LAST TANGO WITH MOSCOW: A POLITICAL AND JURISPRUDENTIAL ANALYSIS OF THE AUSTRALIA–USSR FISHERIES ACCESS AGREEMENT OF 1990

KWAME MFODWO*

[In 1991, the Soviet Union collapsed rapidly and ignominiously, but within a framework of treaty-based order. Soon the rest of the Soviet bloc was to follow. The treaty law dimension to the collapse (principally a question of state succession to treaties) has been comprehensively commented upon, at least as regards treaties between the Soviet Union and the United States, the Soviet Union and the various Western European states, and the former Soviet bloc states themselves. Adopting both a political and jurisprudential perspective, this article discusses the Australian treaty law dimension to the collapse of the Soviet Union. Its starting point is the set of little-known treaties between Australia and Gorbachev's Soviet Union in the late 1980s — a time when it was felt that glasnost, perestroika and novoe politicheskoe myshlenie *had given the Soviet Union a new lease on life. An analysis of the 1990* Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics relating to Cooperation in Fisheries*, with respect to strategic imperatives and the text of the* Agreement*, is central to the discussion. Commentary is also provided on treaty termination and treaty continuation as practised since 1991 by Australia and the Russian Federation — the state continuer of the Soviet Union. Customary international law doctrines (*rebus sic stantibus*, desuetude and effectiveness) are also arguably relevant and are assessed as justificatory rubrics for the termination and continuation approaches discussed. There is a strong comparative strand to the analysis, with the discussion contrasting this specific Australian approach with those used in Europe as the various post-Soviet actors struggled to manage the sprawling treaty system left by the collapse. Political and jurisprudential perspectives are closely fused in the analysis as this best reflects the highly political character of this seemingly formalist area of international law.]*

CONTENTS

* LLB (Hons) (Ghana); LLM (ANU); Lecturer, Monash University Law School, Melbourne. I would like to thank the following for their invaluable editing and other research support: Laura Little, previously at Melbourne University Law School; Tristan Taylor, previously at the University of Tasmania and now at Yale Law School; Patricie Mertova and Caterina Popa at Monash University Law School. Natasha Nadj and Roderick Pitty, both previously at the Australian National University, Canberra, also provided invaluable assistance with translation of large numbers of Russian language documents over the years. The nuanced discussion of Soviet fisheries policy presented here would not have been possible without their excellent rendering of Russian into English. All errors and omissions are mine.

I INTRODUCTION

On 15 February 1990, even as the Soviet Union progressed more deeply into the dramatic 'twilight zone' of its self-dissolution,[1] Australia and the Union of Soviet Socialist Republics finalised a cluster of bilateral treaties — referred to in

[1] The USSR was dissolved on 31 December 1991 through the combined operation of the *Minsk Declaration*, 31 ILM 138 (1992) (signed and entered into force 8 December 1991); the *Alma Alta Declaration*, 31 ILM 148 (1992) (signed and entered into force 21 December 1991); and various other decrees of denunciation by individual member states of the Union: see, eg, *On the Denunciation of the* Treaty on the Formation of the USSR, Decree of the Russian Soviet Federated Socialist Republic Supreme Soviet (12 December 1991), as reproduced in translation in William Butler (ed), *Collected Legal Documents of Russia* (1993) 83. These instruments replaced the *Treaty on the Formation of the Union of Soviet Socialist Republics*, signed on 30 December 1922 by the core Soviet republics: the Russian Soviet Federated Socialist Republic; the Ukrainian Soviet Socialist Republic; the Soviet Socialist Republic of Byelorussia; and the Trans-Caucasian Soviet Socialist Republic (comprising Georgia, Azerbaijan and Armenia). The 1922 treaty was incorporated into the 1924 *Soviet Constitution*, as chronicled in William Simons (ed), *The Constitutions of the Communist World* (1980) 344–6. The text of the 1922 document is reproduced in Joseph Stalin, *Works* (1953) vol 5, 159. For excellent legally focused accounts of the collapse, see Tarja Långström, 'The Dissolution of the Soviet Union in the Light of the 1978 *Vienna Convention on Succession of States in respect of Treaties*' in Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (2000) 723, 726–8; Michael Bothe and Christian Schmidt, 'Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie' (1992) 96 *Revue générale de droit international public* 811, 812–13; Charles Rousseau, 'Chronique des faits internationaux: URSS' (1992) 96 *Revue générale de droit international public* 401. See also below Part V. This article uses the term Soviet Union rather than 'former Soviet Union'.

this article as 'the perestroika treaties' — expanding a previously rather limited[2] set of bilateral treaty relations between the two states.[3] The most substantial of these new instruments was the *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics relating to Cooperation in Fisheries*,[4] which provided Soviet fishing fleets with access rights to Australian waters. The other treaties regulated variously: market access for the Australian primary resources sector;[5] peaceful uses of nuclear energy;[6]

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[2] Earlier Australia–USSR treaties corresponding to the Leninist, Stalinist and post-Stalinist eras were: *Exchanges of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland [and on behalf of Australia, Canada, Eire, India, Newfoundland, New Zