this seabed provision in the oil exploration legislation predated

1. Australian Government, Commonwealth of Australia Gazette 56 (1953), p. 2563.
2. Petroleum (Prospecting and Mining) Ordinance 1951-1965.
3. Section 6.

SEABED DIVISION IN THE GULF OF PAPUA AND CORAL SEA - 1967

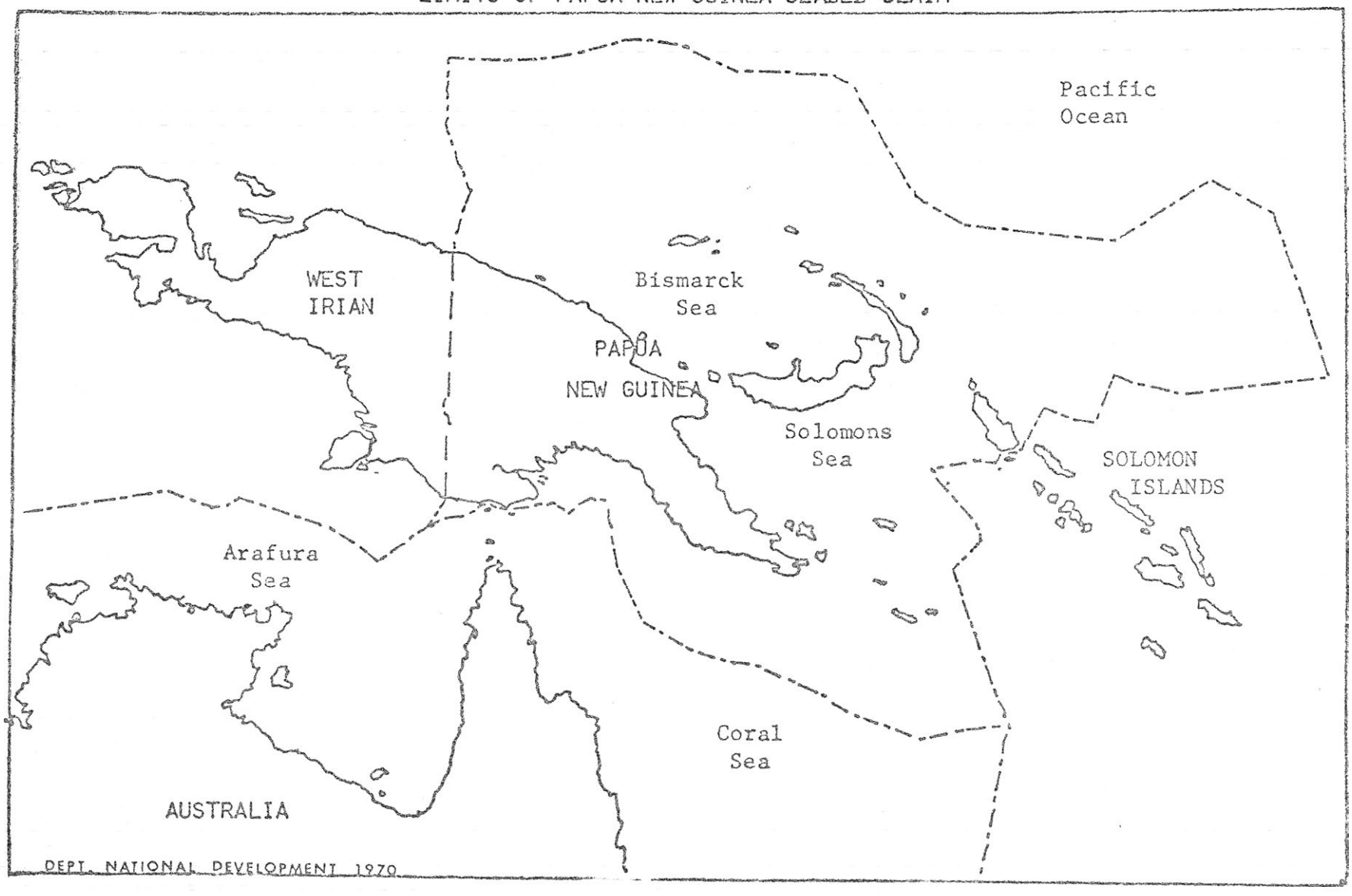


similar enactments by the Australian States, but was considered necessary at the time because surveys of the Gulf District indicated that oil bearing deposits extended from the coastal swamps to the adjacent shallow seabed. Even so, the P.N.G. Administration did not limit the issue of offshore permits to the seabed of the territorial sea, but granted exploration rights for considerable distances offshore in the Gulf of Papua.[4]

Enactment of the Commonwealth Petroleum (Submerged Lands) Act 1968 was made difficult by the presence of P.N.G. permit areas in the Gulf of Papua. When the seabed around Australia was divided into areas of State jurisdiction, it was found that if a median line between the P.N.G. and Queensland coasts was applied, then one of the P.N.G. permits would lie within the area of Queensland jurisdiction.[5] The situation had arisen because the P.N.G. Administration had adopted the seabed division of the Coral Sea as set out in the Commonwealth Pearl Fisheries Act. This division had employed a straight line prolongation of the 1879 boundary between Bramble and East Cay and did not divide the seabed equally. To avoid the problem of a transfer of permits, the Queensland offshore area was limited to the seabed south of the P.N.G. permits. In view of the prevailing feeling that substantial gas deposits were present in the retained sector, the decision was applauded in P.N.G. But to ensure that in future the P.N.G. shelf was explored

4. Permit area P.42 extended over 100 miles from the nearest land in the Gulf of Papua. Information derived from Australian Bureau of Mineral Resources map, Petroleum Exploration and Development Title Areas in Australia and Territory of Papua New Guinea as at September 30, 1967.
5. Permit P.42 issued to Phillips Australian Oil, the Australian subsidiary of an American company. At the time of the decision exploratory drilling was in progress and/

LIMITS OF PAPUA NEW GUINEA SEABED CLAIM



in accordance with the Australian legislation, the P.N.G. Administration secured the passage of the Petroleum (Prospecting and Mining) Ordinance 1951-1968.[6] This measure removed the authority of the Administrator to issue further permits under the powers conferred by local legislation. Control of the issue of new permits was vested in the Minister for External Territories acting under the provisions of the Commonwealth offshore legislation.

The extent of control from Canberra over seabed drilling was demonstrated in early 1972. Against the well publicized wishes of senior Administration officials and prominent P.N.G. politicians[7], the Minister for External Territories prohibited further drilling in the Gulf of Papua because it was perceived by the Australian government as a possible threat to the Barrier Reef. At the time of the Commonwealth action, wells were being drilled to ascertain the commercial viability of earlier gas discoveries in the Gulf. The advent of a new Minister for External Territories was followed by a partial lifting of the ban in February 1972, when it was decided that one further well would be permitted. The issue was a tangible reminder to P.N.G. politicians, in the middle of an election campaign for the third House of Assembly, of the impotence of the P.N.G. Administration when dealing with matters of offshore jurisdiction.

2. Sedentary and Swimming Fisheries

Between 1952 and 1958 the Australian Pearl Fisheries Act, which regulated the harvesting of certain sedentary

gas was later discovered in the permit area.

6. Territory of Papua New Guinea, House of Assembly Debates 1967, vol. I, no. 15, pp. 2886-8.
7. Post-Courier (Port Moresby), 7 & 24 January 1972, p.1.

species, applied to the whole of the shelf around the territories of Papua and New Guinea. Following the decline of Japanese pearling activity in northern Australian waters, the Australian Act ceased to apply to the bed of the P.N.G. territorial sea, although it continued to regulate activities on the outer shelf.[8] Between 1958 and 1968 the P.N.G. Administration was able to legislate for the harvesting of the sedentary marine life in the territorial sea around the whole of P.N.G.[9]

Control over swimming fisheries was originally similar to that over the seabed. Under the provisions of the Commonwealth Fisheries Act 1952-1953 the area of water conforming to the outer limits of P.N.G., as described in the Schedules to the Papua New Guinea Act 1949, was considered as Australian 'proclaimed waters'.[10] Within these limits the Commonwealth could exercise jurisdiction in fisheries matters over Australians domiciled in P.N.G. and over the indigenous inhabitants. However, in 1959 the Act was amended to delete the territorial sea of P.N.G. from the ambit of Commonwealth fisheries legislation.

Thus from 1959 onwards all fisheries in the P.N.G. territorial sea came under the control of the Administration. In 1966 it was decided by the Administration that legislation should be enacted to rationalize the control of all fisheries under one Ordinance. The Fisheries (Licencing) Bill was introduced into the House of Assembly and it was argued that since the form of sovereignty over

8. Commonwealth Gazette 26 (1958), p. 1339.
9. The Pearl, Pearl Shell and Beche-de-Mer Ordinance 1911-1966 applied around Papua and the Fisheries (New Guinea) Ordinance 1922-1966 governed the exploitation of sedentary fisheries around the Trust Territory.
10. Commonwealth Gazette 75, (1954), p. 3610.

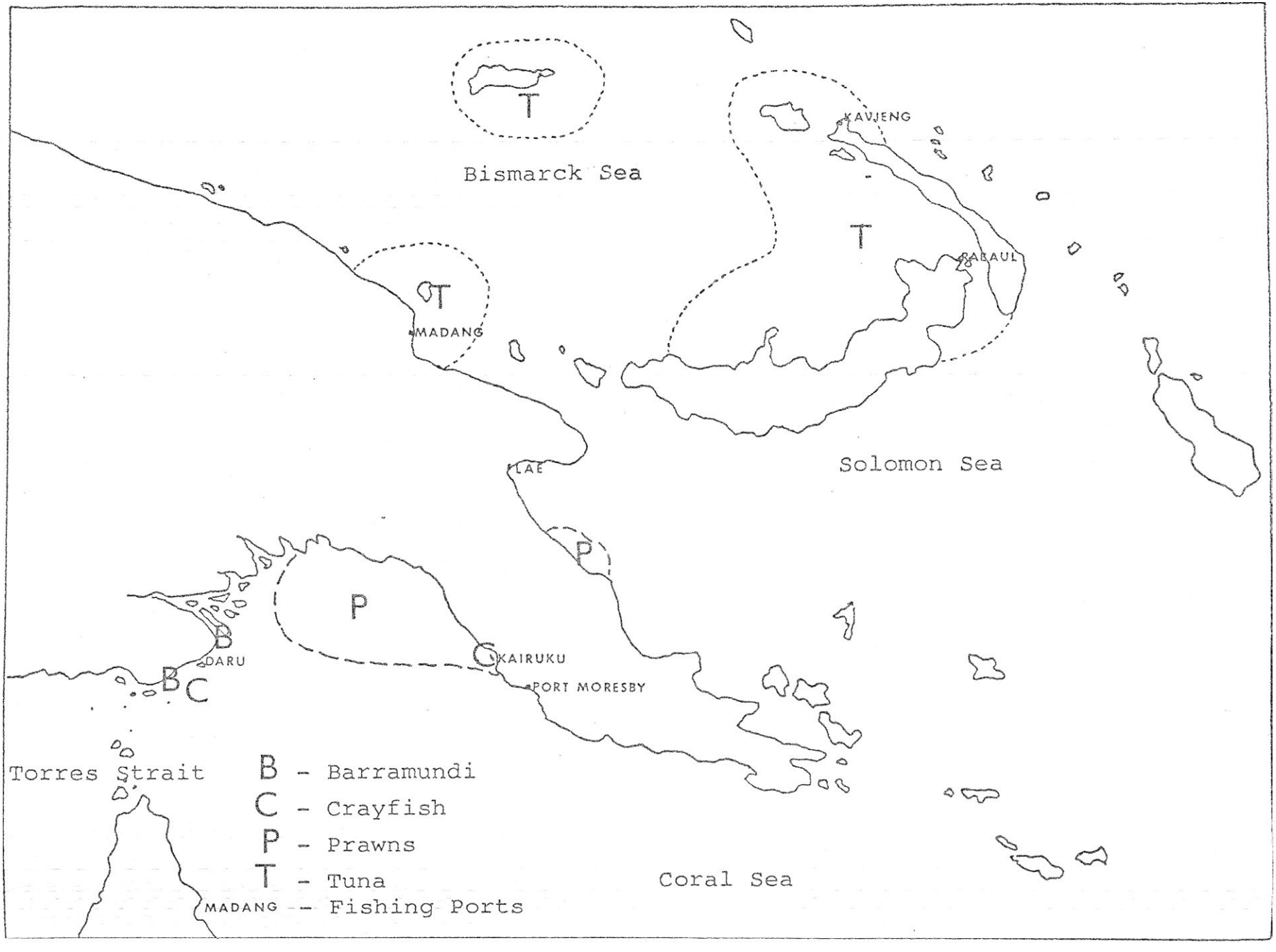
the seabed was, from a fisheries viewpoint, indistinguishable from that of the water mass of the territorial sea, a single item of legislation was apposite.[11] The argument was not accepted by the Commonwealth government and although the Bill was passed, the provisions relation to sedentary fisheries were expunged.[12]

The P.N.G. Administration and elected members of the House of Assembly were increasingly concerned about fishing incursions by Australian interests in the mid-1960's. This problem had been highlighted by indigenous and expatriate politicians since 1964.[13] Because the Australian government had allowed the P.N.G. Administration to retain control over the swimming fisheries of the territorial sea it was possible to take local action to limit the problem. In 1968, under the powers conferred by the Fisheries (Licencing) Ordinance 1966, a twenty mile section of territorial sea opposite Daru was placed 'off limits' to all but indigenous fishermen. The area constituted the major barramundi fishing ground near P.N.G. and, because the fish are caught in estuarine waters, the step effectively precluded Australian fishermen who had previously worked the area. Further amendments to the Ordinance in 1969 prevented the transfer of catches to foreign owned processing vessels, thus mirroring similar Commonwealth legislation applied to the Gulf of Carpentaria. This latter measure sought to protect the development of shore based processing facilities at Daru.

The tendency of the Commonwealth to allow the P.N.G.

11. Assembly Debates 1966, vol. I, no. 10, p. 1846.
12. Assembly Debates 1967, vol. 1, no.13, p.2444.
13. Assembly Debates 1964, vol. 1, no.1, p.115.

COMMERCIAL FISHERIES - P.N.G.



Administration to control the swimming fisheries of the territorial sea was reinforced by further decisions following the passage of the Australian Fisheries Act 1952-1967. The 1967 amendment, which provided for the establishment of the 12 mile 'declared fishing zone' around Australia, also applied the zone around all external territories of the Commonwealth. In keeping with the practice adopted in relation to the Australian States, the Federal government did not seek to apply Commonwealth licencing provisions to the territorial waters of P.N.G. Furthermore, in accordance with Australian practice, it was decided to delegate the powers of fisheries policy implementation in the 9 mile outer zone to officials of the P.N.G. Administration. In addition, in 1968 the area of local jurisdiction was extended eastward from the 155° meridian to the 157° line thereby encompassing the Polkington Reef, east of the Milne Bay District.[14]

While the Commonwealth decided to allow the continuance of P.N.G. Administration control over the swimming fisheries of the territorial sea, it moved at the same time to limit local control over the harvest of sedentary species. In 1968 jurisdiction over the seabed fisheries of the P.N.G. shelf from the low water mark outwards passed to the Commonwealth with the passage of the Continental Shelf (Living Natural Resources) Act.

A number of reasons can be advanced for this difference of approach. In the first instance, the removal of reef marine life was undertaken mainly by foreign fishermen, particularly Taiwanese. It may therefore have been con-

14. Commonwealth Gazette 71, (1968), p. 4671.

sidered appropriate that action taken against offenders should be under the provisions of Commonwealth law. Second, the main infringements into the swimming fisheries of the P.N.G. territorial sea were undertaken by Queensland based fishermen, and the Federal government may have been anxious to avoid a direct confrontation with Queensland by the application of Commonwealth law. Furthermore, in the 1960's there had been vocal opposition to the Australian intrusions from members of the P.N.G.polityand it may have been considered expedient to bolster the authority of the P.N.G. Administration in what was essentially an exercise of domestic law.

In other aspects of the clash between Australian and P.N.G. commercial fishing interests the Australian government appeared less ready to protect the developing local industry. As a consequence of the Australia-Japan Fisheries Agreement of 1968, the Japanese long-line tuna boats were allowed to operate in most of the declared fishing zone around P.N.G. The only area where operations were totally prohibited was on the south coast, west of the 145°E longitude. At the time, this area between the Torres Strait and the Purari River was being developed as a commercial prawn fishery, and barramundi and crayfishing were conducted in inshore waters by local fishermen. Recognition of the need to protect subsistence fisheries was embodied in the decision to limit Japanese operations to the outer 6 miles of the fishing zone, beyond the extensive inshore reefs in the area between the Purari and the tip of Milne Bay. Furthermore, operations around P.N.G. were to be phased out by 1971

in contrast to the longer period allowed around Australia.[15]

In spite of these concessions, other aspects of the Agreement were of questionable benefit to P.N.G. Whereas Japanese participation in the Australian industry was prohibited by a decision of the Australian government in September 1968, Japanese firms were encouraged to establish bases in P.N.G. for fishing the local waters.[16] Although it was seen by the Australian government as a means of diversifying and developing P.N.G. export industries, the decision was later to be questioned by political groups in P.N.G.

The decision in 1970 to prohibit vessels registered in P.N.G. from operating in the Gulf of Carpentaria was a more blatant exercise of Commonwealth discrimination to protect Australian fishermen at the expense of companies and operations registered in P.N.G. Since the late 1960's, vessels owned by Australians living in P.N.G. and also by a Kuwaiti company had been issued licences in Port Moresby, under the Commonwealth Fisheries Act, to fish for prawns in the Gulf of Papua, the Torres Strait and the Gulf of Carpentaria. The operation of P.N.G. registered boats in the latter location was opposed by Queensland fishermen who claimed that they failed to observe a voluntary closed season. In March 1970 the Minister for External Territories ordered the P.N.G. vessels to cease operating outside waters adjacent to P.N.G.[17] This action led to a difference of opinion with the Minister for Primary Industry who was

15. Australian Department of External Affairs, Agreement Between Australia and Japan on Fisheries, Treaty Series No. 22 (Canberra, 1970), Article 2.B., p.2.
16. Agreement on Fisheries, Agreed Minutes Relating to the Territory of Papua and the Trust Territory of New Guinea, p.6.
17. Courier-Mail (Brisbane), 28 March 1970, p. 1.

prompted to remark:

> 'For the purposes of the Fisheries Act, boats licenced from the Territory are not foreign boats, but have the same rights as Australian-based boats and during the current year can fish as close inshore as the outer edge of the three-mile limit.'[18]

Nonetheless, the Fisheries Act was amended in 1971 to validate the ministerial prohibition of P.N.G. operations in the Gulf of Carpentaria, by giving the Minister for Territories wide discretionary power over the issue of licences for boats operating out of P.N.G.

3. Navigation and Pollution Control

Control over shipping, both local and foreign, was also strictly regulated by the Commonwealth throughout the colonial period. Whereas the Commonwealth Navigation Act did not attempt to regulate the movement of intra-State shipping around Australia, it specifically applied to all shipping operating within the three mile territorial limits around P.N.G. and the other territories of the Commonwealth.[19] Under the provisions of the Commonwealth Act the detailed regulation of shipping owned by persons domiciled in P.N.G. was embodied in two sets of local law, one applying to Papuan waters and the other to the waters offshore from the Trust Territory of New Guinea.[20]

In 1961, conflict between the Australian government and the P.N.G. Administration, the latter supported by the

18. Mr. J.D. Anthony quoted in the Australian (Sydney), 3 April 1970, p.3.
19. Navigation Act 1912-1972, section 2 (1.)(c).
20. The Papuan Navigation Ordinance 1889-1966 and the New Guinea Coastal Shipping, Harbours and Ports Regulations 1938-1966.

semi-representative Legislative Council, arose over the application of anti-pollution laws to the waters surrounding P.N.G. Under the provisions of the 1954 IMCO Convention, the Commonwealth Pollution of the Sea by Oil Act 1960 applied a 150 mile wide zone around southern Australia in which only minimal oil discharge from shipping of the Convention signatories was allowed. Neither in the Convention nor in the Act was there any mention of the waters around P.N.G. and it was assumed that only a 50 mile restricted discharge zone applied, as it did to other areas not specified in the Convention. Furthermore, the Commonwealth would not vest jurisdiction over Australian shipping in the P.N.G. courts.

Frustrated by these discriminatory measures, the Legislative Council passed the Pollution of the Sea by Oil Ordinance 1961.[21] The Ordinance proposed measures for the control of all shipping pollution in the territorial sea, including the right to inspect the vessels of signatories of the 1954 Convention, and also provided for action to be taken against P.N.G. vessels guilty of pollution offences beyond territorial limits. The Ordinance was disallowed by the Australian government,[22] probably because it sought to authorize an intrusion into international relations beyond the legal competence of the P.N.G. Administration. Nonetheless, it served to indicate the concern within P.N.G. about the deleterious effects of oil spillage on reefs and the coastal fisheries on which much of the population depended for a livelihood.

21. Territory of Papua and New Guinea, Legislative Council Debates 1961, vol. VI, no. 1, p.30.
22. Territory of Papua and New Guinea, Papua New Guinea Gazette 58 (1961), p. 639.

It was not until the 1970 amendment to the Commonwealth Navigation Act that the waters beyond the P.N.G. territorial sea received any specific coverage by Australian pollution jurisdiction. The provisions of the Act, which extended national jurisdiction beyond territorial waters to include any reefs of the Australian continental shelf, were so defined as to include the reefs of the P.N.G. shelf.[23]

By the discriminatory exercise of powers granted under Australian offshore legislation, the Minister for External Territories succeeded in alienating the commercial interests associated with the offshore oil and fishing industries of P.N.G. The Minister's actions were also resented by the P.N.G. Administration and the indigenous political leaders who were to participate in the government of the country.[24] Consequently, it was the repeal of discriminatory interpretations rather than the general transfer of offshore rights which became the initial focus of attention after the elections of 1972.[25] The Australian government was committed to the continuation of Commonwealth offshore legislation or P.N.G. enactments reflecting Australian law of the sea interpretations until independence, although the extent of day to day control over the activities of P.N.G. citizens in the zones of maritime jurisdiction was to be progressively delegated.

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23. Navigation Act 1912-1970, section 329. D.(1).
24. See for example the comments of Mr. Oala-Oala Rua in the Post-Courier, 7 January 1972, p.1.
25. Joint statement by Prime Minister Whitlam and Chief Minister Somare on 24 January 1973. Australian Department of External Territories, Papua New Guinea Newsletter VII, 3 (1973).

THE DEVOLUTION OF OFFSHORE CONTROL

Two approaches to the transfer of administrative and sovereign rights over the offshore areas of P.N.G. were adopted by the Australian government as part of the process of decolonization. The first, which effectively began in 1968, involved the gradual creation of a system of Ministerial responsibility within the P.N.G. political framework. Initially, the Ministers responsible for fisheries and seabed mining were only granted power to apply local legislation, but this was followed by the delegation of responsibility for the supervision of the applicable Commonwealth Acts. The second approach, which is the main focus of this section, involved the passage of enabling legislation through the Australian parliament, thereby progressively exempting P.N.G. from the provisions of the Australian Acts and facilitating their replacement by local legislation.

Where the system of Ministerial responsibility was concerned, it was not until after the 1968 elections that a degree of domestic authority was granted to appointed Ministerial Members. Subsequent amendments to the Papua New Guinea Act in 1970 and 1971 increased the degree of responsibility of the nominees, and the latter amendment also sanctioned the operation of an elected Cabinet from the beginning of the third House of Assembly in 1972. From 1968 onwards the Ministerial Members in the portfolios of Agriculture, Stock and Fisheries and Mines were able to exercise a limited authority over P.N.G. nationals in the offshore area, under the provisions of local Ordinances, but fuller jurisdiction was delayed until 1974-75. It was not

until 16 September 1975 that 'full sovereignty, sovereign rights and rights of administration' passed to the elected government of P.N.G.[26]

As indicated earlier,[27] one of the means by which the Australian government was able to limit the offshore policy options of the Administration and the government of P.N.G. until 1975, was the use of the Vice-regal veto over proposed P.N.G. legislation. While the power of Australian government constraint over most internal matters was removed at self-government (1 December 1973), the final authority in matters of defence and foreign policy remained with Canberra. Because the offshore area has a degree of international legal character, and many of the problems of administration of the area involved action against foreign infringement of domestic law, the Australian government retained control until independence by ensuring that domestic legislation was in accordance with Australia's international responsibilities and law of the sea interpretations.[28]

Nonetheless, the second approach to devolution of control through the transfer of powers by means of Acts of the Australian parliament was pursued in this period. Transfer in the areas of navigation and shipping, fishing and the seabed will be examined in turn.

1. Navigation and Shipping

The first transfer of legislative power began in May 1972. At that time in the Australian parliament the Minister

26. Commonwealth Papua New Guinea Independence Act 1975, section 4.
27. See p. 130 and p. 135.
28. The transfer of executive powers in the period up to 1973 is analysed in P.J. Bayne & H.K. Colebatch, Constitutional Development in Papua New Guinea, 1968-73, New Guinea Research Bulletin no. 51 (Canberra, 1973).

for Shipping and Transport announced plans for the transfer of control over navigation aids around the P.N.G. coast.[29] Since 1949 this equipment had been subject to Commonwealth control under the provisions of the Lighthouses Act 1911-1970. The transfer was effected from 1 January 1973 by an amendment to the Australian Act in August 1972. To facilitate the takeover of the equipment, the P.N.G. government passed the Marine Aids to Navigation Ordinance 1972, but in the statement announcing the legislation it was indicated that the Ordinance was only a temporary measure pending a full review of maritime legislation and the drafting of a more comprehensive Bill.[30]

It was not until after independence that the P.N.G. parliament passed the first sections of the consolidated maritime legislation, entitled the Merchant Shipping Act 1975. Among the most important provisions of the Act was the establishment of a local shipping register, a step which the Australian government has yet to take.[31] The Act also defined the national character of shipping registered in P.N.G. and forestalled the use of the national flag as a 'flag of convenience' by establishing stringent guidelines for vessel registration. Rigid anti-pollution standards for shipping registered in P.N.G. were also incorporated in the legislation. By imposing strict guidelines for the standard of shipping operations, the government indicated its willingness to accede to the concern of other coastal states about the growing problem of oil pollution resulting

29. Australian House of Representatives, Debates 1972, no. 11, pp. 3102-3.
30. Assembly Debates 1972, vol. III, no. 9, pp. 1134-5.
31. There is no national shipping register in Australia. Australian owned vessels are listed on the British register, but the establishment of a local register is under/

from shipping accidents.

2. Fishing

Questions of fishing access, rather than merchant shipping considerations, were the major offshore problem facing the P.N.G. government after March 1972. The first priority was repeal of the prohibition on access to the Gulf of Carpentaria prawn fisheries which had followed from the decision of the Australian government in March 1970. Discussions between the Chief Minister and Australian Ministers were held in October 1972 but an interim resolution of the problem had to await the advent of the new Labor government in Canberra. On a visit to Australia in January 1973 the Chief Minister was able to convince his Australian counterpart that the existing prohibitions were affecting the viability of the P.N.G. prawning industry. Even so, the Australian Prime Minister remained sensitive to pressures from the Australian fishing industry.

It was agreed that only twelve P.N.G. boats would be licenced to recommence operations in the Gulf, and considerable restrictions were placed on their activity. They were not allowed to work inside the declared fishing zone and, unlike other foreign vessels, they were to abide by the management and conservation provisions of the Australian Fisheries Act, even though operating on the high seas.[32] The P.N.G. boats commenced operations in the 1973 prawning season and again there was hostility expressed by the Australian interests in the Gulf.[33] It was not until July 1974 that

consideration. Information supplied by the Australian Department of Transport, Shipping Policy Division on 27 August 1976.

32. See footnote 25.

33. Post-Courier, 17 & 23 April 1973, p. 4 and p. 1 respectively.

P.N.G. boats were afforded the full status as 'foreign vessels' and the discriminatory operating conditions removed by the passage of the Commonwealth Fisheries (Papua New Guinea Boats) Act.

Regulation of domestic fisheries in waters adjacent to P.N.G. was effected by the transfer of ministerial responsibility to the P.N.G. government under the terms of Commonwealth legislation. This arrangement was formalized by amendments to the Commonwealth Fisheries Act in 1973. In November 1973 the P.N.G. Minister responsible for fisheries outlined his government's philosophy on control of the industry and introduced a series of enabling Bills which became law in April 1974.[34]

The most important of the enabling Acts was the P.N.G. Fisheries Act 1974. Section 1 emphasized the limitations on the exercise of jurisdiction by the P.N.G. government as follows:

> 'to the extent any provision of this Act would... affect the operation of the Fisheries Act 1952-1973 of Australia, or otherwise be for the time being beyond the competence of the House of Assembly, the operation of that provision is suspended.'

Like its Australian equivalent, the P.N.G. Act enumerated powers of jurisdiction over the activities of local fishermen, but did not limit this control to a specified area; it asserted the right to control their activities in 'any other waters.'[35] The Act also claimed a 12 mile fishing zone

34. Assembly Debates 1973, vol. III, no.24, pp. 3179-80.
35. P.N.G. Fisheries Act 1974, section 3(a).

within which foreign fishing was prohibited except under licence, but until independence the formal regulation of foreign fishing remained with the Australian government.

One interesting feature of the definition of the declared fishing zone was the inclusion of 'all bays, gulfs and inlets of the sea and rivers, rivulets, streams, lands and lagoons inside those limits'.[36] Clearly, the P.N.G. government was anxious to avoid the multiplicity of fishing regimes which might be encouraged by the establishment of provincial governments, and to do away with the separate status of internal waters. In these respects it indicates an important advance over the Australian system of fisheries regulation.

Control over the harvesting of the sedentary species of the P.N.G. seabed was facilitated by the passage of the Continental Shelf (Living Natural Resources) Act 1973 through the Australian parliament. The amended Act released the P.N.G. Minister responsible for fisheries from the direction of the Minister for External Territories in seabed matters, but only insofar as they related to P.N.G. residents, companies incorporated in P.N.G. and vessels operating out of local ports. To provide a legislative base for the acquired powers, the P.N.G. government passed the Continental Shelf (Living Natural Resources) Act 1974. The general provisions of the P.N.G. Act followed those of its Australian predecessor, except that it incorporated a limitation on the exercise of jurisdiction similar to that in the P.N.G. Fisheries Act. The only other significant difference was

36. Section 2.

the exemption of traditional fishing activities of the indigenous inhabitants from the licencing requirements.

3. The Seabed

The handover of control over offshore petroleum search also involved limitations on the extent of powers that could be exercised by the P.N.G. government in the period prior to independence. As an interim measure until the passage of enabling Commonwealth legislation, the Minister for External Territories delegated his powers over the P.N.G. seabed to the local Minister for Mines and Energy on 1 December 1973.

The delegation was subject to two conditions. First, P.N.G. could claim rights of jurisdiction over the seabed only in accordance with the 1958 Convention on the Continental Shelf, and actions by the government were not to be inconsistent with any law of the sea Convention to which Australia was a party. The second proviso ensured that before any production licence was granted, both the Australian government and an unspecified 'independent authority' had to be consulted to ensure that the environmental threat of the operation would be minimal.[37] The latter stipulation would appear to reflect the preoccupation of successive Federal governments with the problem of oil damage to the Great Barrier Reef from drilling operations in the Gulf of Papua. Following receipt of the required assurances, the Commonwealth amended the Petroleum (Submerged Lands) Act in 1974 by deleting all reference to the P.N.G. offshore area.

37. Debates 1974, no. 12, p. 1274.

To provide for P.N.G. replacement legislation it was also necessary for the Commonwealth to amend the Papua New Guinea Act in 1974. So as to avoid the possible encroachment of P.N.G. jurisdiction into the seabed area presently claimed by Australia, the amendment stipulated that the P.N.G. definition of the offshore area be limited to the area relinquished by the metropolitan government. Even the subsequent passage of the Papua New Guinea Act 1975, which removed the general limitation on the extent of P.N.G. seabed claims, specifically precluded encroachment on areas covered by Australian legislation. It should be noted that the formal transfer of sovereign rights over the seabed was not effected until independence when Australia 'ceases to have any ... sovereign rights ... appertaining to the whole or any part of Papua New Guinea'.[38]

As some form of compensation for P.N.G., the Papua New Guinea Act 1975 ceded the Polkington Reefs and islets, situated to the east of the Milne Bay District. It was considered by the Australian government that the acquisition may be of importance to P.N.G. for the advancement of seabed claims in the Solomons Sea in any future delimitation with the Solomon Islands.[39] But it would appear that the earlier steps taken by the Commonwealth to circumscribe future claims by P.N.G. indicated their concern that the Port Moresby government may dispute the 1967 delimitations of the continental shelf in the Coral Sea and the Torres Strait.

The P.N.G. offshore legislation providing for the exploration and development of hydrocarbon resources bears

38. Papua New Guinea Independence Act 1975, section 4.
39. Confidential source. See appended list.

little resemblance to its Australian predecessors. The most obvious differences are to be found in the avoidance of a two tier system of responsibility, and in the method of licencing and management of operations. From the viewpoint of relations between Australia and P.N.G. other differences are more significant.

Although the P.N.G. Petroleum (Submerged Lands) Act 1975 came into force before independence, it contained no provision to preclude actions outside the powers of the House of Assembly or acts inconsistent with Australia's law of the sea interpretations or responsibilities. Second, the offshore description makes no reference to limitations on national claims implied in the definition of the continental shelf in the 1958 Convention, but refers only to 'the area of the territorial sea and the continental shelf of Papua New Guinea', while excluding internal waters.[40] Internal waters were presumably to come under the regime of the land area. Third, the Act provides for the proclamation of offshore areas by the P.N.G. government and includes provision for the delimitation of the area. There is no reference to any restriction on the extent of a valid claim. These features would appear to provide a modus operandi for future extensions of P.N.G. jurisdiction. Since the passage of the Act, the P.N.G. Minister for Defence and Foreign Relations has implied its relevance to the problem of effecting a change to the status of the Torres Strait seabed.[41] To date, the threat has not been put into effect, but the wording of the Act remains as a tangible reminder of unsatisfied seabed claims.

40. Section 2(1.).
41. Assembly Debates 1975, vol. III, no.43, pp. 5633-40.

From the foregoing discussion it is evident that the P.N.G. legislative interpretations of the law of the sea were likely to follow the pattern of their Australian precedents, at least in the short term. This was necessarily so because of the inability of the P.N.G. government to assume international responsibilities until the date of independence. Furthermore, because the P.N.G. government wished to avoid a legal hiatus,it was obliged to pass domestic legislation and establish an administrative machinery in the pre-independence period when Australia was in a position to dictate the parameters of policy. Even so, it is noticeable that some features of the P.N.G. legislation were in advance of their Australian counterparts; notably in the provision of a domestic shipping register, in the rejection of the concept of internal waters, and in the avoidance of the limitations imposed by reference to the 1958 Geneva Conventions. The P.N.G. government was also fortunate that the complications inherent in the Australian federal system of government, particularly the State claims to maritime rights, were able to be avoided. Although a form of government approximating to federalism may emerge in P.N.G., the fact that it achieved independence as a unitary state will facilitate the retention of law of the sea rights by the central government. Even so, the strong parochial sense of proprietary rights to the adjacent sea,which is manifest among coastal Papua New Guineans,may place considerable strains on a unitary system of offshore control.

THE LAW OF THE SEA AND P.N.G. FOREIGN RELATIONS : 1971-1976

Since the early 1970's the focus of attention of the P.N.G. government in law of the sea matters has been directed to problems of external relations rather than questions of domestic application. The major problems in the relationship with the Australian government during the period of the transfer of offshore control have been outlined in the previous section. Although there were difficulties in the bilateral relationship, it was the policy of the Commonwealth to involve P.N.G. officials in negotiations with other countries in maritime matters affecting P.N.G., but for which Australia had the ultimate responsibility until independence. After self government in December 1973 the level of involvement of Papua New Guineans in the decision making process increased, so that by independence the P.N.G. government had a clearly enunciated policy which had been advanced in regional and international forums. The discussion which follows examines the development of a national policy and its manifestations in regional negotiations and international debate.

Development of an independent law of the sea policy was inhibited by three interrelated factors: Australia's continuing responsibility for the external relations of P.N.G. until independence, the late establishment of the bureaucratic machinery for the development and implementation of foreign policy, and the low priority accorded to the formulation of such policy by the P.N.G. government.

Australia's reluctance to establish an embryonic foreign affairs department in Port Moresby can probably be explained by doubts about the time frame in which P.N.G. was

to achieve independence. The International Affairs Branch of the Department of the Administrator was set up in June 1971, and this coincided with the beginning of the period when it became clear that some P.N.G. political leaders would seek independence within the life of the third House of Assembly. However, there were also strong pressures within the country for the postponement of the colonial break and the time frame did not really become clear until after the formation of the Somare Coalition in 1972.[42] From this time onwards, the fledgling foreign affairs department was expanded to supply the needs of an independent government. The Australian government ensured that there was a high degree of consultation with P.N.G. decision makers in the period before independence, and the framework of the future P.N.G. policy was evident from mid-1974. Even so, the need for P.N.G. expressions of law of the sea attitudes to be in accordance with Australian policy was an effective brake on actions taken by the P.N.G. government in the period prior to independence.

It was also the intention of the new government in Port Moresby to give priority of effort to the formidable economic and social problems which faced the country. Writing in November 1972 the Chief Minister made the following comment:

> '...the members of my government have been concerned with more urgent domestic issues, we have not yet examined together in depth

42. Bayne and Colebatch indicate that the most significant decisions on a timetable were announced in two papers tabled by Mr. Somare in the House of Assembly on 27 June and 5 September 1972. Constitutional Development, p.191.

> what we anticipate to be the key pressures, prospects and likely threats. We have not yet looked at the influence of domestic politics and of our attitudes and fears upon the formation of foreign policy in future. [sic] We have not yet considered to what extent our destiny will be controlled and formed by international forces.'[43]

Thus any assessment of P.N.G. law of the sea policy in the period since 1971 should be viewed against the twin backdrops of a government preoccupation with domestic matters and Australian involvement in decision-making until September 1975.

1. Regional Boundary Agreements

As early as 1971, P.N.G. officials participated as part of the Australian delegation, in negotiations with the Indonesian government over the seabed boundaries in the Arafura Sea. In May 1971 agreement was reached on a partial division of the seabed between P.N.G. and Irian Jaya.[44] The northern boundary was delimited from the coastline outwards by the use of a median line equidistant from both coasts. On the southern coast the two major participants failed to reach agreement on the location of the boundary from the coast to a point approximately 20 miles seaward, but from that point onwards the equidistance principle was employed and the Arafura Sea subdivided between Australia,

43. Foreward to James Griffin (ed.), A Foreign Policy for an Independent Papua New Guinea (Sydney, 1974), pp. v-vi.
44. Australian Department of Foreign Affairs, Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia, Treaty Series No. 31 (Canberra, 1974), Articles 3 and 4, p.2.

P.N.G. and Indonesia. Before ratifying this first agreement, the Australian government saw fit to seek the concurrence of the P.N.G. Administrator's Executive Council, thus providing a tangible demonstration of consultation in maritime matters of concern to P.N.G.

The section of seabed not delineated at the 1971 conference was settled in a further meeting in February 1973, in which P.N.G. officials again participated. The P.N.G. Chief Minister signed the accord as a representative of the Australian government, but more importantly, Indonesia agreed to the continuing validity of the agreement before and after P.N.G.'s independence.[45] Apart from settling the southern boundary from the coast seaward, again on the basis of the median line principle, the parties also utilized the delimitation to define the maximum extent of the respective territorial sea and fishing zone claims. By this expedient P.N.G. was able to avoid the proliferation of separate boundaries which is a feature of the Australian regime in the Torres Strait. As will be indicated in the following chapter, support for the application of a single maritime boundary embracing water, seabed and airspace rights became an important feature of P.N.G. law of the sea policy.

Two domestic actions were necessary following the 1973 agreement. The first, in May 1973, was the amendment of the Commonwealth Petroleum (Submerged Lands) Act which set out the new seabed division of the Arafura Sea. In the same month the House of Assembly passed the Indonesian Border

45. Details of the agreement were announced by Mr. Somare in May 1973. Assembly Debates 1973, vol. III, no. 15, p. 1832.

Agreement Act, so as to provide the basis for ratification of the agreement by the Australian government.

Apart from the Indonesian and Torres Strait boundaries, the division of the maritime area between Boungainville and the Solomon Islands has been under scrutiny by the governments of P.N.G. and the Solomons. The existing division is based on the agreement reached between Britain and Germany in 1904 when their respective spheres of influence in the Pacific were decided,[46] and was subsequently accepted by the U.N. Trusteeship Council when the Australian mandate over New Guinea was confirmed after World War II. The boundary lies approximately equidistant from the larger islands of both countries and there are smaller islands lying close to the division on both sides. To date, the boundary question has tended to be overshadowed by the more pressing problems of common ethnic ties and the desire of some politicians from both the Solomons and Bougainville for the union of the northern area with the Solomon Islands.

Since 1972, however, there have been indications that both the British administration in the Solomons and the emerging political leaders are not satisfied with the present maritime division. The problem has been exacerbated by economic considerations in recent years. Offshore oil drilling has been undertaken to the south west of Bougainville Island and, although unsuccessful, the readiness of international companies to explore the area indicates that the area may be potentially oil bearing. Furthermore, the boundary area is being commercially fished by a joint

46. P.W. van der Veur, Search for New Guinea's Boundaries (Canberra, 1966), pp. 39-40.

Solomons-Japanese tuna consortium, and the question of fishing rights has become important to both the P.N.G. and Solomons governments.

In January 1973 it was announced by the British government that a 12 mile declared fishing zone would be applied around all of the Solomon Islands. Traditional fishermen from Bougainville were exempted from the regulation, but all other foreign fishing vessels, including those from P.N.G., were expected to comply with the restriction.[47] The problems of the overlap of the existing Australian fishing zone and the proposed Solomons zone, together with the status of the common continental shelf, were discussed at a meeting between the Chief Minister of P.N.G. and senior Solomons officials in late January 1973. No agreement was reached and the matter was further discussed in July 1976, again without success. The only tangible result of the latter conference was the concurrence of both parties that P.N.G. should represent the Solomons at the 1976 session of UNCLOS III.[48]

Achievement of a settlement on the Solomons boundary question was almost certainly hampered by the preoccupation of the P.N.G. government with the Torres Strait dispute. Furthermore, the P.N.G. government may argue that settlement should be delayed pending the outcome of UNCLOS III, because of the likelihood of increases in the area of national maritime jurisdiction which the conference may sanction. It could also be argued that settlement of the Torres Strait boundary would provide guidelines for an agreement

47. Post-Courier, 15 January 1973, p. 16.
48. P.N.G. Office of Information, Papua New Guinea Newsletter, 30 July 1976, p.2.

in the Bougainville -Solomons area. But it should be emphasized that in the latter case the existing division appears much more equitable in terms of an approximately equal division of the common maritime area, and it is unlikely that either government would accept significant changes.

Although P.N.G. is bounded on the north and east by the U.S. Pacific Trust Territory and Nauru respectively, their distance from the nearest P.N.G. land area and the deep nature of the intervening seabed have until recently precluded the need for a delimitation of the zones of national jurisdiction.[49] But from early 1977 the U.S.A. will proclaim a 200 mile fishing zone around the Pacific territories,and this will necessitate a new delimitation of the area to the north of the Bismarck Archipelago because the distance between the northernmost P.N.G. island and the Kapingamaringi atolls of the Trust Territory is less than 400 miles.

It might be expected that an amicable settlement on the basis of the equidistance principle will be achieved, but some problems of fisheries regulation are likely. In the first instance,a U.S. limitation on foreign fishing within the 200 mile zone may prompt a transfer of activities further south around P.N.G. Second, the main item of contention between the U.S.A. and P.N.G. at UNCLOS III is the proposed regime for the harvesting of highly migratory fish species, and the sea to the north of the Admiralty Islands is the focus for extensive American, Taiwanese and Japanese

49. It should be noted that a de facto division of fishery and seabed rights was provided for by the Commonwealth Fisheries Act 1952 in respect of the activities of Australian and P.N.G. fishermen, and more generally in terms of seabed delimitation,by the Continental Shelf (Living/

tuna fishing. To date, no details of contact between the U.S. and P.N.G. governments on the question of delimitation and the associated fisheries problems have been made public.

2. Foreign Fishing Access

Two main types of fishing activity are undertaken by foreign boats in the waters surrounding P.N.G. Both have a significant impact on the inshore subsistence fisheries around the country, and this has provided one reason for the government's desire to regulate the foreign activity. It is only in recent years that the government has adopted the approach that the country should not only avoid damage to the local economy but also benefit financially from foreign operations in the waters generally encompassed by the island configuration of P.N.G.

One type of activity which is of concern to the P.N.G. government is the removal of clams and other reef fish from the extensive coral formations which surround much of the coastline. As indicated earlier, the Australian government attempted to prohibit such fishing by the passage of the Continental Shelf Act of 1968, and the P.N.G. government passed similar legislation in 1974. Since foreign depletion of the reef fisheries competes with domestic fishermen for a basic food source, there has never been any government intention to sanction the foreign activity. Instead, patrol boats from the R.A.N., later transferred to the P.N.G. Defence Force and supplemented by other government vessels, have undertaken a continuous surveillance and

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Natural Resources) Act and the Petroleum (Submerged Lands) Acts.

policing operation to apprehend foreign offenders and charge them for breaches of the respective Acts.[50]

Government action against illegal fishing has been hampered by a number of factors. The decision of the Commonwealth government in December 1972 to sever diplomatic relations with Taiwan and the subsequent reluctance of the P.N.G. government to reopen formal channels of communication have hampered efforts to bring pressure on the Nationalist regime to curb the illegal fishing of its nationals. Where court convictions have been imposed on offenders, fines, vessel repurchase and the repatriation of crews have had to be arranged through the informal links of the local Chinese community.

A further limitation on the ability of the P.N.G. government to police the reef areas is the shortage of suitable vessels. The five patrol craft allocated by the R.A.N. could not hope to cover adequately the zones of prohibited foreign fishing, and supplementary steps were taken to increase the efficiency of overall operations. In 1974, a Fisheries Inspection Service of the Department of Agriculture, Stock and Fisheries was established to provide specialist officers versed in the legal technicalities of fisheries law and foreign infringement. Early in 1975 a more

50. The following table gives some indication of the expansion of naval policing activity, although it is generally admitted that patrolling programme only suceeds in apprehending a small proportion of the total number of offenders.

	Sightings		Arrests	
Year	Total	R.A.N./P.N.G.D.F.	Total	R.A.N./P.N.G.D.F.
1968	9	1	3	1
1969	7	-	3	2
1970	5	2	1	1
1971	22	19	2	1
1972	42	4	10	8
1973	42	36	-	-

Figures cited in Paul Mench, The Role of the Papua New /

coordinated reporting system was instituted to utilize all available agencies, including commercial and government shipping, civil and military aircraft and plantation, mission and government personnel in outlying areas. To increase the effectiveness of Defence Force patrols four search zones were established: the Northern, Islands, Papuan and Southern regions, and by analysis of the seasonal incidence of past sightings, patrol effort was concentrated on the most likely areas.[51] It would seem that these measures did increase the efficiency of policing. In two weeks in September-October 1975, seven arrests were recorded.[52]

Not all of the infringements of the P.N.G. restricted fishing zones can be attributed to Taiwanese activity. The other, and more commercially important, form of foreign fishing around P.N.G. has been the harvesting of tuna. Most of this activity has been conducted by Japanese and American companies with operations based in Guam, Okinawa and the islands of the U.S. Trust Territory. Most tuna fishing around P.N.G. takes place beyond the 12 mile declared fishing zone, in the Bismarck Sea, but operations are dependent on a regular supply of live baitfish which can only be obtained from inshore waters. It is this latter activity which is of particular concern to the coastal population because they allege that it depletes the fish stocks on which they depend for food. Some of the foreign concerns ship their baitfish from the U.S. Territories and can thus operate on the high seas around

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Guinea Defence Force - The Development and Transfer of Military forces to an Independent Papua New Guinea (M.A. (Hons) thesis, University of New South Wales, 1974), vol. 1, p. 180.

51. Confidential sources. See appended list.
52. Post-Courier, 4 October 1975, p.3.

P.N.G. without being subject to local regulation. However, this method of operation is generally considered less efficient, and the desire of the foreign companies to obtain bait sources locally provided the means for P.N.G. regulation and participation in the industry.[53]

As indicated earlier, the Australian government encouraged the participation of foreign companies in the development of joint fishing ventures around P.N.G. In November 1971 a joint Australian-P.N.G. delegation visited Japan to discuss aspects of the 1968 Australia-Japan Fisheries Agreement and the basis for joint ventures. Agreement was reached on a number of points. It was agreed that 'long-line' boats operating under the 1968 agreement could have access to P.N.G. waters until 1975 and to the ports of Rabaul and Madang for fuel and stores replenishment. It was also planned that 'pole fishing' operations would be established by foreign companies and that the P.N.G. government could purchase up to 20% equity in these ventures. Three areas near Madang, Kavieng and Rabaul were chosen for the supply of baitfish and a system of royalty payment to the local villagers was instituted.[54] These measured were given legislative effect by the Tuna Fishing Industry Agreement between Papua New Guinea and Various Companies Act and the Tuna Resources Management Act 1972.

The government of Mr. Somare exhibited an initial enthusiasm for participation in joint fishing ventures

53. Observations by Mr. P. Wilson, United Nations Development Programme Fisheries Survey officer, on 12 January 1976. Mr. Wilson was visiting P.N.G. as part of a review of South Pacific fisheries.
54. Post-Courier, 16 May 1972, p. 3.

because of their potential for the development of a local industry and their value as a source of foreign exchange. This opinion was not shared by many other politicians or their constituents. Early criticism of the scheme was largely based on the supposed depletion of subsistence fisheries by vessels conducting surveys for baitfish.[55] This criticism was later extended to a questioning of the overall economic value to P.N.G., but underlying the debate was the view that the local people had a proprietary right over the inshore fisheries and should receive renumeration for the baitfish removed.[56] These economic criticisms were partly allayed by the imposition of a 2½% export levy on the tuna catch, and the payment of these monies to the people living in the baitfish acquisition area.

In spite of scepticism about the effects of Japanese fishing in the waters of P.N.G., the government decided in November 1975 to extend the provisions of the 1968 and 1971 fisheries agreement for a further year. At the time it was stressed that this would be the last extension under existing conditions and that future access would depend on Japanese acceptance of more stringent regulation of activities and a greater financial return for the national government.[57]

55. See for example the comments in Assembly Debates 1972, vol. III, no. 5, p. 427 and vol. III, no. 9, p.1022. The view is disputed by Mr. R.E. Kearney, Principal Biologist of the P.N.G. Department of Agriculture, Stock and Fisheries. He comments that:
    'In so far as the experience gained in three years enables a prediction, it would appear that the known baitfishing grounds are in no immediate danger of being overfished and that there are numerous other areas which could be developed as at least supplementary sources of bait.'
    R.E. Kearney, 'Skipjack Tuna Fishing in Papua New Guinea, 1970-73', U.S. Environmental Science Information Centre, Marine Fisheries Review 37, 2 (1975), p.8.
56. Assembly Debates 1973, vol. III, no. 17,p. 2143 and vol. III, no. 26, p. 3339.
57. Confidential source. See appended list.

The joint venture had also come under criticism from government ranks, particularly over the failure of the Japanese to construct a local cannery. At a meeting of the Tuna Resources Management Advisory Board, which was comprised of government and industry officials, the Minister responsible for fisheries put the situation bluntly:[58]

> 'We discussed means by which benefits could flow to this nation more rapidly, but little has happened. Should you not choose to join our efforts, we will sincerely regret losing your skills and experience you have developed while fishing here during the past five years. However, we cannot let friendship or past understanding stand in the way of utilizing our fisheries resources to improve our economy'.

The mood of government and public disenchantment was not directed at the Japanese alone. For some time there had been allegations about misuse of the prawning licence issued to the Kuwait company, Gulf Fisheries (New Guinea). On 1 October 1974 the Minister for Natural Resources announced a comprehensive government review of the prawning industry[59] and shortly thereafter Gulf Fisheries decided to terminate their P.N.G. operations. While their decision may have been prompted by economic factors and poor catches as much as the prospect of close government scrutiny, the public pressure on the company indicated the growing concern of the P.N.G. polity about the exploitation of maritime resources.

58. Post-Courier, 28 January 1976, p.3.
59. Post-Courier, 2 October 1974, p.3.

3. Participation in UNCLOS III.

Early in the preparatory stages of UNCLOS III it was decided by the Australian government that P.N.G. officials should participate in the deliberations, as part of the Australian delegation. By encouraging this form of close consultation it was hoped that the interests of P.N.G. could be advanced in the period prior to independence and that the P.N.G. government would have the opportunity to formulate a coherent law of the sea policy by the time it attended sessions as an independent country.

As a first step towards the development of P.N.G. government attitudes it was arranged that the Secretary for Law would attend the September 1972 and all subsequent meetings of the UNCLOS III preparatory committee. By 1974, when the first plenary session of the conference convened, P.N.G. legal and foreign affairs planners had identified the main issues of national concern.[60] These were considered to be the need for a wider territorial sea, the requirement for an extended fishing zone where foreign activity might be regulated, and the clarification of the whole status of distant water fishing near underdeveloped coastal states.

Five P.N.G. delegates attended the Caracas session as part of the Australian contingent. Unlike the main Australian group, the P.N.G. delegation included no Defence Force representation. With the three issues of particular

60. Details of the P.N.G. participation and role in the UNCLOS III preparatory and plenary debate are derived from confidential sources. See appended list.

concern in mind, the P.N.G. members were charged with the formulation of a more definite policy for presentation to Cabinet on their return. The stance which was ultimately adopted was broadly in accord with that of the less developed states, and more specifically with that of South Pacific and South East Asian neighbours as well as Australia. Even at this early stage some differences in approach to that of the Australian delegation were manifest, and these were heightened at the later meetings where P.N.G. was able to adopt a progressively more independent stance.

Most of the matters of particular interest to P.N.G. were discussed in Committee II of the UNCLOS sessions. Rights of fishery control dominated the policy which evolved from the Caracas session. Acceptance of a 12 mile territorial sea and an exclusive economic zone extending for a further 188 miles seaward became the basis of the national position; in addition the government hoped that archipelagic status would be conferred on the waters enclosed by the main outer islands. While it was accepted that a 12 mile territorial sea claim would involve additional problems of boundary demarcation with Australia and the Solomons, it was felt that these would be offset by complete control over subsistence fisheries. The delegation took the view that adoption of the economic zone concept would have to be tempered by some rights of foreign access to fisheries. The system of preferential rights for established foreign fishing groups under coastal state licence, as proposed by Australia and New Zealand, with some reservation was considered acceptable to the P.N.G. government.

Control of the fishing of highly migratory species became an issue of special concern, because of the proximity of tuna grounds in the Bismarck and Solomons Seas and in the West Pacific north of P.N.G. At the conference there was wide support for the view that in the economic zone the catch should be subject to the local regime, but on the high seas it should be regulated by an international body consisting of the main fishing nations and the coastal states along the migration path. While the P.N.G. government concurred with the first proposal, they believed that the international body for high seas regulation should be dominated by the adjacent coastal states. Australia was reluctant to accede to this latter suggestion, but the main opposition was from the United States which preferred the avoidance of a local veto power in the international regulatory body.

The P.N.G. government seeks to enclose the waters of the Bismarck Sea by the application of the archipelago doctrine, so as to exercise complete control over the tuna fisheries of the area. Even before Caracas, the Australian government decided that it would support the P.N.G. claim. Indonesia and the Philippines, as the original proponents of the concept, were not so enthusiastic because they feared that a proliferation of similar assertions would jeopardize international acceptance of the principle. Australia sought to advance the Indonesian and P.N.G. case by encouraging acceptance of a definition providing for 'parts of islands' to be included in the proposed regime.[61] The P.N.G. delega-

61. Australian Department of Foreign Affairs, Third United Nations Conference on the Law of the Sea. Second Session: Report of the Australian Delegation (Canberra, 1974), p.25.

tion hoped to promote agreement by expressing a willingness to accept liberal rules for shipping transit through the enclosed waters. The specific application was also fostered by the presentation of a map showing the proposed baselines for the enclosure of the national waters. It was proposed that the Milne Bay islands be linked to the mainland by closing lines and that the Bismarck Sea be similarly enclosed. It was also indicated that the eastern islands of the New Ireland Province, together with Nissan, Buka and Bougainville should be enclosed. Claims to incorporate the more distant and smaller islets of Tauu, Nukumanu and Polkington Reef were not pressed. The importance of the concept as a means of reinforcing the sense of national identity was stressed; but leaving some of the populated outlying atolls of the North Solomons Province beyond the enclosure was hardly likely to endear the pro-secessionists of Bougainville to the national government.

On the question of rights to the continental shelf, which preoccupied their Australian counterparts, there is evidence of a divergence of opinion. Because it was considered by the P.N.G. government that the areas of seabed beyond 200 miles from the coast which were to be transferred at independence were not prospective sources of oil or gas, there was little to be gained from supporting the Australian position. Accordingly, P.N.G. supported the majority viewpoint which allowed for claimant stage exploitation beyond 200 miles on the condition that part of the revenue accrued would pass to the international community. The P.N.G. delegation probably believed that identification with the Australian position would indicate an unacceptable

degree of subservience to Australian law of the sea policy in the eyes of other Third World countries.

The subject of boundary demarcation posed a difficult problem for P.N.G. policy makers. On the one hand, they were reluctant to propose specific principles to be applied in such situations and were prepared to accept the consensus of conference opinion. It was felt that this approach might enhance their bargaining position in the Torres Strait dispute and provide guidelines for the settlement of the Solomon Islands boundary. However, the government decided to support the Australian position that existing negotiated agreements should remain, since it was felt that the agreements with Indonesia represented an equitable settlement, whereas the existing unnegotiated Torres Strait regime was unacceptable.

Another problem of maritime zone demarcation which was examined by the P.N.G. delegation at Caracas was the right of a state to claim water and seabed areas around small or uninhabited islands. As a nation with numerous atolls, small islands and drying reefs, P.N.G. would either gain or lose considerable areas of continental shelf or economic zone, depending on the regime of islands finally established. The delegation argued that all islands regardless of size should generate resource zones of equal status to those accruing to the main landmass. Because the conference thinking favoured a distinction based on either size, habitability or economic viability, P.N.G. was prepared to accept that uninhabited islands should forgo the right to an economic zone but that continental shelf rights should be retained. This position indicated the concern of the national

government over the removal of reef marine life by foreign fishermen, and the frequent dependence of people in outlying areas on the reefs of adjacent uninhabited islands for their food supply. It may also have reflected a belief among some government members and advisors that some of the detached seabeds may contain oil or gas.

Unlike its Australian sponsor, the P.N.G. government was particularly interested in the outcome of the deep seabed mining debate. In Committee I, which was devoted to the question, the P.N.G. delegation supported the concept of a strong seabed authority. The considerations advanced were that such a body and a system of commodity price regulation would ensure that the international copper market did not become depressed because of an oversupply from seabed mining. Taking a more cynical view, it might be argued that if a seabed regime unattractive to capital investment could be created, then marginal land operations such as Ok Tedi and Frieda River could become more attractive development propositions. However, it has been suggested that P.N.G. is adopting a rather alarmist view in regard to the threat to land operations of seabed nodule mining. A report of the U.N. Secretary-General presented to the Caracas session indicated that 'copper production from nodules could be expected to have a minimum impact on a relatively large and growing and somewhat diffuse market...'.[62]

The Committee III topics of research and technology transfer were not subject to detailed scrutiny at the Caracas conference and the P.N.G. delegation preferred to reserve

62. Report of the Australian Delegation, Second Session, p.13.

its attitudes until subsequent debate brought forth the main trends. One final problem which was addressed at Caracas was ocean pollution. P.N.G. was obliged to resolve the potential conflict between her dependence on unrestricted seaborne trade and the need to protect coastal fisheries. No doubt because of the dependence of approximately one-third of the population on locally caught fish,[63] the government tended to favour strong littoral state power over any potentially polluting activity in the adjacent waters. The government was also cognizant of the fears of its Australian counterpart regarding the possibility of environmental damage from seabed drilling accidents.

In March 1975 the P.N.G. government hosted a meeting attended by Australia, New Zealand, Tonga, Western Samoa and the Solomon Islands, in which the results of the Caracas conference were discussed and common strategies for future sessions considered. Considerable regional cohesion was evinced on matters of common concern, notably the exclusive economic zone, the regime for migratory fisheries, archipelagos and maritime claims around small islands. From the viewpoint of the P.N.G. government, the major benefit to be gained from the conference was the ability to demonstrate an independence of view, at least partially free from the restraints of Australian policy.

Even though independence was four months distant, the P.N.G. delegation at the Geneva session in May 1975 was able to adopt a more active role than at previous meetings. In the first instance, Australia secured approval

63. L.W. Filewood, 'Commercial Fisheries' in Edgar Ford (ed.), Papua New Guinea Resource Atlas (Milton, Queensland, 1974), p.20.

from the U.N. General Assembly for P.N.G. admission to the conference as a national entity with observer status. Second, the less structured nature of the second session, with its emphasis on informal meetings of special interest groups, facilitated expression of the government's views on matters of major concern.

At the Geneva session the delegation reiterated their support for a strong seabed authority and the need for a mechanism to regulate seabed mining in accordance with commodity price movements. In Committee II discussions, a 'package' of a 12 mile territorial sea and a 200 mile economic zone was supported, and with Australia's backing the application of archipelago status was advanced. There was also considerable unanimity of opinion between the P.N.G. and Australian delegations on Committee III subjects. The right of the littoral state to take action against foreign pollution offenders breaching international standards was supported, as was the right to impose local regulations in special circumstances of environmental threat.

There were, however, considerable divergences of opinion between the two delegations. The difference of opinion over the predominance of the local states in the proposed migratory fisheries regime was one issue highlighted.[64] Unlike P.N.G., the Australian fishing industry was not so dependent on the tuna catch, and as Australia was anxious to avoid a protracted dispute over the subject it supported

64. It has been suggested by one P.N.G. official that the tropical crayfish, which is of particular importance to the fishing industry of western Papua, should be treated as a migratory species. Its life cycle habitat ranges from the northern Barrier Reef near Queensland through the eastern Torres Strait and along the floor of the Gulf of Papua to Yule Island. Confidential source. See appended list.

the 'middle of the road' position of equal voting rights in the regulatory body. Differences of opinion on the subject of catch apportionment in the economic zone have also become evident. The P.N.G. government has moderated its support for the proposal that local waters be fished to their maximum sustainable yield, and tended to favour a system whereby the coastal state could arbitrarily limit the size of the foreign catch. This view probably reflects the desire of the P.N.G. government to allow the local fishing industry to develop on preferential terms, and the realistic appraisal that local research facilities lack the manpower and equipment to carry out the surveys necessary to determine maximum sustainable yields.

Between the Geneva session and the New York meeting in August 1976 the P.N.G. government faced the problem of acceptance or rejection of the existing law of the sea Conventions. In an Independence Day declaration the government stated that it would review all treaties entered into on its behalf by Australia. Although there is no express provision in the 1958 Conventions for their application to territories and colonies, it is an internationally accepted right of the metropolitan power to apply such treaty provisions.[65] On 25 February 1976, the government advised the Secretary-General of the U.N. that it would not accede to the 1958 Conventions. This was more an indication of the government's commitment to the creation of new concepts in the law of the sea, rather than an attempt to reject what

65. K.J. Keith, 'Succession to Treaties by Newly Independent States' in Jean G. Zorn & Peter Bayne (edd.), Seventh Waigani Seminar : Foreign Investment, International Law and National Development (Sydney, 1974), p.10.

has been generally accepted by the international community as customary law, binding on new states as they achieve independence. Domestic legislation, although it makes no specific reference to the Conventions, embodies the main features of the earlier law. It should also be noted that the national parliament approved the retention of the IMCO conventions on pollution and shipping safety[66] which had previously been accepted by the Australian government on behalf of P.N.G.

The New York sitting of UNCLOS III in August 1976 was the first at which P.N.G. was represented as an independent nation. Details of the negotiating positions have not yet been made available. However, the Minister for Defence, Foreign Relations and Trade indicated that the issues of primary concern were archipelagic status, the management regime for highly migratory fish and the methods of maritime boundary demarcation between states.[67] This statement would appear to indicate that the P.N.G. government believes that the 12 mile territorial sea and the economic zone are no longer contentious problems and will be accepted as part of a new law of the sea.

In the period between July and October 1976, P.N.G.'s law of the sea initiatives were advanced through the medium of the South Pacific Forum. Apart from threats to take legislative action to implement changes to the maritime status of the Torres Strait, which are discussed in the next chapter, the Forum has been used to announce the plans of

66. Assembly Debates 1975, Vol. III, no. 49, pp. 5993-4 and Papua New Guinea, Minutes of Proceedings of National Parliament 1976, (proof copy), no.15.
67. Post-Courier, 3 March 1976, p.3.

the P.N.G. government to implement some of the major areas of consensus arising from the so far inconclusive UNCLOS III meetings. These decisions, and their effect on relations between P.N.G., Australia and the other Forum members, are discussed below.

4. Participation in the South Pacific Forum

At the July 1976 meeting of the Forum, the P.N.G. delegates supported the general proposals that regional nations should adopt the exclusive economic zone concept and the need for a coordinated approach in relations with distant water fishing countries.[68] When the special session of the Forum was convened in October 1976 to consider the results of the August UNCLOS III conference, the P.N.G. government advocated the immediate proclamation of economic zones around all of the countries in the region.[69] However, the other nations, led by Australia, counselled a more cautious approach and it was decided that the formal application of the zones should await the outcome of the May 1977 UNCLOS meeting.

P.N.G.'s advocacy of immediate action to declare a 200 mile economic zone would appear to be motivated by a number of considerations. The reason advanced at the October meeting was that a 200 mile fishing zone would be proclaimed around the U.S. Trust Territory from January 1977 and that it would be in the interests of countries which shared boundaries with the Territory to advance their own claims at the same time. In addition, the proclamation of

68. Canberra Times, 29 July 1976, p.1.
69. P.N.G. Newsletter, 15 October 1976, pp. 1-2.

an economic zone before further negotiations with Japan and other distant water fishing nations had been undertaken would tend to strengthen the bargaining position of the P.N.G. government.

To placate P.N.G., the Forum meeting sanctioned the conduct of negotiations with neighbouring states and the drafting of legislation, so that when a date for implementation of the zone was settled, diplomatic and legal preparations would be complete. It would appear to be in Australia's and the Solomons' interest to complete negotiations over presently disputed areas on the basis of the existing limited claims, with the proviso that any settlement represented a final limitation to the extent of national rights in the subject area. There will be a need for a subdivision of the other areas shared by the three countries, particularly in the Coral and Solomon Seas, but this may well be negotiated after UNCLOS III, on the basis of international or regional consensus as to the type and extent of national jurisdiction.

THE PERIOD IN RETROSPECT

Within the period 1966-1976 the P.N.G. polity has moved from a position of subservience to Australian law of the sea initiatives, to one where an independent national policy, in several respects at variance with that of Australia, has been expressed.

Throughout the latter stages of the colonial rule, administrators and politicians within P.N.G. questioned the methods of Australian policy implementation rather than the philosophy behind it. There was general recognition that

the extension of maritime jurisdiction over the seabed and fisheries since 1966 would serve the interests of P.N.G. because of the protection it afforded the maritime resources from uncontrolled foreign exploitation. What was challenged was the centralization of decision making in Canberra, the reluctance to delegate administrative authority under local Ordinances, and discriminatory regulation of P.N.G. maritime activity which served to protect Australian commercial and environmental interests.

The repeal of the discriminatory provisions of Australian law of the sea legislation and the transfer of offshore administrative control to P.N.G. was effected in the period 1972-1975. Even before the formal transfer of offshore sovereign rights at independence, a body of P.N.G. legislation had replaced the earlier application of Australian maritime law. Because the replacement Acts were passed in the period when Australia retained formal responsibility for the P.N.G. offshore area, they reflected Australian law of the sea interpretations, except insofar as they avoided the division of administrative power between the national and regional governments.

While the P.N.G. government was free from the problem of apportionment of offshore control between two tiers of political authority, it was faced with problems of external expression of policy. Although P.N.G. officials participated in Australian decision making on law of the sea matters of international concern, it was not until after the Caracas session of UNCLOS III that a coherent national policy emerged. Concurrent with participation in international and regional negotiations on the broad structure

of the future maritime regime, the P.N.G. polity was obliged to reassess its attitude towards sea and seabed boundaries with its neighbours, and redefine the commercial and legal relationship with the distant water fishing countries which operated in the region. At the time of writing, the relationship with both groups is clouded by uncertainty, partly because of the undecided nature of the new maritime regime sought by UNCLOS III participants and the South Pacific Forum, but also because many aspects of the P.N.G. government's attitude towards the law of the sea conflict with the policies of their neighbours and the other users of the local marine environment. The single most important manifestation of conflicts in law of the sea interpretation between P.N.G. and Australia, the Torres Strait boundary dispute, is considered in the following chapter.

CHAPTER IV

POLICY IN CONFLICT : THE TORRES STRAIT DISPUTE

INTRODUCTION

Since 1969 the most intractable aspect of law of the sea relations between Australia and P.N.G. has been the dispute over respective national rights in the Torres Strait. The dispute has also exacerbated tensions between the Commonwealth and the Queensland governments, and can be seen as an important factor in the decision of the Commonwealth government since 1972 to assert offshore rights at the expense of State claims. While much of the political rhetoric has been directed to the questions of island sovereignty and citizenship rights, the major issues of contention are rights to the resources of the sea and seabed in the area. These are the primary concern of the study. But they cannot be totally divorced from the human aspect, particularly as it relates to resource utilization. Furthermore, the sovereignty of the islands is also an important determinant of the pattern of maritime claims.

The chapter begins with an examination of the physical nature of the Strait, with particular emphasis on those characteristics and resources which have influenced the negotiating positions of the parties to the dispute. Also considered in the first section is the legal regime which has been applied to the area since the mid-nineteenth century. In this section it is argued that the seeds of the present dispute lie in the failure of the Queensland government to agree to an equitable distribution of the navigation channels and the reef areas before Federation, but that current negotiations have also been hampered by the extension of the

scope and nature of Commonwealth maritime jurisdiction in the last ten years. The second section is devoted to an appraisal of the major political groupings involved in the dispute - the Commonwealth, Queensland and P.N.G. governments, and the Torres Strait Islanders and their Papuan neighbours - and of their interaction as they strive to maintain or change the legal status of the area.

Earlier studies have focused on the socio-economic and legal character of the Strait and have paid little attention to the determinants and development of the P.N.G. claim. The most comprehensive examination of the contemporary socio-economic and legal regime of the Strait is contained in a series of monographs produced by the Research School of Pacific Studies of the Australian National University. These focus on the structure of the local economy, the demographic and settlement pattern and the legal status of the area and conclude with suggested policy options available to the Commonwealth and Queensland governments. The law of the sea considerations are only briefly covered and little attempt has been made to develop an overall perspective of the boundary question as a problem of international relations.[1] An earlier work of particular value which examines the boundary problem in a historical perspective until 1966 is that of Paul van der Veur. He considers the problem in the context of the earlier colonial relationship which existed in the South West Pacific and the Indonesian archipelago, and much of the detail of the early history of the dispute is drawn from his work.[2]

1. E.K. Fisk et. al. The Torres Strait Islanders (Canberra, 1974-75), vols. I-VI.
2. P.W. van der Veur, Search for New Guinea's Boundaries and Documents and Correspondence on New Guinea's Boundaries (Canberra, 1966).

In the early years of the dispute there was no distinct P.N.G. position, in part because of the subordinate status of its administering and official bodies, but since independence the parameters have changed. No longer is the problem a matter for the application of Australian constitutional law, and the definition of the offshore relationship between the Queensland and Federal governments. P.N.G. can now not only invoke the precepts of international law, but can also use less formal pressures such as international debate in the U.N. and the South Pacific Forum. But perhaps the most important consequence of independence is that the P.N.G. government can now bargain as a sovereign equal rather than rely on the good offices of the Commonwealth to provide an equitable solution. In some ways the achievement of independence by P.N.G. has also strengthened the Commonwealth bargaining position when dealing with the Queensland government.

THE PHYSICAL AND LEGAL ENVIRONMENT

The maritime area separating the mainland of the two countries is approximately 80 miles from north to south and 165 miles between the westernmost cays and the eastern edge of the Great Barrier Reef. The waters of the area overlie a shallow seabed intersected with numerous coral reefs and rock outcrops, and there are many inhabited and uninhabited islands throughout the region. The particular focus of the study is the northern half of the Strait, the area north of the 10^{o} parallel of latitude. It is this area, rather than the southern half, which has been the focus of dispute. This can be explained by the traditional dependence of the coastal

Papuans on fishing south of the boundary and the problems of shipping access along the coast of Papua. Furthermore, the claims of earlier P.N.G. administrations and the present government for a reordering of the boundary have only embraced areas north of the 10° parallel.

1. Islands

Although the status of the islands is not a matter decided by the application of law of the sea principles, sovereignty over land areas is important because it serves as the basis of maritime claims advanced since 1879. With the exception of Saibai and Boigu, all of the islands and cays north of the 10° parallel are relatively small. Most of the populated islands and many of the uninhabited cays north of the parallel are to be found in the central and eastern part of the Strait in the vicinity of the major reef complex, commonly known as the Warrior Reefs. Nine of the islands in question are inhabited,[3] while 13 are presently uninhabited.[4] Given the trend of developments in the law of the sea in recent years, the size, habitability and economic significance of these uninhabited islands may provide a guide to the future status of maritime rights in the area.

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3. Saibai, Boigu, Dauan, Maibuiag, Yam, Yorke, Stephen, Darnley and Murray Islands.
4. Aubusi, Moimoi, Kaumag, the Kawa Group and Kussa Island are low lying mudflats between Boigu, Saibai, Dauan and the Papuan coast. The others are coral elevations interspersed throughout the central and north eastern area: Turu, Deliverance, Turnagain, Pearce, Bramble, Underdown, East and Anchor Cays. Many of the latter group were inhabited in the latter nineteenth century and even now are periodically gardened and used as a source of turtle eggs and small wildlife.

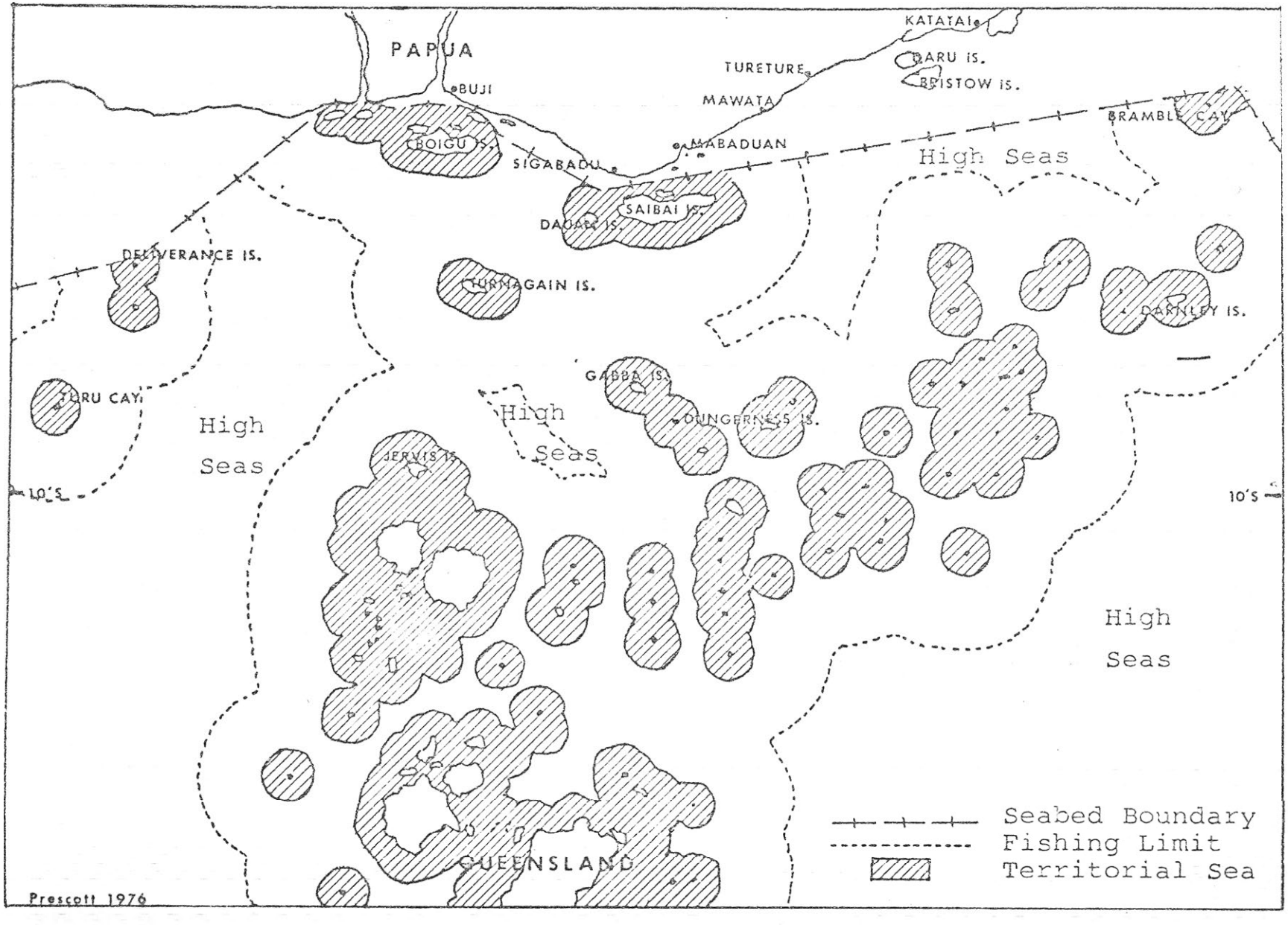
Since 1879 all of these islands have been incorporated as part of Queensland,[5] and since 1901 also as part of the Commonwealth. Because the islands are interspersed across the whole of the Strait their incorporation with Queensland has been indicated on maps by an enclosing line which also embraces the waterways of the Strait. As Holder points out, the validity of the incorporation of these islands, as part of the State of Queensland and the Commonwealth of Australia, is not questioned by constitutional lawyers.[6]

With the exception of Daru Island, the administrative centre for the Western Province of P.N.G., and the associated low-lying Bristow Island, the only other P.N.G. islands close to the international boundary are very small and uninhabited. Yapere Island is a mudbank near Boigu, and Sogeri and Marakara are small rock outcrops north east of Saibai.

Since 1879 the Queensland and later Commonwealth governments have taken steps to integrate the water and seabed around the islands south of the boundary into the State and national maritime regime, to the almost total exclusion of P.N.G. maritime claims.[7]

5. Colony of Queensland, The Queensland Coast Islands Act of 1879. The authority from the British government for the island annexation was contained in Letters Patent dated 10 October 1878.
6. W.E. Holder, 'A Borderline Case', New Guinea 8, 1 (1973), p.20. A possible exception to the position as stated by Holder is under examination by the Commonwealth Attorney-General's Department and the P.N.G. Department of Law. It is believed by both departments that the mudbank islands of Mata Kawa, Kawa and Kussa may have been mistakenly surveyed as part of the 'Talbot Group' mentioned in the 1879 acquisition, and may not legally be part of the Queensland domain. Confidential sources. See appended list.
7. Cogent legal analyses of the seabed claims are contained in L.F. Goldie, 'Australia's Continental Shelf : Legislation and Proclamations', The International and Comparative Law Quarterly 3, 4 (1954), pp. 543-8 and W.E. Holder, 'The Queensland "Border" : The Legal Position' in The Torres Strait Islanders, vol. V, pp. 28-38.

AUSTRALIAN MARITIME ZONES - TORRES STRAIT.



2. Shipping

The historical significance of the Torres Strait derives from its location as one of the few shipping channels between the Pacific and Indian Oceans. The only alternatives are the routes through the waters of Indonesia, and Bass Strait and routes to the south of Tasmania. Unlike the shipping lanes through Indonesian waters, the major constraints to usage are imposed by physical rather than political considerations. The seabed is generally shallow, and strong currents result in constant variations to the channel depth through their effect on the unstable sandy bottom. These two factors limit the long-term value of any dredging operations. The approaches to the main shipping lane, the Prince of Wales Channel, permit its use only by vessels of less than 45 feet draught. This restriction precludes the use of the route by vessels over 65,000 dwt, and also by submerged submarines. Furthermore, the region is intersected by reefs and submarine rock outcrops, many of which are inadequately charted.[8]

Only the most important channels are marked with navigation aids. These are limited to the narrow access from the Arafura Sea through passages north of Thursday Island, and hence relatively close to the Australian mainland. East of Thursday Island two routes are available. Vessels travelling south to Queensland ports can use the Inside Passage, as it is known, which skirts the Queensland coast inside the Barrier Reef. Shipping bound for P.N.G. or other Pacific ports use the Great North East Channel, located to

8. Detail supplied by Mr. T. Francombe, Australian Department of Transport, Coastal Surveillance Section, on 15 July 1976.

the east of the Warrior Reefs, which emerges into the Coral Sea south of Bramble Cay. Much of the Great North East Channel passes through Australian territorial waters because of the proximity of islands incorporated by the 1879 enclosing line. The Australian government has commissioned a R.A.N. survey of possible alternative routes through the Barrier Reef south of Cape York so as to afford a Coral Sea channel closer to the Australian mainland. The Second Three Mile Opening, east of Cape Direction, has been surveyed but is not equipped with navigation aids as yet.[9] Shallow draught vessels with experienced local navigators are able to traverse most of the Torres Strait, but boats departing from P.N.G. ports for centres west of Saibai are obliged to use a channel south of the 1879 enclosing line and within the Australian territorial sea around the northern islands. This problem of shipping movement along the Papuan coast has been stressed as one of the main reasons for changes in the status of the northern waters of the Strait.

One justification, advanced in 1879 by the government of Queensland for the acquisition of the whole of the Torres Strait, was the need to secure the shipping channel against foreign interdiction. At that time there were fears in Australia of German colonial encroachment; it was believed that if the southern coast of Papua were annexed by a potentially hostile power the trade routes to North Queensland would be jeopardized.[10] Acquisition of the islands of the Strait served to secure the navigation channels because the application of a three mile territorial sea around each island brought most of the channels under Queensland and

9. Confidential Source. See attached list.
10. H.C. Lee, The Papua New Guinea/Australia Maritime Border (LL.M.Thesis, University of Papua New Guinea, 1973) p.6.

and later Commonwealth jurisdiction.

The advent of commercial and military shipping unable to use the Torres Strait, and the existence of passages to the south of Australia closer to the main centres of population have lessened the importance of the northern route. Moreover, claims to the whole of the region on the basis of a need to control the sealanes were probably never valid because the ability to dominate the narrow southern entrances near Thursday Island would be sufficient to interdict foreign shipping passage. For this reason, and because of the existence of alternative routes, any loss of control over the northern sector of the Great North East Channel would be unlikely to jeopardize Australia's commercial or defence interests.

In recent years, however, the Commonwealth has sought to increase its superintendence over another aspect of maritime control. Since 1970 it has claimed comprehensive powers to control vessel source pollution, not only in the territorial sea, but on any reefs of the Australian continental shelf.[11] The terms of the legislation are written in such a way as to bring almost the whole of the main navigation routes in the Strait under Australian jurisdiction in matters relating to pollution. This action by the Commonwealth followed the grounding of an oil tanker in the Prince of Wales Channel in March 1970. The resultant oil spillage and the "mop up" operations were blamed for the decline of the cultured pearl industry in the southern part of the Strait.

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11. Navigation Act 1912-1970 section 329 E(1).

3. Sedentary Fisheries

One additional factor in the desire of the Queensland government to gain control of the Strait was the growing importance of the seabed fisheries.[12] In the latter half of the nineteenth century the Torres Strait became one of the world's largest exporting areas for pearls, pearl-shell and edible sea slugs, particularly trepang and beche-de-mer. Much of the racial heterogenity of the Islanders stems from the influx of fishermen from Asia and the western Pacific,and from the commercial and evangelical interests which catered for the needs of the population. In order to regulate the fisheries, the proto-Commonwealth government, the Federal Council of Australasia, in 1888 authorized the exercise of jurisdiction by Queensland over the seabed harvest throughout the whole area enclosed by the 1879 limits of land sovereignty. This jurisdiction was limited to the control of British citizens and protected persons from the colonies of South East Asia and the Pacific.[13] Thus this measure did not provide for general rights of maritime jurisdiction: these remained limited to the territorial sea around the Queensland islands.

Until 1952, when the problem of Japanese depletion of the pearl-shell beds threatened to develop into an international dispute, the Queensland legislation continued to apply.[14] Because the Japanese operations had hitherto

12. Lee, The Maritime Border, p.7.
13. Queensland Pearl, Pearl Shell and Beche-De-Mer Fisheries (Extra-Territorial) Act 1888.
14. Covering section 7 of the Constitution Act 1900 allowed the continuance of legislation passed by the Federal Council of Australasia, unless specifically repealed by the Commonwealth parliament.

been unregulated, the Commonwealth in 1952 assumed jurisdiction over all foreign activity concerned with the harvest of pearl-shell in the Torres Strait.[15] The Act allowed the continuance of State jurisdiction over the seabed of the territorial sea,but throughout all other areas of the continental shelf in northern waters only the Commonwealth legislation applied.

Although the seabed fisheries declined in importance in the 1950's,there is still a small amount of shell harvested in the Strait. The harvest and marketing is controlled by Islanders from Badu and Thursday Islands, but much of the labour is recruited from the Papuan coast. Most of the shell is sold to the cultured pearl farms of Western Australia, because efforts to establish similar farms near Thursday Island were frustrated by oil pollution after 1970.

Since the mid-1960's Commonwealth attention has switched to the protection of the marine life of the reefs which is being harvested for food by Taiwanese fishermen. As the 1952-53 Act did not cover the newly endangered species, more general legislation[16] has been passed by the Commonwealth which holds that the reef outgrowths of the seafloor are part of the continental shelf. Although the legislation has little deterrent effect, the frequency of shipping movement and the general level of Australian activity in the Strait have limited the extent of illegal fishing in the area. In terms of relations with P.N.G., the Pearl Fisheries and Continental Shelf Acts had the effect of claiming almost the whole of the Strait south of a boundary approximating to the

15. Pearl Fisheries Act 1952-1953.
16. Continental Shelf (Living Natural Resources) Act 1968-1973.

1879 line.[17] By this expedient P.N.G. fishermen could be legally denied access to the sedentary fisheries prescribed in Commonwealth regulations made under the provisions of the Act.

4. Swimming Marine Life

While sedentary fisheries are no longer the mainstay of economic life in the Torres Strait, the sea has always been a major source of food for both the Islanders and the Papuans of the northern coast. The area supports a variety of tropical reef fish, mackerel, shark, prawns and tropical crayfish. Marine animals are also an important ingredient in the local diet. The Torres Strait is one of the few remaining areas of the world where 'open range' hunting of dugong and turtles is feasible.[18] Both animals are protected species under Queensland and P.N.G. legislation, with the exception that hunting by indigenous inhabitants using traditional methods is permissible. The dugong are found mainly in the shallower waters of the western part of the Strait but the turtles range throughout the whole region. The sand cays of the north eastern portion of the Strait, particularly Bramble and East Cays, are important turtle breeding grounds.[19]

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17. The details of this seabed division and the compensatory grant of seabed rights to P.N.G. in the deeper waters of the Coral Sea are discussed in Paul W. van der Veur, 'Australian New Guinea's Borders and Shelves : Inequities and Idiosyncracies' Australian Outlook 18,1(1964),pp.19-20.
18. B. Neitschmann, The Ecology of Marine Herbivores, Seagrasses and Torres Strait Islanders (Australian National University, Department of Human Geography seminar paper, 18 August 1976), pp. 1-2.
19. Helen Duncan, 'Socio-Economic Conditions in the Torres Strait' in The Torres Strait Islanders, vol. I, p.1.

Commercial harvesting of the swimming marine life has never been a key ingredient in the local economy, although Thursday Island has been a base and processing point for the prawn fisheries of the Gulf of Carpentaria and the Gulf of Papua. But since the mid-1960's the importance of this role has declined with the establishment of facilities closer to the fish stocks, notably at Karumba, Weipa and Daru. There are, however, plans under consideration for the upgrading of the existing processing facilities at Thursday Island to handle a predicted increase in the production of tropical crayfish and local reef, shark and mackerel fisheries.[20] Daru, the administrative capital of the Western Province of P.N.G., provides processing facilities for both the local crayfish harvest and for the barramundi fisheries of the Papuan coast. Since 1970 the Commonwealth has attempted to promote the viability of the Islander economy by the development of commercial turtle farming, but it is generally recognized that the scheme has not been a success.[21] The only rapidly expanding commercial activity in the whole region is the harvest of the tropical crayfish and it is considered to have the potential for much greater expansion. Given the paucity of land crop alternatives in the coastal area of West Papua, it is understandable that the P.N.G. government places considerable importance on guaranteed commercial access to the reefs where the crayfish abound.

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20. Comment by Mr. J. Buchanan, Queensland Department of Aboriginal and Islander Advancement, Thursday Island on 2 December 1975.
21. The main source of Islander income in 1973 was Commonwealth social service payments (pensions, child endowment and unemployment benefits). Duncan, The Torres Strait Islanders, vol. I, pp. 50-3.

Fisk and Tait summarize the situation as follows:

> 'To the Islanders they [the Warrior Reefs] will be an important though by no means the only reef area in any open range type of turtle breeding scheme and they are perhaps the best crayfisheries accessible to them. To the Papuan coastal people they are virtually the only significant turtle and cray fisheries in the region.'

Except for desultory small-scale operations by trawlers working out of Thursday Island, fishing activity in the region emphasizes the use of the traditional methods of the indigenous population. Even the commercial exploitation of the crayfish depends on hand spearing because the species will not enter catching pots in the manner of the southern crayfish species. Furthermore, the more primitive method is preferred by the Papuan fishermen because it is labour-intensive and employs traditional skills.[23] The boats which operate out of Thursday Island in the swimming fisheries also recruit divers and crew seasonally from the Papuan coast. Neither the P.N.G. Administration, nor until recently the government, took steps to inhibit these activities, which were seen as a valuable source of cash income for people otherwise denied wage employment in an area of little job opportunity. The practice still continues, but the Papuans are now required to gain government approval before undertaking employment on the Thursday Island fishing boats.[24]

22. E.K. Fisk & Maree Tait, 'The Islands are Queensland's, New Guinea 8, 1 (1973), p.13.
23. Detail on the crayfish industry provided by Mr. R. Moore, Marine Biologist, P.N.G. Department of Agriculture, Stock and Fisheries, Daru on 6 January 1976.

Until 1968, by virtue of Australia's territorial sea claim, jurisdiction over swimming fisheries extended for only three miles around each island in the Strait. A similar limit was applied seaward of the Papuan coast and around the offshore islands north of the 1879 boundary, except that the 1879 line marked the division between Queensland and P.N.G. jurisdiction where islands on either side of the boundary were separated by distances less than 6 miles.[25] Since 1879 the Queensland government has exercised jurisdiction over the fisheries of the territorial sea in the Strait, notwithstanding the decision of the High Court in the Seas and Submerged Lands Act Case, which sought only to establish the primacy of Commonwealth law and not to supplant State legislation in fisheries matters. Since the passage of the Fisheries Act 1952-1967, however, the Commonwealth has assumed the right to control all fisheries in a zone extending nine miles beyond the territorial sea around each island. Prior to this decision much of the Torres Strait was open to unregulated foreign fishing because all waters beyond the territorial sea had been considered as high seas. The 1967 legislation had the effect of bringing most of this hitherto high seas area under Commonwealth fisheries jurisdiction and there are now only small areas of the Strait which remain as high seas.

It should be noted that since 1952 the activities of Australian and P.N.G. fishermen have been circumscribed in the whole of the Torres Strait because it constitutes part of Australian 'proclaimed waters' under the terms of

24. Interview with Mr. G. Bottrell, Deputy Province Commissioner, Western Province on 25 January 1976.
25. Holder, Torres Strait Islanders, vol. V, p.31.

the Fisheries Act 1952. It is only since 1974, when an amendment to the Commonwealth Fisheries Act conferred the status of 'foreign fishermen' on P.N.G. citizens, that they have legally been able to fish the remaining pockets of high seas beyond the Australian declared fishing zone without Commonwealth regulation. This situation is of significance because it is only in the areas beyond the Australian fishing zone that the crayfish can legally be taken by Papua New Guineans. Most of the Warrior Reef from which the P.N.G. harvest is presently being drawn constitutes part of the Australian declared fishing zone, and this situation is one of the more significant problems confronting the governments of the Commonwealth and P.N.G.

5. Oil and Gas Search

A sedimentary basin underlies the seabed in the eastern and western parts of the Strait and it is these areas rather than the central portion which are considered to be potential reservoirs of hydrocarbons.[26] Drilling in the area has been limited to one well on Anchor Cay in 1969 and there are conflicting reports as to the result. In any event, no further drilling was undertaken as a consequence of the joint Commonwealth-Queensland moratorium imposed in 1970 along the whole of the Barrier Reef. However, the most significant indications of the presence of oil or gas in the eastern Torres Strait derive from the success of gas wells drilled in the adjacent Gulf of Papua. Although the Gulf discoveries were not proved to be commercially profitable, the potential of the area is shown by a

26. Observation by Mr. J. Henry, Australian Department of National Development, Bureau of Mineral Resources, 19 July 1976.

recent decision to recommence drilling in 1977.[27] As Australia cannot satisfy domestic demand from existing oil reserves and P.N.G. is totally dependent on imported oil, there is a strong incentive to authorize further drilling in the Torres Strait. Furthermore, the shallowness of the seabed and the availability of uninhabited islands for processing and storage make the area attractive from a technological veiwpoint.

Under the terms of the 1967 Commonwealth-State agreement on offshore petroleum, the seabed between Queensland and P.N.G was delimited. Mention has already been made of the Coral Sea division and the problems caused by earlier permit issue under P.N.G. legislation.[28] In the Torres Strait the 1967 division generally followed the 1879 line, thus enclosing the whole of the seabed under Australian control for the purposes of oil exploration. One section of the demarcation, either through cartographic error or failure to take account of the rapid alluviation along the Papuan coast, enclosed part of Strachan Island as part of the Queensland area of jurisdiction. Inexplicably this anomaly was not corrected when the demarcation was reviewed in 1973 following the Australia-Indonesia-P.N.G. seabed agreements.[29] This failure, when coupled with the decision of the Minister for Territories in 1972 to prohibit further drilling in the Gulf of Papua, did little to engender support among P.N.G. politicians and administrators for the Australian seabed claim.

27. Post-Courier (Port Moresby), 6 October 1976, p.3.
28. See Chapter III, p.127.
29. The coordinates for the demarcation of the Queensland area of jurisdiction in the Torres Strait remain the same in both the Petroleum (Submerged Lands) Act 1967 and the 1973 amendment.

THE PARTIES TO THE DISPUTE

The parties to the dispute fall into two categories: those with an intimate interest because of their dependence on the maritime area for part or all of their livelihood, and the governments which have an interest in maintaining or changing the legal status quo in the Strait. Fisk and Tait categorize the 'people of Australia/Papua New Guinea taken as a whole' as parties to the dispute but go on to say 'of these, little explanation is required'.[30] But the attitudes and rationale of the governments involved cannot be so lightly passed over, because they are the entities which will determine the future status of the Strait.

1. The Islanders

Approximately 4,500 indigenous people live in the Torres Strait area but of this number only about 1,660 live on the islands north of the 10° parallel.[31] The people consider themselves to be an ethnic group different from the Papuans to the north and the aboriginals of Cape York. This tends to be borne out by anthropological research[32] but there are historic trading and ceremonial links with the coastal Papuans.[33] What should be stressed are the perceptions of the people as to their national identity, and there is little doubt that their orientation is towards Australia - a consequence of almost 100 years of Queensland government control. In essence their right to retain

30. New Guinea, p.9.
31. Fisk & Tait, New Guinea, p.16.
32. See for example J.R. Beckett, 'The Torres Strait Islanders' in D. Walker (ed.), Bridge and Barrier : The Natural and Cultural History of the Torres Strait (Canberra, 1972), pp. 307-26.
33. Margaret Laurie, Myths and Legends of the Torres Strait (Brisbane, 1970), and interviews at Buji, Sigabadu and Mabaduan villages, 15-26 January 1976.

Australian citizenship is not open to question. Mr. Olewale, the Papuan politician who has most publicized the supposed ethnic linkages of his people and the Islanders, has been more concerned about the transfer of the three northern islands rather than their population. In 1969 he acknowledged the Australian orientation of the Islanders and went on to say that they 'may prefer departure to Australia above association with Papua New Guinea'.[34]

But while the Islanders are determined to retain their Australian citizenship and the attendant material benefits, they also wish to live on the islands of the Strait. At present all of the inhabited islands north of Thursday Island are designated as an aboriginal reserve which is under the administrative control of the Queensland Department of Aboriginal and Islanders Advancement (D.A.I.A.). Local government within the reserve is undertaken by a network of island councils, and in addition there is a superior liaison body, the Islander Advisory Council, made up of representatives of the three major island groupings. Both the councils of the separate islands and the Advisory Council are answerable to the D.A.I.A. The Torres Strait is also a component of both Federal and State electorates which have demonstrated changes in voter allegiance. The Islanders have since the early 1970's utilized each of these political channels for the expression of their opposition to any changes to the sovereignty of islands or the maritime regime of the sea. Since August 1972 an additional political group, the Border Action Committee,

34. Papua New Guinea House of Assembly, Debates 1969, vol. II, no. 6, p.1486.

has been constituted to reinforce demands for no change to the legal status of the Strait.

On specific maritime matters, the Islander position of no change to the status quo is justified by their spokesmen by reference to the intimate relationship which exists between the people and their sea environment. Not only are the adjacent sea and surrounding uninhabited islands a source of food, but much of the mythology and beliefs of the inhabitants are focused on specific geographic features within the Strait. While the Islanders accept that the Papuans have traditionally fished the waters and reefs of the northern sector, they maintain that this access is not based on an inherent right but is a privilege granted by the Islanders. It has been stated by an influential leader of the Islander people that in the pre-contact period there existed a 'traditional border' which broadly corresponded to the 1879 line, except that northern segments of the Warrior Reef may have been included in the Papuan sphere of influence.[35] Associated with the desire to maintain the present limits of sovereignty, is the fear among the Islanders that if any maritime areas are ceded to P.N.G., that government will foster economic development on a scale likely to threaten the habitat and the traditional way of life. The Islander position in relation to events which

35. Comments by Mr. Kemaul Abednagno in an interview with the writer on 1 December 1975. The informant was unclear as to the extent of the reef area to which Papuans could lay valid claim through predominant usage. In the most extreme case it may have extended to Moon Passage, but he believed that a more likely division would have encompassed only Parakari, Kumaderi, Dagagota and Kokope sections of Warrior Reef.

have occurred since the issue was resurrected in 1969, will be elaborated in a later section.

2. The Coastal Papuans

Estimates vary as to the number of Papuan people dependent on the Torres Strait for subsistence and economic needs. Fisk and Tait put the figure at 3-4,000 inhabitants of the Western Province partially dependent on the Strait for their income.[36] Mr. Naipuri Maina, the member for the Western Regional electorate in the House of Assembly, indicated in 1971 that the figure was as high as 7,000.[37] Even taking the more conservative figure, it would appear that a greater number of Papuans than Islanders are dependent on the northern part of the Strait. The people from Daru and nearby villages are only partially dependent on the lobster fisheries of the northern Warrior Reef because their chief source of income, barramundi, and most of their subsistence needs, come from within P.N.G. territorial waters.[38] However, the villages opposite the sector where the national boundary passes close to the Papuan coast are much more reliant on fisheries south of the 1879 line. Fishing in the area west of Mabaduan village is predominantly for local consumption because the distance to the Daru market and processing plant, and a lack of local freezing facilities, preclude commercial exploitation. Money remitted by men

36. New Guinea, p. 11.
37. Assembly Debates 1971, vol. III, no. 1, p. 103.
38. A recent survey of the fisheries potential and current exploitation is contained in R. Kent Wilson, Western District Development Study (2nd draft, P.N.G. Government Central Planning Office working paper, October 1975), pp. 31-4.

working on boats out of Thursday Island provides one of the few sources of cash income for the villages west of Mabaduan.

Attitudes towards change to the present boundary appear to reflect either proximity to the border or the degree of dependence on the Warrior Reef for income. Opinions expressed at meetings of men from the Daru, Tureture and Katatai areas, which provide the most of the cray fishermen and which are some distance from the border, were in favour of changes granting guaranteed access to the northern portions of the Reef. There was no consensus as to whether actual legal changes should be effected, or whether an agreement on access between the Commonwealth and P.N.G. governments would be sufficient.[39] At meetings held in villages closer to the boundary there were no expressions of a desire for changes to the present regime. This probably reflected their appraisal that the Australian government would be unlikely to restrict their subsistence fishing south of the border, unless the dispute over commercial fishing rights led to a total embargo on P.N.G. fishing in the Strait. Furthermore, there was expressed a fear that the system of seasonal employment in the Thursday Island fishing industry might also be stopped if the P.N.G. government threatened the Australian hegemony in the area south of the Papuan coast.[40]

Unlike their Islander counterparts, the people of the Western Province do not have a multiplicity of political

39. Meeting with 40 representatives of the above villages, held at Daru on 20 January 1976.
40. Meetings held at Buji, Sigabadu and Mabaduan on 15, 16 and 26 January 1976.

bodies suitable for the presentation of their views on the boundary dispute. The Province headquarters is only an administrative centre for the national government and there has been no establishment of a provincial government in the area, although such an eventuality is foreshadowed by national government policy. Consequently, there is no situation analogous to the system of State government representation available to the Islanders. Daru is the headquarters for the Kiwai Local Government Council, embracing the west Papuan coast opposite the boundary, but it has been preoccupied with economic development in the area and has not acted as a mouthpiece for local views on the dispute. The major expressions of interest in the border question have emanated from the two members of the House of Assembly (now the National Parliament), Mr. Olewale and Mr. Maina. Both express views in favour of changes to the present boundary, which would appear to reflect their personal viewpoint, rather than that of their electorates.[41]

3. The P.N.G. Government

In the period under review, the impetus for change to the Torres Strait land and sea boundary was provided by Mr. Olewale after his election to the House of Assembly in 1968. His view that the 1879 line was an unfair colonial anachronism was not taken up at a governmental level until after the formation of the P.N.G. coalition government in 1972, although there had been some earlier support from other Papuan politicians prior to this date.[42] Even in the period

41. This opinion was established after interviews on 10 January 1976 and is reinforced by reference to their public statements. See for example their House of Assembly speeches referenced in footnotes 34 and 37.
42. See for example the comments of Mr. Albert Maori Kiki in the Post-Courier, 22 February 1971, p.3.

since 1972 the issue has not generated significant interest among the predominantly New Guinean members of the coalition and even Mr. Somare was cautious in his initial approaches to the Australian government. Throughout the whole debate the dominant political and negotiating role has been taken by Mr. (now Sir Maori) Kiki in his capacity as Minister for Defence and Foreign Relations.[43]

The attitude of the P.N.G. government can be summarized as a belief that the present division of the waters and seabed of the Torres Strait and the area to the east of the Barrier Reef is inequitable in that it is a result of decisions in which Papua New Guineans had no say.[44] The government stresses considerations of equity in the problem, rather than the strict application of the law of the sea, possibly because it can be argued that contemporary international law would require little change to the existing arrangement. In other words, P.N.G. seeks a political solution, rather than a rigid application of law, because it perceives this approach as the one most likely to result in substantial concessions by Australia.[45] Current law of the sea, moreover, is far from settled and is changing under political pressure, including just such demands for the restitution of colonial inequities.

43. Sir Maori Kiki is a Papuan from the Gulf Province, which lies immediately to the east of the Western Province.
44. The P.N.G. position was detailed in a speech to the National Parliament by Sir Maori Kiki on 15 June 1976. The text is contained in P.N.G. Office of Information, P.N.G. Newsletter, 18 June 1976, pp. 1-2.
45. This view is set out in J.R.V. Prescott, The Territorial and Maritime Aspects of the Torres Strait Question (paper presented at Townsville College of Advanced Education, 29 October 1976), p.10.

4. The Commonwealth Government

The interest of the Commonwealth stems from a number of factors. In the first instance, the Federal government was involved because the issue touched upon the exercises of its constitutional power over territories. When P.N.G. became independent in 1975, Commonwealth participation was justified by the exercise of the external affairs power. The external affairs power could also be invoked because of the international ramifications of changes to the status of the sea area, and the application of the 1958 law of the Sea Conventions in the disputed area.

There are also domestic legal implications which necessitate Commonwealth involvement. Any change to the sovereignty of the islands in the Strait will require the approval of both the Federal and Queensland governments, under the provisions of sections 111 and 123 of the Constitution. Furthermore, although the respective rights of the Commonwealth and State governments over the sea and seabed have been disputed, the trend of constitutional law interpretation and Commonwealth practice since 1967 leave little doubt as to the competence of the federal polity in these areas. Also, the central government can claim the right of involvement as a consequence of the 1967 referendum decision which gave power to the Commonwealth to legislate in respect of aborigines; the Islanders coming under this racial category.

As will be elaborated in the succeeding sections,the overriding interest of the Australian government is to achieve a settlement which will in some way satisfy all

parties.[46] Minor changes to the maritime regime in the north of the Strait will have a negligible effect on Australian society. The trend of developments seems to indicate that the primary concern is the satisfaction of the P.N.G. government: this is illustrated by the Commonwealth's willingness to subscribe to the P.N.G. 'equity' approach, rather than the strict application of contemporary practice in international law. Accordingly, the Australian government is prepared to forgo rights to some seabed areas, and possibly also areas of land and water over which it presently exercises jurisdiction. But because the Torres Strait seabed is believed in many quarters to have commercial potential as a reservoir of oil or gas, the Commonwealth shares with Queensland a reluctance to cede any more than the minimum amount of seabed. On the other hand, the Commonwealth places more emphasis than does the Queensland government on the need for amicable relations with P.N.G. and is therefore more accommodating to the P.N.G. viewpoint.

5. The Queensland Government

Queensland involvement in the dispute stems from three stated interests. The most publicized reason for participation is the stated obligation to protect the right of the Islanders to remain Australian citizens.[47] In support of this position, Queensland has continued to play an active role in the administration of Islander life, at a

46. The most detailed statement of the Commonwealth negotiating position is contained in a speech by the Prime Minister, Mr. Whitlam in parliament on 9 October 1975. Australian House of Representatives, Debates 1970, no. 31, pp. 1991-8.
47. See for example the comments by Mr. Bjelke-Petersen, the Queensland Premier, on 7 October 1975. Queensland Legislative Assembly, Debates 1975, vol. 268 , p. 846.

time when the other States are devolving their powers in areas of social welfare to the central government. It should be remembered that the inhabited islands likely to be affected by any change are aboriginal reserves. Closely associated with the citizenship question is the right of sovereignty over the islands,which has been previously discussed.

As previously indicated, any cession of Queensland territory would require the concurrence of the State government. This constitutional sovereignty over the land domain of the Strait is the single strongest bargaining point with which Queensland may be able to affect the outcome of the dispute. Although the Queensland government has participated in High Court action to challenge the claims of the Commonwealth to sovereignty over the territorial sea and seabed, the State government has not stressed its maritime legal claims as a basis for participation in the Torres Strait debate. The avoidance of this argument would appear prudent,given the unfavourable decision in the Seas and Submerged Lands Act Case. There is, in addition, a less well defined but nonetheless strong sentiment fostered by the government of Mr. Bjelke-Petersen that the interests of the State and its people must be protected against the ravages of centralism and the socialism of 'big' governments in Canberra.

On the other hand,there are strong arguments for the non-participation of the Queensland government in the debate. These have been highlighted by the P.N.G. government which has maintained all along that it will deal only with the

national government.[48] The main argument for exclusion of Queensland from the Commonwealth-P.N.G. dialogue is the lack of international status of the State, which thus precludes any direct negotiation on international political questions with P.N.G. as an independent nation. This legal argument has not deterred the Queensland government from seeking to become involved in direct negotiations. However, successive Federal governments, while adopting a bipartisan approach on the need for a settlement involving some derogation of Australian rights in the Strait, have been under pressure to ensure the smooth functioning of the Federal system. Furthermore, the Federal politicians from both major political groupings are under pressure to operate harmoniously with their State organizations, and this provides an added incentive to maintain Queensland involvement in the negotiations. As has been stressed in earlier chapters, the desire for State acquiescence before the adoption of an international posture on law of the sea matters has been an important impediment in relations with Australia's neighbours. This has been particularly so in the Torres Strait dispute, where it remains the single biggest handicap to the achievement of a solution.

In essence, the Queensland government view is that there should be no cession of sovereignty over land or maritime rights in the Torres Strait. The government argues that any such action would jeopardize the lifestyle of the indigenous inhabitants and would be establishing an international precedent, not justified by previous practice in similar disputes. Consequently, the government of Queensland

48. Comment by Chief Minister Somare in Post-Courier, 18 January 1973, p.4.

places heavy emphasis not so much on law of the sea considerations, which are susceptible to flexible interpretation, but on the contemporary international practice of maintaining former colonial boundaries.[49]

POLICY CONFLICT IN THE TORRES STRAIT : 1879-1976.

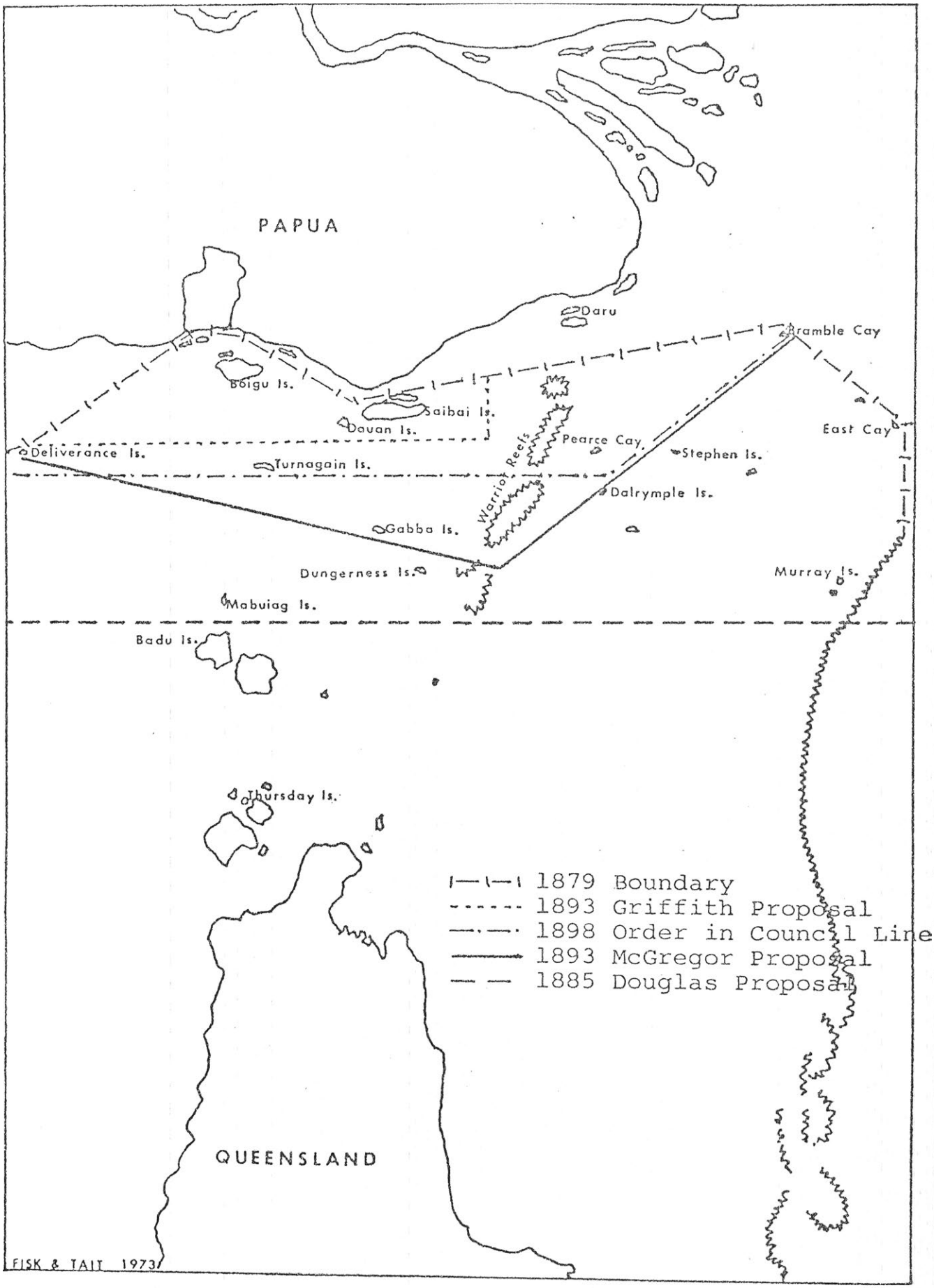
1. The Queensland Acquisition.

The Torres Strait was discovered by Western explorers in 1605 when it was used as a westerly route to Europe by a Spanish expedition in the Pacific. In spite of the treacherous nature of the shipping channels and the reputation for ferocity of the indigenous inhabitants, the Torres passages became an important access route to the South West Pacific from Europe. However, it was not until the 1870's that steps were taken to establish European control over the Strait.

The first step in the acquisition of the islands of the Strait was taken as a consequence of the detachment of Queensland from New South Wales as a separate colony. The division was effected in 1859 but the extent of the new colony was imprecisely described as 'all and every the adjacent islands, their members and appurtenances, in the Pacific Ocean'[sic].[50] Because of the ambiguity inherent in this definition, subsequent Letters Patent were issued by the Crown limiting the incorporation of islands to those within 60 miles of the coast. Consequently, there was

49. See footnote 47. This approach is supported by Prescott in his paper presented to the Townsville seminar, pp. 1-2.
50. Queensland Statutes (1936 Reprint), vol. II, p. 569 cited in Holder, Torres Strait Islanders, vol. V, p.39.

NINETEENTH CENTURY BOUNDARY PROPOSALS



concern in Queensland that this limitation did not allow for the exercise of effective control over the northern reaches of the Great North East Channel and the pearling grounds of the Warrior Reef. Although the British government was not prepared to accede to a request for the annexation of the south eastern portion of New Guinea by the colony, they did agree to the extension of Queensland control over all of the islands south of the P.N.G. coast in the Torres Strait. The decision was given effect by further Letters Patent and the acceptance of the proposal by the Queensland legislature in 1879.

The extent of Queensland sovereignty over the islands of the Strait has not been varied despite a number of attempts to modify the extent of the 1879 enclosure. What should be emphasized at this point is that the Letters Patent only made reference to the acquisition of the islands of the region, not to the sea or seabed.[51] It can be argued, however, that Crown rights over a three mile territorial sea around each island was implied, with the practical exercise of day to day jurisdiction vested in the colonial government. As discussed in the earlier chapter on Australia, much of the debate in recent years over State and Commonwealth offshore rights emanates from a false equation of the rights of jurisdiction with those of sovereignty in the Australian colonial situation. The spatial extent of Queensland jurisdiction was extended in 1888 to embrace the regulation of the harvest of sedentary marine life on the whole of the continental shelf encompassed by the 1879 boundary,

51. Colony of Queensland, The New Maritime Boundary of Queensland (Letters Patent from the British government presented to both Houses of Parliament, Brisbane, 1879), p.2.

but only in respect of British citizens.[52]

2. Nineteenth Century Proposals for Change.[53]

In 1884 the British proclamation of a Protectorate over Papua removed much of the rationale behind the Queensland acquisition of the Torres Strait islands. Accordingly, in 1885 it was proposed by Mr. John Douglas, the Resident Magistrate of Thursday Island, that all islands north of the 10^{o} parallel should be transferred to the Papuan Administration. His proposal would have had the effect of dividing the islands of the Strait almost equally between Queensland and Papua. The suggestion was not accepted by the government of Queensland. While the motives for this rejection are obscure, it may have been considered that the meagre administrative resources of the Protectorate were not sufficient to protect the shipping route or to regulate the pearling industry. It should also be remembered that the Queensland government derived revenue from the latter activity.

In 1893 the Premier of Queensland, Sir Samuel Griffith, presented an alternative proposal. He suggested that only the islands of Saibai, Boigu and Dauan and their adjacent mudbank appurtenances should be ceded to the Papuan Administration. While the proposal would perhaps have satisfied the demand for a shipping channel to western Papua, outside Australian territorial waters, it would not have conferred any significant economic benefit because none of the Warrior Reef was included.

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52. See footnote 13 page p.182.
53. The following discussion is drawn from van der Veur, New Guinea's Boundaries, pp. 1-34.

The Griffith proposal brought forth a counter-proposal from the Administrator of British New Guinea (as Papua was then called) later in 1893. MacGregor suggested that the boundary should be moved south to a point commencing at Deliverance Cay and then drawn through the Basilisk Passage to a coordinate just south of Bramble Cay. This amendment would have transferred the three northernmost inhabited islands and a number of uninhabited cays plus almost the whole of the Warrior Reef. It would have left the Great North East Channel under Queensland control while at the same time providing the required shipping channel from Port Moresby to the western villages of Papua. Access to the area around Mabaduan was important to the British Adminstration because in 1888 a government station had been established near the site of the present village.[54] In any event, the MacGregor proposal was not acceptable to the Queensland government. It is likely that the proposed transfer of the Warrior Reef and its important pearl beds may have been a major factor in the negative decision of the colonial government.

The Queensland government pressed the British Crown for the adoption of the Griffith proposal and in 1896 an Order in Council was prepared to this effect. However, MacGregor strenuously opposed the plan and the Queensland government responded with a compromise offer. This embodied a line passing south of Deliverance and Turnagain Islands, through Moon Passage,which bisects Warrior Reef,then north

54. In 1895 the station was disbanded and the new administrative centre for the whole of western Papua was established at Daru.

to Bramble Cay. This second Queensland suggestion was considered acceptable by the Papuan Administration and was drafted as a new Order in Council in 1898. However, it was never submitted to the Queensland parliament for ratification, possibly because of the preoccupation of that body with the imminent federation of the colonies. In 1901 when the Lieutenant-Governor of Papua raised the matter with the Queensland Premier he was informed that Queensland no longer had jurisdiction in such matters of external relations.

3. The Period 1901-1969.

In 1906 the Commonwealth government, which had earlier agreed to accept Papua as a territory, commissioned the Attorney-General (Sir Isaac Isaacs) to examine the constitutional implications of putting into effect the 1898 Order in Council. He suggested two possible methods. First, the British government could be approached to revoke the 1898 Order to Queensland and substitute one addressed to the Commonwealth. Given the climate of dependence and intimate political association which existed between Australia and Britain in the first years of the century, such a step would have been unlikely to engender significant political opposition in Australia. The second proposal was that Queensland might be persuaded to surrender the islands concerned, under the provisions of section 111 of the constitution, and that the Commonwealth should then incorporate them as part of the territory of Papua. The Commonwealth government, however, did not proceed with either suggestion.

It has been claimed that in 1919 the Queensland government was prepared to cede the three northern islands after the issue had been raised by the Executive Council of Papua.[55] In his article Hall goes on to state that the only impediment to the transfer was the obduracy of the Lieutentant-Governor of Papua, Sir Hubert Murray, who refused the incorporation as a gesture of protest against the low level of financial support for his administration.[56]

In 1925 the Queensland government succeeded in remedying an anomaly in the formal description of the State boundary,which had been incorrectly promulgated at the time of Federation. In the 1901 Letters Patent constituting the office of Governor of Queensland, there was no mention of the islands incorporated in the 1879 acquisition, but only those within 60 miles of the coast acquired under the provisions of the 1872 Letters Patent.[57] It is interesting to speculate whether this situation could have been used by the Commonwealth to incorporate the northern islands into the territory of Papua.

It was not until the mid 1960's that the boundary issue again achieved prominence. National interest had focused on the Torres Strait for a period in the early 1950's when the Commonwealth government became involved in a dispute

55. Article by Richard Hall in the Bulletin (Sydney), 15 May 1976, p. 22.
56. Van der Veur in his more comprehensive study makes no mention of the proposed transfer, but does refer to discussions in 1919 between Murray and the Queensland Premier over the provision of navigation aids in the northern part of the Strait. New Guinea's Boundaries, p. 149.
57. New Guinea's Boundaries, p. 33 and M.H. McLeland, 'Colonial and State Boundaries in Australia', Australian Law Journal XLV, 11 (1971), p. 679.

with Japan over the exploitation of the pearl shell of the Torres Strait seabed, but the boundary issue was not resurrected until the academic and political debate on law of the sea questions was prompted by changes in the commercial exploitation of Australia's offshore areas.

Academic and political interest in the boundary problem followed the publication of van der Veur's works in 1966, which drew attention to the maritime features of the problem.[58] These aspects were also highlighted by the need for a general reassessment of government control over the offshore areas around Australia which followed from the increase in foreign fishing and the beginning of seabed oil exploration. The debate entered the political arena with a call by the then Deputy Leader of the Federal Opposition, Mr. E.G. Whitlam, for a redefinition of the boundary.[59] However, the Liberal-Country Party coalition which governed in the 1960's was preoccupied with the more pressing problems of relations with the States and with foreign fishing interests, and did nothing to heed the Opposition call. Instead, the initiative passed to members of the P.N.G. House of Assembly, particularly Mr. Ebia Olewale, and this was recognized by Mr. Whitlam when he travelled to Daru for discussions with Olewale in December 1969.

4. The P.N.G. Initiative:1969-1972.

Like most P.N.G. politicians, Mr. Olewale had been active since his election in 1968 in promoting the economic interests of his electorate, which encompassed the Papuan

58. See footnote 2.
59. Canberra Times, 22 December 1965, p. 2.

coast opposite the boundary. As indicated earlier,[60] he had secured the exclusion of Australian barramundi fishermen from the rich grounds along the Papuan coast near Daru, and there is evidence that his desire for changes to the Torres Strait boundary were motivated partly by considerations of fishing access. There was also a strong sentiment of ethnic nationalism in his demands for change to the status of the Strait. His views first achieved national prominence in P.N.G. after a speech to the House of Assembly on 21 August 1969 in which he called on the Australian government to amend the 1879 line to either the location proposed in the 1898 Order in Council, or the 9°32' South latitude which bisects the Strait. He argued for the change on the basis of the inequality of the existing division of resources in the Strait, and the potential for Australian deprivation of P.N.G. fishing and navigation access in the northern part of the area. Olewale also suggested that the northern islands should be transferred to P.N.G., but, as has been indicated,[61] he was aware of the strong sentiment among the Islanders for their retention of Australian citizenship.[62]

In a considered reply five days later, which bears the hallmark of consultation with the Australian government, the Assistant Administrator, Mr. L.W. Johnson, stated that no change to the border was likely, or indeed necessary. He

60. See chapter III, p.130.
61. See footnote 34, p.191.
62. Assembly Debates 1969, vol. II, no. 6, pp. 1485-6. His impressions of Islander attitudes were probably obtained during visits to the islands of the north east of the Strait which he has undertaken as part of the maintenance of ceremonial and social ties linking the Islander and coastal people.

pointed to the disruptive effect on the lives of Islanders, and the constitutional difficulties in gaining Queensland acquiescence in such a move. While he went on to state that the offshore rights of P.N.G. were protected by the application of Commonwealth fisheries and seabed legislation, he neglected to mention that the area under local administration in the Strait was limited to a miniscule strip north of the 1879 line.[63] Olewale's motion for change was defeated on the floor of the House. Even so, the issue had attracted sufficient local prominence to come to the attention of a U.N. Visiting Mission reporting on the colonial administration of P.N.G. Included in their report was a cautious reference as follows: 'There is incipient pressure for revision of the boundary in the Territory's favour. This is far from being a national issue as yet but could develop into a source of potential friction unless sympathetically handled.'[64]

In the third House of Assembly Olewale was supported by the newly elected member for the Western Regional electorate, Mr. Naipuri Maina.[65] It was only after the formation of the Somare coalition government, which included Olewale among its ministers, that the issue began to be seriously considered by the P.N.G. and Australian governments. Mr. Somare was initially cautious in his approach to the question. In May 1972 he stated that his government was not in a position to make a definitive statement, except that some changes to the existing regime in the Strait

63. Assembly Debates 1969, vol. II, no. 6, pp. 1564-5.
64. United Nations Trusteeship Council, Report of the United Nations Visiting Mission to the Trust Territory of New Guinea, 1971, Supplement No. 2, p. 104.
65. Assembly Debates 1972, vol. III, no. 1, pp. 103-4.

were desirable.[66]

5. The Deadlocked Debate : May 1972 - June 1976.

The initial reaction of the State and Federal governments set the pattern for the later development of the dispute. The Premier of Queensland, Mr. Bjelke-Petersen, supported the wishes of the Islanders to remain Australian citizens and for the retention of Queensland sovereignty over the islands.[67] The Prime Minister, Mr. McMahon, sought to placate the Premier by stating that sovereignty over the islands was not negotiable, but he pointedly made no reference to the future of the maritime regime.[68] This was not surprising in view of the intra-party criticism directed at McMahon by his predecessor, Mr. Gorton, over the failure of the Commonwealth to assert its legal authority over the offshore areas.[69]

In mid 1972 McMahon arranged for the establishment of an inter-departmental study of the boundary, and although the report was not made public, one source suggested that the departments concerned (Foreign Affairs, Attorney-General and Treasury) were amenable to changes to the maritime status of the Strait.[70] The Commonwealth in July 1972 proposed a 'round table' conference of Federal, Queensland and P.N.G. officials, but the decision was premature because the P.N.G. government had not yet arrived at a firm negotiating position.

66. West-Australian (Perth), 6 May 1972, p.20.
67. Courier-Mail (Brisbane), 2 May 1972, p.7.
68. Sydney Morning Herald, 5 May 1972, p.5.
69. As one editorial suggests, the position of the Commonwealth vis-à-vis the Queensland government in the dispute would have been strengthened if McMahon had not been instrumental in securing the failure of the Territorial Sea and Continental Shelf Bill. The Advertiser, 5 May 1972, p.5.
70. National Times, 3-8 May 1972, p.4.

The accession to power of a Federal Labor government in December 1972, under the leadership of Mr. Whitlam, was greeted by proponents of change. In September 1972 Mr. Whitlam had emphasized the need for a settlement resulting from bilateral negotiations, and had also suggested the use of the negotiating provisions of the 1958 law of the sea Conventions as the basis for discussions.[71] On 12 December, as Prime Minister, he indicated his support for the use of the equidistance principle as the negotiating basis, and he also expressed a willingness to engage in consultations with the Queensland government.

On 17 January 1973 after a visit to Australia by the P.N.G. Chief Minister, a joint statement by the two national leaders was issued.[72] It did little other than to commit both governments to the need for changes in the regime in the Torres Strait. Both parties agreed that an important ingredient in any settlement would be the protection of the interests of the Islanders. However, the Australian Prime Minister indicated that parochial considerations would not be allowed to obstruct a final settlement, and thus served warning that the State and Islander views would not necessarily predominate in any discussions.

In a more positive vein, it was agreed that early talks on the law of the sea issues of concern would be appropriate. It was proposed to begin these discussions before the status of the islands had been settled. While this order of priorities indicated the attitude of the Whitlam government that the Commonwealth possessed unquestionable

71. Post-Courier, 26 September 1972, p.7.
72. Statement by Prime Minister Whitlam and Chief Minister Somare, Parliament House, Canberra, 17 January 1973.

rights to vary the extent of national maritime claims, it failed to recognize that the settlement of many of the law of the sea problems depended on the final status of the islands in the region. Conceivably, it may have indicated that the Commonwealth intended to minimize the importance given to the location of islands in the settlement of international maritime boundaries.[73]

On his return to P.N.G., Mr. Somare gave an indication of the negotiating stance to be adopted by his government.[74] He supported the idea of the 10° parallel as a suitable line of demarcation, but most of his statement was concerned with the mechanics of the settlement. Foremost was his commitment to negotiate only with the Commonwealth government. He stressed that in the period before independence it was the responsibility of the Commonwealth to secure the interests of the territory, and that as Queensland had no international status it should not become involved in the discussions.

The Commonwealth and P.N.G. negotiating positions were complicated by the attitude of the Federal Minister for Aboriginal Affairs, Mr. Bryant. Prior to a visit to the Torres Strait, Bryant had intimated a willingness to accept the transfer of sovereignty over the northern islands,

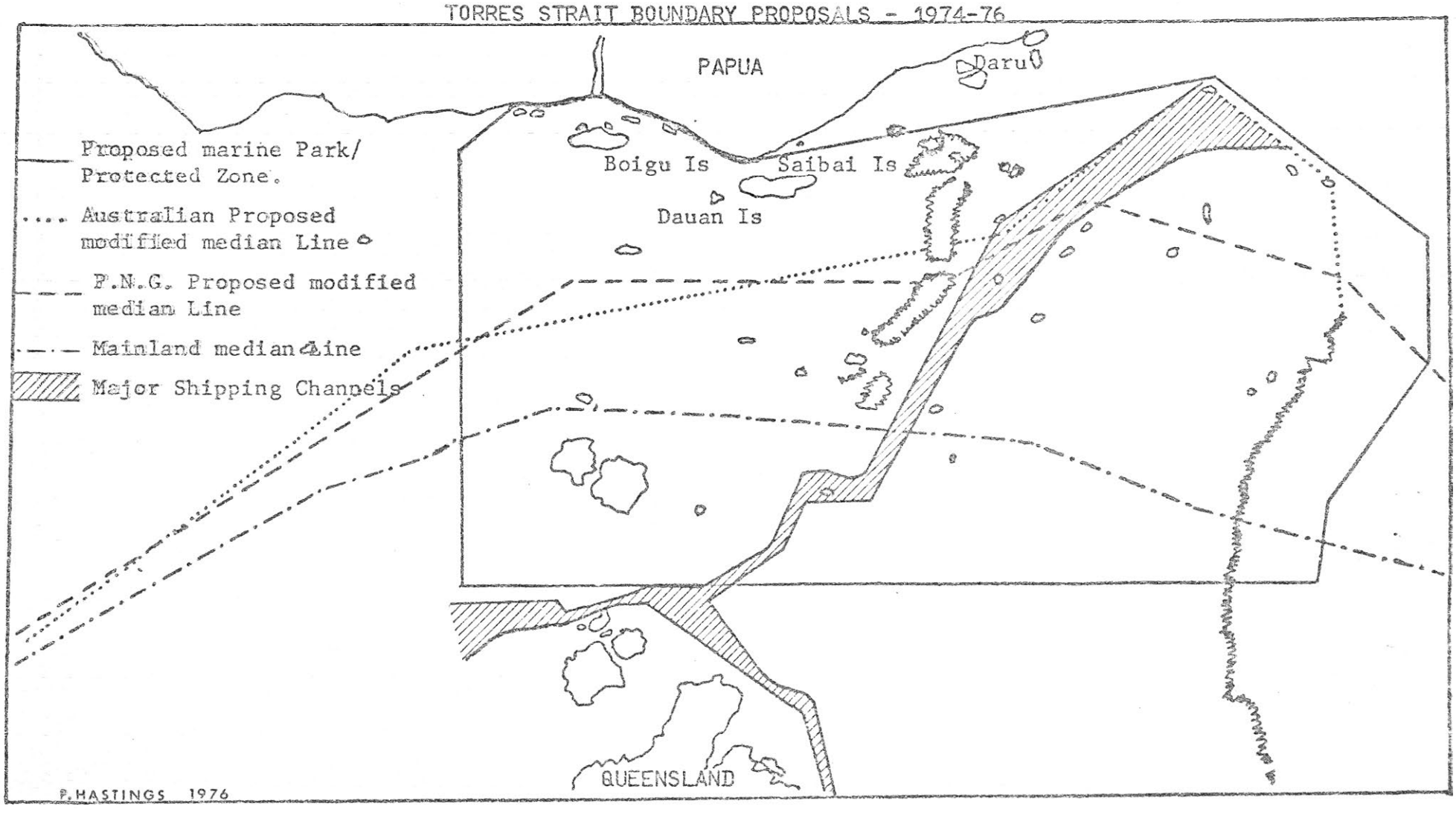
73. This suggestion is put forward by H.C. Lee, The Papua New Guinea/Australia Maritime Border, p.52. Prescott in his Townsville seminar paper (p.12) indicates that international practice in recent disputes involving islands is by no means settled. In the 26 cases cited, the presence of islands was discounted in 14 instances.

74. Post-Courier, 18 January 1973, p.4.

on the basis of Mr. Somare's commitment to the protection of the interests of the Islanders.[75] After his visit in April 1973, Bryant indicated that he was now opposed to the transfer of island sovereignty but was not opposed to P.N.G. maritime claims in the northern area. However, he subsequently developed reservations about the security of the Islander livelihood as an enclave within P.N.G. waters and drew tactless analogies with the problem of West Berlin in East Germany. Bryant's changing attitude prompted Mr. Somare to elaborate further on the P.N.G. position. He stated that P.N.G. no longer claimed the inhabited islands, but rejected the Bryant suggestion that only a sea boundary be realigned. Instead, Somare cryptically commented that P.N.G. must consider 'all the options open'.[76]

Following the failure of the major parties to establish detailed negotiating positions, the initiative passed to the 'grass roots' interests. In June 1973 political leaders from the Torres Strait visited Canberra and put their case to the Prime Minister. One basis for their desire that the legal status of the area remain unchanged was a fear that if the P.N.G. government was granted fishing rights in the Strait then it might license Japanese and Taiwanese commercial fishing in the area, with consequent detrimental effect on the main food source of the Islanders.[77] Their opposition was articulated mainly against the Port Moresby government, rather than their Papuan neighbours, and they expressed a desire for a meeting with leaders of the coastal Papuan community. The Prime Minister acceded to this request.

75. Australian (Sydney), 23 February 1973, p.2.
76. Post-Courier, 27 April 1973, p. 1.
77. Interview with Mr. Kemaul Abednagno, 1 December 1975. Mr. Abednagno participated in the meeting.


TORRES STRAIT BOUNDARY PROPOSALS - 1974-76
PAPUA
Daru
Boigu Is
Saibai Is
Dauan Is
Proposed marine Park/ Protected Zone.
Australian Proposed modified median Line
P.N.G. Proposed modified median Line
Mainland median Line
Major Shipping Channels
QUEENSLAND
P.HASTINGS 1976

The first meeting of Islanders and Papuans at an official level was held at Yam Island in September 1973.[78] The meeting failed to reach agreement on the boundary question, but there was consensus on the desirability of some form of governmental guarantee for the preservation of the Torres Strait environment and the traditional activities of the area. It was envisaged that there should be no restriction on fishing of direct benefit to the local communities, but that foreign fishing and oil drilling operations should be precluded. It is from this expression of concern about the environment and the desire to protect the traditional livelihood of the population that the Queensland government was later to develop its 'marine park' proposal. The conference also agreed that a further round of talks should be held to clarify the question of the 'traditional border' and it was decided to meet again at Daru.

The Daru conference was held in May 1974 and it again failed to achieve agreement on a border acceptable to the respective governments, although there was a degree of local consensus as to the location of the 'traditional border'. It was described as following the 1879 line, except that the Kawa and Kussa Island groups close to the Papuan coast, Pearce Cay and the northern part of the Warrior Reef were considered to be part of the Papuan domain.[79]

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78. Joint chairman of the meeting were Mr. George Mye, a representative of the Border Action Committee and the Islander Advisory Council, and Mr. Sam Kloney, the Mabaduan representative on the Kiwai Local Government Council. Officials from the Commonwealth, Queensland and P.N.G. governments were also present.
79. Details of both the Yam and Daru conference were obtained from Kemual Abedgnano and Don Moseby at Thursday Island on 1 December 1975. Both are Torres Strait Islander leaders who attended the meetings. The tenor of the meetings was confirmed in an interview with Mr. Sam Kloney on 13 January 1976.

In early 1974 the P.N.G. Cabinet reached agreement on a detailed negotiating position.[80] The government sought to avoid the 'zonal' approach adopted by the Commonwealth in the 1960's, and argued for a demarcation on the basis of a single line indicating the maximum extent of the sea and seabed claim of both countries. Second, the median line principle was proposed as the basis of settlement, with some concessions to take account of Australian islands north of the division and the rights of the Islanders in the area. Third, the P.N.G. government accepted the continuance of Australian sovereignty over the inhabited islands north of a modified median line, but argued that the status of uninhabited islands should be the subject of further negotiation. Similarly, it was suggested that the future regime of the Great North East Channel should be open for reappraisal. As an alternative negotiating position, it was decided that P.N.G. should press for seabed and fishery zone concessions in the Coral Sea if the Australian government was unable to meet their demands for changes in the Strait. The P.N.G. government was non-committal on the question of environmental preservation raised at the earlier meetings of local inhabitants, since it was considered that a preoccupation with such issues might obscure the major demands.

Instead of replying with a positive response to the P.N.G. proposal, which was communicated to the Australian government in March 1974, the Commonwealth became embroiled in discussions with Queensland. In April 1974 the government of Mr. Bjelke-Petersen abandoned its earlier posture of avoiding discussions with the Commonwealth, and put

80. Confidential source. See appended list.

forward a concrete proposal.[81] In essence, the State proposal was an elaboration of the environmentally protected zone concept discussed at the Yam Island meeting. It reiterated the determination of the Queensland government that sovereignty over the islands and rights of citizenship for the local inhabitants should remain with Australia. No mention was made of the uninhabited islands, and it might be inferred that their future was negotiable in the context of the Queensland initiative. The proposed boundary of the 'marine park' was defined to include the Papuan coast from a point near Parama Island to the intersection of the 141° 30' longitude then south to a point just north of Wednesday Island. The eastward limit of the zone was envisaged as the 145° meridian, beyond the eastern edge of the Barrier Reef.

Within the area it was envisaged that commercial fishing would be limited to pearling and trochus gathering, both of which were controlled by Islanders. No mention was made of crayfish harvest, but there was provision for subsequent vetting of proposed commercial acitivity by a representative body comprised of Islanders and Papuans. Inclusion of large areas to the east and west of the Strait served to preclude further oil exploration in the proposed zone. Some of the areas to the east of Daru included in the zone were already covered by exploration permits issued by the P.N.G. government, under the terms of the Commonwealth Petroleum (Submerged Lands) Acts. The Queensland proposal specified that within the zone, the existing maritime boundaries should remain, but as a conciliatory gesture it was suggested that a new seabed demarcation in accordance with the

81. Queensland Debates 1973, vol. 264, pp. 3417-21.

principles of the Continental Shelf Convention might be effected outside the zone. It can be surmised that this concession was designed to encourage P.N.G. to abandon its Torres Strait claims in favour of increased seabed rights in the Coral Sea. If so, it did not succeed. The proposal was generally not well received by the P.N.G. government, particularly the last proviso which called for direct negotiations between Queensland and P.N.G. prior to the formal conclusion of any treaty between Australia and P.N.G. This latter suggestion was also unpalatable to the Commonwealth which subscribed to the P.N.G. view that the latter country should deal only with the Australian government.

It would appear that the Whitlam government sought to achieve modifications acceptable to the Commonwealth before incorporating the 'marine park' concept in a firm proposal to the Port Moresby government. While some features of the Queensland proposal were favourably received, four items in the April 1974 resolution were not acceptable to Canberra. First, it was reiterated that the Commonwealth was committed to a southward readjustment of the seabed boundary throughout the whole of the Strait. Second, it was suggested that the eastern edge of the Barrier Reef, rather than an arbitrary line further to the east, might be an acceptable boundary for the zone. Third, Mr. Whitlam was not prepared to place a 'blanket' moratorium on oil drilling, but favoured a selective approach based upon environmental considerations. Finally, he ruled out the possibility of direct negotiations between P.N.G. and Queensland but did acknowledge his readiness to accept a parallel agreement between the Commonwealth and the State.[82] Perhaps the most

82. Debates 1975, no. 31, pp. 1993-4. The comment on the Commonwealth attitude to the boundaries of the protected/

important outcome of the initial discussions between the Commonwealth and the State was the agreement to undertake more comprehensive discussions on the overall problem. These discussion were undertaken at a departmental level from November 1974 until July 1975.

In September 1975,on the eve of independence, the P.N.G. Minister for Foreign Relations, Sir Maori Kiki, wrote to the Australian government reiterating his government's position and expressing their desire for an early settlement.[83] Central to the P.N.G. position was a repudiation of the extent of the Australian claim to the Torres Strait seabed and support for a re-examination of respective claims in the Coral Sea. While the 'marine park' concept,as a framework for the protection of traditional activities, was accepted as a negotiable proposition, the Queensland proviso that there should be no boundary change within the park was categorically rejected. It was considered essential by the P.N.G. government that the whole of the Strait be delimited for jurisdictional purposes. The statement also made reference to the possibility of unilateral legislative action to challenge the Australian seabed claim in the area. As indicated in chapter III[84] provision already existed for variations to the area of the P.N.G. seabed claim,under the terms of the P.N.G. Petroleum (Submerged Lands) Act 1974.

On a more unofficial level, Mr. Olewale chose an Independence Day speech to draw attention to the unresolved

zone was provided by a confidential source. See appended list.

83. Confidential source. See appended list.
84. See p. 145.

problem. He stated that the 'Torres Strait is both historically and ethnically part of Papua New Guinea' and threatened that the national government would 'effect economic development in the area as we see fit to do so'. He also opposed the idea of a 'marine park' because of its inherent restrictions on economic development. Furthermore, he echoed the fear of many P.N.G. politicians and officials that unless a speedy settlement was achieved then oil drilling might recommence under Australian auspices, and that if commercial deposits were found then the attitude of the Commonwealth government towards seabed concessions would harden.[85]

Before the Commonwealth had time to reply to the P.N.G. statement, conflict between the Queensland and Federal governments reappeared. As early as July 1975 there were indications that the talks between the Commonwealth and the State were foundering because of a failure to agree on the terms for the establishment of the 'marine park'. In a speech to parliament on 9 October 1975,Mr. Whitlam stated that the Queensland government had reneged on its earlier advocacy of a 'blanket' prohibition on mineral exploration on the continental shelf by making a distinction between the mining of the seabed and the drilling of the subsoil and on islands within the proposed park.[86]

These subtle distinctions in attitudes towards seabed mining were overshadowed by a more serious allegation made

85. Post-Courier, 16 September 1975, p.3. Mr. Olewale has a vested interest in commercial activity in the Strait. He is one of the directors of the locally owned barramundi and lobster processing factory at Daru.
86. Debates 1975, no. 31, p. 1994.

by the Queensland government.[87] Mr. Bjelke-Petersen accused the chief Commonwealth negotiator with the Islanders, Dr. H.C. Coombes, of duplicity in a meeting at Thursday Island on 20 September 1975. He alleged that after the Islanders had expressed dissatisfaction at a Commonwealth suggestion that all islands north of the 10° parallel would become Australian enclaves in a P.N.G. maritime regime, Coombes indicated that if they remained intransigent then P.N.G. might reassert its claims to the islands. Bjelke-Petersen went on to state that his government would not accept the cession of sea or seabed areas which he considered part of Australia, and whose retention had an importance beyond the satisfaction of the aspiration of the Islanders.[88] Furthermore, he indicated that his position was bipartisan and would be maintained even if dealing with future Federal governments of the same political persuasion as himself. By adopting this stance the Premier effectively excluded his government from further negotiations with the Federal Labor government.

In Federal parliament two days later the Prime Minister presented a detailed rebuttal of the Queensland government allegations. The most illuminating parts of the speech were the tabling of a position paper accepted by the Islanders at the Coombes meeting, and Whitlam's proposal for a resumption of talks between the Commonwealth and Queensland.[89] The Islander paper reiterated their commitment to no change to the present boundary, but did set out conditions for the

87. Queensland Debates 1975, vol. 268, pp. 845-7.
88. Queensland Debates, p. 847.
89. Debates 1975, no. 31, pp. 1996-7.

acceptance of modifications if P.N.G. proved adamant in its demands for change. It stressed the need for an environmentally protected zone and demanded that the Islanders, in conjunction with coastal Papuans, have the right to veto further commercial ventures in the area. A 10 year oil exploration embargo was proposed. The paper also expressed a willingness for the dispute to be subject to outside arbitration if Australia and P.N.G. could not agree to a settlement acceptable to both 'grass roots' parties.[90]

In his speech of 9 October 1975 the Prime Minister also called on the Queensland government to continue the existing drilling moratorium, and in so doing illustrated the inhibitions placed on Commonwealth negotiations with P.N.G. by the system of cooperative decision making embodied in the 1967 Commonwealth-State offshore agreement. Even though the Federal Labor government asserted the primacy of Commonwealth law in offshore matters, especially when external relations were involved, there was a reluctance to deliberately destroy the machinery for the regulation of offshore oil search at a time when Australian was trying to foster exploration activity. Although the High Court decisions of December 1975 may have strengthened the formal legal position of the Commonwealth, it did little to resolve this particular dilemma.

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90. Interviews with Abednagno and Moseby, who attended the Coombes meeting, confirmed the Islander acceptance of the position statement, but both emphasized in separate discussions that it was never meant to be construed as a ready acceptance of proposed changes. Both indicated that the conditions for acceptance of boundary modifications were only inserted after Dr. Coombes had indicated that if the case were taken to the I.C.J., a decision less favourable to the Islanders might result.

The problem was not alleviated by the accession to power of the Liberal-Country Party Coalition government in December 1975. In the first place, they faced the bipartisan opposition of the Queensland government to any change in the Strait, as earlier indicated by Mr. Bjelke-Petersen. Second, after three years of confrontation between the States and the Federal Labor government, the new Prime Minister, Mr. Fraser, was ostensibly committed to a system of closer cooperation with the States.[91] Any unilateral action by his government would be seen as a negation of 'cooperative federalism'.

At the beginning of January 1976 the Queensland Premier called for an early conference with the Commonwealth and P.N.G. governments, on the basis of the April 1974 Queensland proposal.[92] The P.N.G. government reacted cautiously, and Mr. Somare expressed the view that the constitutional differences between the State and the Commonwealth must be settled before P.N.G. became involved in definitive negotiations.[93] After a visit to Australia by Mr. Somare in March 1976, Mr. Fraser and the P.N.G. leader issued a joint statement indicating their commitment to an equitable and permanent settlement. Mr. Fraser for his part indicated that his government was prepared to accept some adjustments to the present regime.[94] Mr. Somare responded by stating that he would not proceed with the introduction of proposed new seabed delimitation legislation,

91. Federal Liberal/National Country Party Coalition, The New Government policies (Canberra, 1976), pp. 29-31.
92. Statement by the Premier of Queensland, Brisbane, 5 January 1976.
93. Australian, 15 January 1976, p.3.
94. P.N.G. Newsletter, 5 March 1976, p.1.

which had been foreshadowed by Sir Maori Kiki in September 1975.[95]

The Queensland government and the new chairman of the Islander Advisory Council, Mr. Getano Lui, continued to press for the adoption of the April 1974 'marine park' proposal, subject to the modifications incorporated in the position statement of September 1975.[96] By this time the Queensland government had ceased to stress the issues of island sovereignty and citizenship because the repeated Commonwealth assurances on these questions had dulled their emotive appeal. Instead, the government followed the Islander lead in emphasizing the environmental considerations and the need to maintain the traditional way of the life of the Strait inhabitants, except where changes were sanctioned by the local communities. In an interview in mid-1976 the Queensland Premier, in his self-appointed role of arbiter of the national interest, reiterated his opposition to any change to the legal status of the area, but intimated that the question of oil drilling in the Strait may be under review by his government.[97]

6. The Limited Agreement of 1976 and Subsequent Negotiations

The first breakthrough in negotiations was announced on 4 June 1976. This followed two meetings between Sir Maori Kiki and his Australian counterpart, Mr. Peacock, in mid and late May. The announcement indicated that Australia had agreed to a southward movement of the seabed boundary, but that no definite location had been settled.

95. Canberra Times, 16 March 1976, p.3.
96. Canberra Times, 2 April 1976, p.3.
97. Interview with Peter Hastings in the Post-Courier, 9 June 1976, p.5.

However, it was stated that Saibai, Boigu and Dauan islands would be north of the new demarcation,although they would retain their Australian status and a three mile territorial sea, except on their northern shores where a separate delimitation would be necessary because of the proximity of the Papuan coast. There was also agreement on the establishment of a protected zone in which traditional fishing and movement patterns would be guaranteed. While it was accepted that the proposed zone would extend north and south of the new seabed boundary, the exact limits were not settled.[98] Insofar as the agreement indicated that the seabed boundary within the Strait was to be realigned, it was in accord with the wishes of the P.N.G. government and a repudiation of the Queensland proposal. But, as indicated subsequently, the major remaining point of contention was whether the southward extension of P.N.G. jurisdiction should be limited to the seabed,as proposed by the Commonwealth, or should embrace rights over the superadjacent sea and airspace, as argued by P.N.G.

The agreement met with predictable hostility from the Queensland Premier. He was quoted as saying that '...Papua New Guinea has no legal or moral right to claim any part of the Torres Strait, except its greed to lay hands on oil supposed to occur in this part of Queensland and Australia'.[99] There was also an adverse reaction from some P.N.G. politicians. The Leader of the Opposition in the National Parliament, Sir Tei Abal, called on the disputants to delay a final agreement until after the next P.N.G. general elections.

98. Details of the interim agreement are contained in P.N.G. Newsletter, 4 June 1976, p.1.
99. Canberra Times, 7 June 1976, p.1.

Should the present opposition groups form a government, he added, they would review any agreement negotiated before they took office. His viewpoint reflected the opinion among many observers[100] in both P.N.G. and Australia that the Australian government was trying to avoid international oppobrium during what might be considered as the last stage of the decolonization process.

In a speech to the National Parliament on 15 June 1976, Sir Maori Kiki outlined the major issues which remained to be settled. First, he indicated that the P.N.G. government could not accept that all of the islands north of a boundary should remain as Australian territory. The announcement of 4 June carefully avoided all reference to the future of the uninhabited islands. Kiki also resurrected the earlier desire of his government that the seabed boundary in the Coral Sea should be renegotiated. However, as a gesture of conciliation to Australia he indicated that the long awaited seabed boundary legislation would be further delayed, pending a resumption of negotiations.[101]

The difference of opinion over the type of jurisdiction to be exercised by P.N.G. in the Strait was raised by Kiki during a visit to Australia in July 1976. He stated that what P.N.G. required was an 'all purpose' maritime boundary, rather than just a seabed and subsoil delimitation. This was in accord with the arrangement negotiated with Indonesia in their delimitation of the seabed boundary in the Arafura Sea in 1973.[102] This demand was rebutted by

100. See, for example, Prescott's Townsville seminar paper, p.10.
101. P.N.G. Newsletter, 18 June 1976, p.1.
102. Canberra Times, 7 July 1976, p.1.

Australian officials who are persevering in their efforts to limit the extension of P.N.G. jurisdiction in the Strait to seabed rights.

At the time of writing (December 1976), the boundary question remains unsettled with no announcement of further points of agreement since June 1976. A Federal Joint Parliamentary Committee, earlier set up to examine the question, reported that there should be no change to the existing regime in the area,[103] but it would appear that the Fraser government and their P.N.G. counterpart remain committed to the need for some changes, although there is little consensus as to the details. For the present, the existing Australian claims the territorial sea, fishing zones and seabed remain, but unless settlement is achieved in early 1977 it is possible that P.N.G. will formalize a counter-claim by legislative fiat or executive proclamation.

CONCLUSION

In this section, a restatement of the law of the sea considerations and their bearing on the dispute, and other factors o contemporary international negotiation and adjudication practice, are considered in terms of their possible contribution to a solution to the Torres Strait question. Even so, it is argued that domestic political considerations, particularly in Australia, and the overriding desire for good relations between the two countries, rather than the strict application of international law, will be the predominant influence on any final settlement.

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103. Canberra Times, 15 December 1976, p.21.

Contrary to popular opinion it is not so much the 1879 acquisition of the islands of the Strait, but rather the Commonwealth extension of maritime jurisdiction between 1952 and 1970, which has made the solution of the boundary problem so difficult. The 1879 line conferred Queensland sovereignty only over the islands and not the intervening water and seabed, although the 1888 decision of the Federal Council of Australasia did extend the sedentary fisheries jurisdiction of the colony. It was not until the mid-1960's, when the problem of fisheries protection against foreign exploitation and the need to regulate offshore oil search necessitated an increase in the scope of Australian maritime jurisdiction, that the Torres Strait dispute was resurrected.

The importance of the islands of the Strait as a factor in the application of the law of the sea by Australia cannot be overlooked. The presence of Australian islands throughout the whole of the area has been the basis on which the Commonwealth claims to territorial sea, fisheries zones and the seabed have been justified in terms of international law. Although Prescott has indicated that contemporary negotiating practice has been to limit the importance of small and uninhabited islands,[104] the Queensland and Commonwealth governments have indicated a reluctance to cede even the uninhabited areas, and the P.N.G. polity has been equally anxious to gain control over such islands. The problem of island cession is complicated by the Australian constitutional requirement for both Federal and State concurrence before any change to the legal status is effected. Thus it

104. Townsville seminar, pp. 9-10.

might be argued that if Queensland is opposed to any changes to the legal status of the Strait, it should advocate negotiations which emphasize the importance of the land mass as the determinant of national maritime rights. The status of the territorial sea around the three northern inhabited islands appears settled, but the issue of Australian rights around the other islands remains clouded in uncertainty because of P.N.G.'s claim to water areas corresponding to their seabed claim.

The historic significance of the Great North East Channel has lessened with the advent of bulk carriers and warships too large to navigate the channel. Accordingly, the question of passage rights no longer dominates discussions between P.N.G. and Australia. Perhaps the main shipping concern of all parties to the dispute is the problem of vessel source pollution, and it is likely that any final agreement will include clauses for the application of uniform standards of pollution control. Such measures would be facilitated by the retention of Australian control over vessel pollution in the Strait, even beyond the territorial sea, by virtue of the application of the Navigation Act 1912-1970. Even if P.N.G. were to gain control of the north eastern sector of the main channel and seek to apply shipping restrictions, these may well be negated by the Australian control of the Arafura Sea entrance near Cape York, and the existence of the alternate channel through the Second Three Mile Opening. An examination of the map will indicate that in terms of trade, the Torres Strait is only of particular importance to P.N.G. and north Queensland although some of the oil supplies for south eastern Australia from Indonesia

pass through the Strait. It is questions of sedentary fishery and seabed oil access which have become the prime considerations in the negotiations since 1972.

The control of fisheries in the Strait is a matter of particular importance for P.N.G. In order to gain security of access for Western Province fishermen to the rich crustacean concentrations of the Warrior Reef, the P.N.G. government has sought rights not only over the seabed but also over the superadjacent water. It is perhaps ironical that the earlier decision at UNCLOS I not to include prawns and crayfish as sedentary species has worked to Australia's advantage in the Strait. Unless rights to the waters above the reef can be guaranteed to P.N.G. then there can be no security of access to the fish stocks. This may be one reason behind the reluctance of the Commonwealth to accede to P.N.G.'s demands that the southward movement of the boundary should encompass areas of water now controlled by Australia for fisheries purposes.

It may be that the P.N.G. government will accept an undertaking that commercial fishing in the Strait should remain in the hands of the local inhabitants, as at present. The only foreign operations sanctioned by P.N.G. in the general area have been the prawning activities conducted to the east in the Gulf of Papua. Inshore tuna fishing was specifically precluded by the provisions of the 1968 Australia-Japan Fisheries Agreement. It would, therefore, seem that an overall agreement between P.N.G. and the Commonwealth on the fisheries question is possible, as the only major source of contention appears to be the P.N.G. claim to extend

the water boundary southward. The P.N.G. claim is not surprising in view of its advocacy of both the archipelago and economic zone concepts at UNCLOS III and the South Pacific Forum. What is more difficult to justify is the Australian reluctance to accede to the demand, in view of its support for both concepts at international forums.

At the core of the P.N.G. negotiating position has been the desire to obtain rights to wider seabed areas for the purpose of oil exploration. The cession of seabed areas presently under the administrative control of Queensland has been strongly opposed by that State. Both parties believe that the sedimentary basins underlying the Strait are potential sources of oil or gas. This opinion is based on very limited scientific evidence, but such is the potential importance of an oil discovery to Australia, P.N.G. and Queensland that they are negotiating on the basis that oil does exist in the area.

The P.N.G. government has widened its options on this question by also indicating that it favours a re-examination of the international seabed boundary in the Coral Sea, which was decided by agreement between the Commonwealth and Queensland in 1967. On the basis of the existing gas discovery in the Gulf of Papua this latter course of action by the P.N.G. government would appear more practical, rather than pursue the chimera of oil in the Torres Strait. The whole question of changes to the seabed regime highlights the dilemma faced by the Commonwealth government, as evidenced by the earlier negotiations with Indonesia over the North West Shelf boundary. Unless the State affected by any change is prepared to accede to the Commonwealth decision,

then the whole system of joint control of offshore exploration will be jeopardized. In concert with their veto power over the cession of islands, threats by the Queensland government to withdraw from the 1967 offshore oil agreement are probably the most powerful bargaining weapons in the State armoury.

To place the issue in broader perspective, reference may be made to the pattern of maritime boundary settlements in recent years. Prescott, in his recent seminar paper, highlights the three contentious features of most significance for the local problem.[105] First, he points to the fact that regardless of their ethnic or geographic untidiness, it has not been the practice to redefine colonial boundaries. It is perhaps appropriate to note that he focuses on boundaries between two or more ex-colonies, rather than between the ex-colony and the colonial power. With the exception of the boundaries between metropolitan Spain and Morocco, the situation whereby P.N.G. and Australia shared both a boundary and a colonial relationship is unique, and may justify the establishment of a precedent in the terms of settlement.[106] Second, he demonstrates by reference to recent settlements that the possible willingness of the Australian government to cede uninhabited islands would be creating an international precedent. He concludes, thirdly, that the settlement which may eventuate is likely to be on the basis of political considerations rather than the detailed application of the law of the sea, and that this is undesirable because it weakens the importance of legal precedent. While

105. Townsville seminar, pp. 2 and 4.
106. I am indebted to Dr. W.H. Smith, Department of Government, University of New South Wales, for the observation of the boundary relationship.

it is perhaps true that the final solution may embody many unique features which would be difficult to justify by recourse to international legal practice, it may also be apposite to point out that because a solution does not accord with precedents it is not *per se* a retrograde step in international relations. Instead,it tends to illustrate one of the basic themes of the thesis; that the formal wording of contemporary law of the sea is no more than a guide for the essentially political process of maritime dispute settlement.

CONCLUSION

Mid-twentieth century developments in the law of the sea illustrate the essentially political nature of this facet of international law. UNCLOS I negotiations were based on a draft set of articles drawn up by international jurists, but it became evident that when national self interest was balanced against sacrifices for the sake of consensus, the latter would not prevail. As consequence, UNCLOS I and its successor conference in 1960 failed to satisfactorily codify those features of the maritime regime which were to engender so much controversy in the 1960's and early 1970's: the limits of national sovereignty over the adjacent waters and seabed, the management of fish stocks and the control of pollution.

As in other geographic regions, the law of the sea posture of the countries of South East Asia and the South West Pacific reflects perceptions of national interest, as well as the contemporary legal philosophy and the utilization of the physical environment. Because the seas have an international character, national policy must not only be responsive to the maritime activities of its own citizens, but must also take into account the pattern of foreign activity in the area. The law of the sea policies of Australia and P.N.G. reflect both this continuous dichotomy of interests and shorter term technological and political changes in the pattern of sea usage.

Since 1945 the law of the sea has undergone major changes in response to technological advances in man's ability to exploit the oceans, and more recently under the pressure of Third World philosophies which perceive the

system embodied in the 1958 Conventions as inequitable and favouring the major maritime nations. Among the first and perhaps the most important development in the law of the sea since World War II has been the evolution of a philosophy of national rights to the shallow seabed which forms the prolongation of the landmass. This element of customary law evolved after 1945 and was subsequently codified in the 1958 Convention on the Continental Shelf. In essence, it is likely to remain as a part of the new law of the sea which is emerging from UNCLOS III, with the exception that national rights beyond 200 miles from the coastline will be circumscribed by greater international regulation.

Within the area under study, two major continental shelves exist. One links the western section of the Indonesian archipelago with peninsula and mainland South East Asia, and although its potential has not been fully tapped it is at present the more important offshore oil producing area. The second major shelf surrounds Australia and the island of New Guinea and while once again it is not fully explored, it is considered by the oil industry to have less significance as a source of hydrocarbons. The proven reserves of the latter shelf are predominantly natural gas, located off the north west coast, in the Gippsland Shelf and in the Gulf of Papua. Should the world demand for gas increase, as is likely, then the significance of the Australasian shelf will increase.

The doctrine of the continental shelf has been accepted as customary law by the countries of the region. Australia was one of the first nations to proclaim national

rights to regulate foreign activity on the shelf, but this was a response to the harvest of sedentary marine life by Japanese operations around northern Australia in the 1950's. As a consequence of national preoccupation with this problem, Australian delegates at the first law of the sea conference played an important role in the development of a restricted definition of the organisms subject to national control. This was to preclude the use of a more liberal definition in the 1960's to protect the commercially important crayfish and prawn industries.

In common with the rest of the Asia-Pacific region, offshore oil exploration around Australia and P.N.G. did not become significant until the 1960's. This new activity, when associated with Australia's hitherto almost complete dependence on imported oil, ensured that reinforcement of continental shelf rights became one of the keystones of Australian law of the sea policy. Because the 1958 Convention provided a flexible definition of the legal extent of national claims, based on the criterion of exploitability, and the methods of delimitation of common seabed areas were never satisfactorily established, the most significant manifestation of Australian seabed policy was the delineation of international seabed boundaries. Between 1971 and 1973 the area between Indonesia and Australia in the Timor and Arafura Seas was divided, involving some retreat from earlier Australian claims, but there was agreement between both countries that it constituted a permanent settlement. The boundary between Australia and P.N.G. was settled by Australian domestic legislation and the Australian - Indonesian Agreements.

While the P.N.G. government accepted the latter as an equitable settlement, the seabed division in the Torres Strait and Coral Sea has become one of the major items of contention between the ex-territory and its former metropolitan government. This boundary had been set after negotiations between the Commonwealth and Queensland governments and the location was only marginally influenced by pressures from the P.N.G. Administration. The problem has been exacerbated by unsupported rumours that the area is a potential reservoir of oil or gas. However, it should be noted that gas has been discovered to the east in the Gulf of Papua. In particular, P.N.G. objects to the boundary in the Strait, which follows the 1879 delimitation of the land sovereignty of Queensland and Papua, thus bringing the whole of the Torres Strait seabed under Australian jurisdiction. The P.N.G. government has aruged for a more equitable division and has furthermore pressed for the application of a principle adopted in the 1973 Australia - Indonesia - P.N.G. boundary settlement: that of a single maritime delimitation involving seabed, water and superadjacent airspace, rather than the zonal regime imposed on the Torres Strait by Australia since 1879.

Not surprisingly, the independent P.N.G. government hopes that UNCLOS III will reach a consensus on a more equitable method of seabed division and, unlike Australia, it places less emphasis on the inviolability of existing seabed divisions as a feature of the new sea law. P.N.G. faces a second problem of seabed division - the area south of Bougainville between that island and the soon to be independent Solomon Islands. While there may be a case for

a readjustment of the Torres Strait boundary because it is unique, insofar as it is shared by a former territory and a metropolitan power, the widely accepted principle of no modification of inter-territorial boundaries may limit P.N.G.'s options in the case of the Solomons seabed. In any case, the existing division divides the area almost equally between the two states.

At UNCLOS III, P.N.G. has also demonstrated a concern in common with many other Third World Countries that the seabed beyond national jurisdiction should be exploited for its mineral resources only under international regulation. As a land based producer dependent for the bulk of its export income on copper, one of the minerals which may be extracted from the deep seabed in the future, P.N.G. is particularly concerned with the problem of market stability. In common with many other nations, P.N.G. has tended to disregard the economic analysis to date, which indicates that the scale of seabed operations and the problems of refining the seabed product will ensure that land based mining economies will not be jeopardized in the near future. For countries such as Australia, the deep seabed debate threatens to overshadow more important issues such as the continental shelf, shipping passage and fisheries management. These may not be satisfactorily resolved if the seabed issue continues to dominate national considerations. Rather than voicing concern over the rights to deep seabed minerals, Australia is anxious to have accepted by the global community, rights to the resources of the landmass prolongation beyond 200 miles from the coast. This policy is understandable in the light of indications of the presence of

substantial hydrocarbon reserves in the outer reaches of the North West Shelf, and the imminent availability of technology capable of exploiting the area.

The policy of the Australian government on seabed matters has to an extent been circumscribed by domestic political considerations. Under the terms of the 1967 Commonwealth-State agreement for the management of offshore petroleum resources, the States played a dominant role in day to day control of the adjacent seabed. Commonwealth powers were limited to subjects specified in the constitution as the prerogative of the central government. In two instances in the last ten years there has developed a dispute between the two levels of government in matters affecting foreign relations. In the first case the Western Australian Government opposed the plans of the Commonwealth to cede areas on the North West Shelf to Indonesia, because the State government had earlier issued exploration permits to the outer edge of the 1967 demarcation. Apart from embarrassing the Commonwealth, which was obliged to temporarily suspend negotiations with Indonesia, the problem highlighted one of the weaknesses of the 1967 Commonwealth-State agreement, insofar as the primacy of Commonwealth rights in the offshore area was not established. The second instance involves the participation by Queensland in the Torres Strait debate. The State government's continued involvement is facilitated by its de facto control over offshore oil exploration in the Strait, and although the Commonwealth has the legal power to supplant State authority, it would only do so at the risk of destroying the 1967 arrangement. Notwithstanding the limitations imposed on

their options by the offshore petroleum regime, the Commonwealth appears ready to cede seabed areas in the Strait. In adopting this stance of advancing the international interest over parochial considerations, the Commonwealth position vis-à-vis Queensland has been strengthened by the Seas and Submerged Lands Act Case decision in 1975.

The 1975 High Court decision represents the most definitive statement of the respective rights of the Commonwealth and the States in the offshore area. By endorsing Commonwealth sovereignty over the seabed and territorial waters, while at the same time sanctioning the operation of State legislation not inconsistent with Federal law, it marks a major step in the establishment of Commonwealth primacy. That a decision has been so long delayed is no accident. Since 1967 the States have strenuously opposed all moves by the Federal government to pass declaratory legislation conducive to High Court judgement on the question of sovereignty. Instead, they were able to negotiate the compromise offshore petroleum arrangement, which specifically avoided the question of sovereignty while at the same time producing an administrative system with major theoretical flaws, but which has proved eminently suitable for the domestic management of the offshore area. When Prime Minister Gorton sought to devise a mining system more favourable to the Commonwealth, and to assert Commonwealth seabed rights in 1970, the combined forces of State opposition and Cabinet revolt led to the abandonment of the scheme. Even the Labour Government in 1973-4 was unable to secure the passage of an offshore mining Bill or take alternative measures to increase the degree of Commonwealth superintendence over offshore hydrocarbons, because of State

opposition. At this point it should be emphasized that the State opposition to the assertion of Commonwealth powers transcended party loyalties, just as the assertion of Commonwealth rights after 1973 was given qualified bipartisan support at the national level, thus reversing the earlier opposition by prominent members of the Federal Liberal Party.

By comparison, the P.N.G. polity has not been plagued by a domestic debate over the respective central and regional government rights over the seabed. Australian control was transferred unequivocally to the national government, although it is possible that at a future date the Provinces may seek a greater participation in seabed control if the present system of political devolution continues. This is most likely to become an issue in the Gulf and Western Provinces, which are considered to have the most prospective adjacent seabed, although drilling has also been conducted offshore from Milne Bay and the North Solomons (Bougainville) Provinces.

Rather than devolve political control over the exploitation of the seabed, the P.N.G. central government is likely to create a system of proportionate revenue sharing if commercial oil of gas discoveries are developed. One advantage that the P.N.G. government has over its Australian counterpart is that there exists no administrative infrastructure at the Provincial level capable of administering the complex business of offshore oil search, as there does in Australia. In the colonial period the tendency of the Commonwealth to centralize decision making did not favour the development of an offshore administrative infrastructure in Port Moresby. However, the long history of onshore search,

often conducted in swampy and estuarine waters of the Papuan delta, under local control, and the ability of the P.N.G. government to recruit experts and ideas from overseas has facilitated the development of a pool of expertise capable of managing the national resources.

In spite of considerable effort to discover offshore oil and gas, both Australia and P.N.G. rely on imported oil to satisfy local requirements. The requirement for this commodity and the more general dependence on seaborne trade ensure that the policies of both countries are oriented towards the oldest maxim of the law of the sea: the freedom of the high seas. Both countries, however, subscribe to the contemporary beliefs of all but a few of the major powers that some form of limitations on shipping freedom is necessary, particularly where the freedom adversely affects the coastal state. The major concerns of P.N.G., Australia and their regional neighbours have been the threats posed to national sovereignty by illegal fishing and smuggling of arms and contraband. In more recent years, particularly in the straits where shipping is obliged to converge, the problem of vessel source oil pollution has become a major concern, and in the case of the Malacca Strait has resulted in the imposition of restrictions on shipping by Malaysia and Indonesia.

Until UNCLOS III encouraged a reappraisal of Australia's international stance on the question of shipping passage, the successive governments had tended to favour the essentially mercantilist approach embodied in the 1958 Conventions on the Territorial Sea and the High Seas. Evidence of this attitude is the commitment of the Australian

government to the retention of a 3 mile territorial sea, at a time when the global tendency was to claim 12 miles or greater widths. Among the most significant aspects of this policy was rejection of the right of the Philippines and Indonesia to impose restriction on shipping within the waters enclosed by their outer islands. It was fortunate that during the Vietnam conflict and the deployment of Australian forces to Malaysia in the 1960's a diplomatic modus vivendi had been achieved and military confrontation avoided. With the thaw in relations between Indonesia and Australia after 1966, Australia began to adopt a more sympathetic approach to the archipelago concept and has supported its adoption at UNCLOS III. Appreciation that P.N.G. would be able to claim a similar status after independence was a further incentive to Australian policy makers to adopt this more accommodating approach. Even so, the knowledge that much of Australia's trade passes through the Indonesian, Philippines and P.N.G. archipelagos has encouraged the Australian government to seek the inclusion of liberal rights of shipping access in any final Convention which may emerge from UNCLOS III. Since 1974,when the P.N.G. delegation began to adopt an active stance at UNCLOS III and the South Pacific Forum, albeit as part of the Australian delegation, they have indicated a commitment to liberal terms of shipping access in any archipelagic regimes which may be applied to their waters.

The question of shipping rights in international straits is of slightly less direct concern for Australia and P.N.G. than it is for the U.S.A., Japan and the U.S.S.R. which are heavily dependent on passage rights through the

Malacca, Lombok and Sunda Straits. Because of Australia's alliance with the U.S.A.,the deployment of American warships is of some interest to Australia, in particular the ability of the U.S.A. to counter the Soviet fleet in the Indian Ocean. But,as mentioned earlier, the relinquishment of a forward military posture has diminished the requirement for straits access for elements of the R.A.N. Rather than military considerations involving the deployment of fleets, Australian and P.N.G. concern is directed more towards the rights of access for commercial shipping, particularly the group most prone to pollution accidents, the supertankers. The grounding of a tanker in the Torres Strait in 1970 prompted a change in Commonwealth policy from one of adherence to the spirit of the I.M.C.O. Conventions, which emphasized the rights of the flag state to regulate pollution by its vessels,except in a foreign territorial sea, to a stance adopted by P.N.G. and many other Third World Countries whereby internationally agreed pollution standards should continue to apply, but their enforcement should be the prerogative of the coastal state. Both countries have gone one step further in advocating the right of the coastal state to apply local legislation in certain circumstances of particular threat. The two countries are no doubt prompted by their concern for the protection of reef areas, which are a significant source of tourist revenue and subsistence food respectively.

The location of reefs in the Torres Strait determine the shipping channels which constitute the historical focus of the present dispute between Australia and P.N.G., although in recent years it has been overshadowed by other issues. While the Straits' commercial and military value

as a shipping route is limited by the labryinth of reefs and the shallow seabed, it may become more important if alternative routes through the Indonesian archipelago are denied to foreign vessels. Its importance as a commercial route is much more significant for P.N.G. than for Australia. Historically, demands for the readjustment of the border southward were advanced by the P.N.G. Administration because of the lack of access routes west of Daru, except through Australian territorial waters. One reason why the navigation argument has lost much of its validity is the appreciation by the P.N.G. government that even if rights to control the waters of the northern reaches of the Great North East Channel were negotiated, these are effectively negated by the Australian control of the Prince of Wales Channel which provides the only access to the Arafura Sea. Also, there is the likelihood that Australia will develop an alternative opening to the Coral Sea south east of Cape York.

Division of jurisdiction over coastal shipping as set out in the constitution, and by implication over the territorial sea, has not developed into a major point of contention in the Australian Federal system, and in the last ten years has been overshadowed by the seabed debate. Even so, the long acknowledged system of dual control has posed problems for the implementation of international Conventions to which the Commonwealth has subscribed. To date, it has been Commonwealth practice to seek matching State legislation before the Commonwealth could give legislative effect to Conventions affecting the operation of shipping around the Australian coast. Like the offshore oil arrangement, the system was structurally unsound because no clear right of primacy was established and it relied on what might in

in retrospect be termed "cooperative federalism." Although the situation has not been tested since the 1975 High Court decision, the wording of the Seas and Submerged Lands Act clearly indicates the supremacy of Commonwealth law in the offshore area and may facilitate a more positive response by the Commonwealth in the implementation of future Conventions. Such a situation may arise if international consensus on pollution questions can be achieved at UNCLOS III.

P.N.G. has been spared the problems of divided jurisdiction over coastal shipping, except insofar as the P.N.G. legislature in 1961 unsuccessfully attempted to create a degree of decentralized control over pollution in the local territorial sea. P.N.G., while it has for the present adopted a 3 mile territorial sea and the IMCO Conventions earlier applied by Australia, has broken new ground in the regulation of merchant shipping. The Merchant Shipping Act 1975-1976, apart from establishing stringent conditions for the registration of vessels, has set up a shipping registry. By comparison, Australian owned shipping remains listed on the U.K. registry, a colonial anachronism unpalatable to more nationalistic commercial and political interests. In spite of these minor differences,there is no major divergences between Australia and P.N.G. in law of the sea policy regarding shipping and shipping access. Both share economic problems in the operation and usage of shipping which are beyond the ambit of this study, and which provide significant impediments to the most efficient use of the seas as a means of transporting goods and providing services.

Economic problems, rather than constraints imposed

by the law of the sea, are the major impediment to the development of large scale, locally controlled fishing industries around Australia and P.N.G. Although domestic demand for fish as a food staple in Australia is not high, the market cannot be satisfied by local producers and there is considerable reliance on imported fish. The situation is similar in P.N.G.,except that seafood is a much more important source of protein in a country where protein deficiency poses significant health problems. The Australian fishing industry is predominantly a small scale owner-operator activity and has not been the recipient of large scale government assistance to encourage it to develop into a significant world producer of seafood. Whereas the Australian industry has not been penetrated to any significant extent by foreign capital, government policy in both Australia and P.N.G. between 1968 and 1975 encouraged foreign financial control of the major P.N.G. fishing enterprises. The major fishing activity in the Australia-P.N.G. region is undertaken by Japanese and Taiwanese operators, although there is a significant American involvement in the waters north of P.N.G. It is a matter of some concern to both governments, but more particularly to Australia, that Russian and Eastern European nations are evincing an interest in South Pacific fisheries.

Until recently, the expansion of fishing activity in the South Pacific has been facilitated by the failure of the 1958 and 1960 Law of the Sea Conferences to agree on set widths for national fisheries zones beyond the territorial seas, although there was widespread agreement on the need for some form of national regulation. The countries of the

South Pacific and South East Asia have adopted three expedients to limit the extent of foreign fishing in inshore waters. The first, the archipelago concept, predated UNCLOS I and II and was as much a proclamation of exclusive fisheries rights as it was a shipping regulation regime. It is this desire to exercise full control over fisheries without any obligation to grant foreign access which has encouraged P.N.G. to seek the enclosure of the Bismarck Sea by the application of archipelago closing lines. The second policy, adopted by Indonesia to apply seaward from the archipelago baselines, and by Malaysia, was the extension of the territorial sea to 12 miles, thereby establishing a de jure wider fishing zone. Australia and New Zealand adopted the general policy of Anglo-Saxon countries by retaining a 3 mile territorial sea but claimed a further 9 miles seaward as an exclusive fishing zone. In common with the general practice by the Australian government of undifferentiated application of zones of maritime jurisdiction around both the States and territories, the 12 mile exclusive fishing zone was applied around P.N.G. from January 1968.

The imposition of the fishing zone posed problems in the relationship with the two major distant water fishing countries operating around Australia and P.N.G. Because contemporary law of the sea doctrine endorsed a right of limited foreign access to national fishing zones, the Australian government negotiated rights of access for Japanese tuna fishermen in specified areas where they would not compete with Australian fishermen. The agreement was also important in a symbolic sense because it tended to legitimize

the Australian claim to a fisheries zone, although at this time the international proliferation of such zones meant that the principle had in effect become part of the customary law of the sea.

Australian fishermen and State governments adopted a parochial attitude towards foreign fishing, which they perceived as a major threat to the local industry. The problem was particularly acute in the Gulf of Carpentaria prawning grounds where hostility to Russian, Japanese, Taiwanese and even P.N.G. registered boats was expressed. Demands from the fishing industry were instrumental in a series of government decisions to inhibit foreign operations around Australia from 1969 onwards. Two of the most important measures were the closure of Australian ports to foreign fishermen, with the exception of limited access for Japanese tuna vessels, and the decision to refuse Japanese participation in Australian fishing ventures.

While it may never be known whether the Australian government decision in 1968 to foster Japanese participation in the development of the P.N.G. fishing industry was prompted by a desire to move the focus of attention away from Australian waters, or out of genuine concern for the development of the territory's economy, the Commonwealth decision in 1971 to prohibit P.N.G. boats from fishing the Gulf, even beyond the 12 mile fishing zone, was clearly motivated by a desire to protect Australia's interests. As a consequence of the encouragement given to the foreign tuna fishing interests, the end result was Japanese economic domination of the tuna fishing industry around P.N.G. The P.N.G. government has passed a series of laws to regulate

their activities, and has a powerful bargaining weapon insofar as the baitfish are located in territorial waters, but there is considerable criticism, both from within the political framework and from the coastal people, that the commercial operators are damaging subsistence fisheries. When it is considered that one-third of the P.N.G. population depend on fresh fish as a food staple,and coastal people perceive the fish stocks as their property, then it is likely that their views will continue to have a major effect on the shaping of government policy. To date, criticism from their parliamentary representatives has centred on the inadequacy of the domestic economic return from the joint-venture operations and the need for wider zones of exclusive national fishing rights. The extent of unregulated foreign fishing beyond the 12 mile declared fishing zone,inherited from Australia, is also a matter of concern for the P.N.G. government and is reflected in their claim for archipelagic rights.

While the problems of regulating foreign fishing have preoccupied some P.N.G. politicians and officials, the more localized question of P.N.G. fishing rights in the Torres Strait has become an important problem for the politicians of the Western Province of Papua. As most of the Strait is either enclosed by Australian territorial sea or declared fishing zone, the legal rights of access for Papuan fishermen to the burgeoning tropical crayfisheries of the Warrior Reef are open to dispute. Although it is not emphasized as a major problem by the Australian Government, the Queensland government and the people of the Torres Strait, while acknowledging the informal historic rights of the Papuans

to fish the area, oppose any southward extension of the P.N.G. fishing zone, which under the existing regime is limited to a narrow strip along the Papuan coast and south of Bristow Island. On the other hand, the P.N.G. government is pressing for a guaranteed right of access for Papuan fishermen in the form of an "all purpose" maritime boundary embracing both sedentary and swimming fisheries to the south of the 1879 demarcation. It is perhaps ironical that the Islanders fear an influx of foreign fishing into the Strait if the fisheries zone is moved southward, when it is considered that it was their Federal and State governments in 1968 who were so anxious to encourage foreign fishing around P.N.G.

Both P.N.G. and Australian governments have sought to extend their zones of fisheries jurisdiction at UNCLOS III, in concert with most other coastal states with underdeveloped fishing industries. Although P.N.G. has only attended the last two sessions as an independent state, the Australian government fostered the active participation of the P.N.G. government by the inclusion of P.N.G. delegates in the Australian delegation at earlier sessions. Australia has adopted a somewhat ambivalent stance on the question of a 12 mile territorial sea claim, but P.N.G. has stressed this feature of national policy. Both nations have supported the international adoption of a 200 mile economic zone in which foreign fishing would be regulated by the coastal state, but P.N.G. has adopted a more intransigent attitude on the right of coastal states to control the harvest of highly migratory species, such as tuna. Although the tuna harvest of the Bismarck Sea may well come under complete national control if the archipelago concept is

adopted, the P.N.G. government is probably looking to the likely expansion of tuna fishing in the Solomons Sea, over which the less restrictive economic zone may be applied. Given the paucity of research and policing facilities in both countries, the effective management and control of foreign fishing will be difficult.

At the South Pacific Forum, which has developed into the most important regional venue for law of the sea negotiations, there has also been evidence of divergences of P.N.G. and Australian policy, but more in the matter of timing rather than substance. While both agree on the right of P.N.G. and other nations to claim archipelago and economic zone rights, in accordance with the consensus evident at UNCLOS III, Australia has opposed the immediate proclamation of such national rights, and has counselled a delay in the hope that the May 1977 session of UNCLOS III may achieve a more universal endorsement of the proposals through the medium of a new law of the sea Convention.

Turning to a broader perspective, four underlying trends are evident in the domestic and international relationship between the law of the sea and the politics of Australia and P.N.G. These are the development of an independent Australian law of the sea policy; the expansion of Commonwealth jurisdiction, both in a physical sense and at the expense of regional authority at the State and territory level; the domestic adoption by the P.N.G. government of the main features of Australian policy (except for the dual system of control), and the growing divergence of Australian and P.N.G. policy as expressed at the bilateral and international level. These reinforce

the assertion that the law of the sea, as a legal entity, is difficult to dissociate from its political and economic bases, and that its legal form reflects a "lowest common denominator" of political consensus on questions of the extent of national sovereignty over the seas and seabed.

Until the mid-1960's Australian law of the sea interpretations reflected more the governments commitment to the Anglo-Saxon and mercantilist philosophy of the British government, rather than Australia's position as a European outpost on the Asia-Pacific periphery with very underdeveloped maritime interests. As commercial and military ties with the U.K. lessened and were replaced by links with Japan and the U.S.A., the law of the sea position of the Australian government did not always coincide with the interests of its major trading partners and allies. Early evidence of this independence of approach can be seen in the dispute with Japan over tuna fishing rights, but the clearest indication has been the national stance adopted at UNCLOS III. Apart from reflecting the concern of the Australian government that a maritime regime conducive to the development of the local fishing, shipping and offshore oil industry should be pursued, there may well be more pragmatic considerations. The adoption of an independent posture is unlikely, in the short term, to significantly disadvantage Australia's trading and military partners, but may lead to disputes with maritime neighbours. On the credit side, by allying with the general position of coastal Third World and smaller countries, particularly those in the immediate environs, Australia would appear to be providing a tangible demonstration of its community

of maritime interests with the underdeveloped countries. It is a policy with major advantages and few disadvantages in the international sphere.

In terms of the domestic impact of the law of the sea in the period 1966-1976, the most significant trend is the expansion of Commonwealth authority at the expense of the States and territories in the Australian political system. This increment has not come about through any formal change to the constitutional balance, but is more the result of an assertion by the Federal government of dormant rights which had always been implied in the constitutional relationship. Because of the long history of State participation in the day-to-day administration of the offshore area, there had developed a belief among State politicians and administrators in the desirability of continued State participation, if not in the legal basis, for such rights. Certainly the 1975 High Court decision in the Seas and Submerged Lands Act Case should have dispelled any doubts as the legal division of powers in the offshore area. Even so, because the States can bring considerable pressure to bear on a Commonwealth government, through a variety of political and economic strictures, they exert an important influence on the formation of Australian law of the sea policy, especially as it affects their local interests. Unless there is a radical restructuring of the whole federal relationship, State pressures are likely to continue to limit the law of the sea options of the national government. It is this problem of a three-way balance between State demands, pressures from the international community, and the Commonwealth government perceptions of the national interest, which make the formulation

of law of the sea policy a difficult task for Australian governments.

Although the channels for expression of parochial maritime interest were not systematized in the Australia-P.N.G. colonial relationship, as they were between the Commonwealth and the States, they could not be overlooked, despite some attempts to do so by the Department of External Territories. The problem was exacerbated, not only by the dependency relationship, but also by the ethnic and societal differences in attitude towards the sea. To an extent, the undifferentiated application of Australian policy tended to protect the maritime interests of P.N.G. until the upsurge of foreign fishing and discovery of offshore gas exposed the essentially self-protective nature of Australian policy. It was to be expected that, notwithstanding the superficial resemblance of P.N.G. domestic application of the law of the sea in the immediate post-independence period, it is showing signs of an early divergence from the Australian model. Apart from differences of physical environment, of which the archipelagic configuration is an important but by no means the only element, and the proprietary attitude of the coastal population towards offshore resources, the P.N.G. policy also reflects the advantages which a unitary form of government confers in matters of administration and control. To what extent, if any, the Port Moresby government will devolve powers in offshore matters to the burgeoning Provincial governments remains to be seen. If the Australian experience is any guide, there is a strong case for the retention of the present system of unitary responsibilty.

The fourth and most recent, trend in the law of the sea relationship of Australia and P.N.G. is the growing divergence of national policies. It might be argued that the more independent P.N.G. policy is a reflection of a desire to break the colonial links and identify with the aspirations of other ex-colonies of the Third World. Although it is true that P.N.G. policy does have much in common with that of other newly-independent and underdeveloped states, so too does the policy of Australia as expressed at UNCLOS III and the South Pacific Forum. Furthermore, it is difficult for P.N.G. to divorce national maritime policy from that of Australia because of the geographic proximity - an unusual situation in a relationship between a metropolitan power and its former colony. In essence, the geographic proximity, when coupled with shared resources but differing attitudes to their management and exploitation, is at the crux of the policy divergence. Whereas a dispute over the resources of the Torres Strait was perhaps inevitable, given the inequitable division of the area since 1879, the expansionist law of the sea policies of both countries in recent years have ensured that the problem will become more intractable as new concepts such as the archipelago and economic zone are superimposed.

In sum, therefore, the Torres Strait dispute is perhaps a harbinger of numerous future disputes around the globe which could follow from the failure of UNCLOS III. Instead of creating a new and more equitable world order, with clear rules for the delimitation of national claims, all that the Conference has succeeded in doing is to provide a quasi-legal <u>modus operandi</u> for the seaward extension of

national jurisdiction. Because there has been a failure to agree on the details for the establishment and delineation of these maritime regimes, their potential as a source of political and military conflict should not be underestimated. Having overcome their historic and political inhibitions in the pursuit of expansionist law of the sea policies, Australia and P.N.G. may well discover that the disadvantages, in terms of deterioration in bilateral and international relations, outweigh the short term commercial gain.

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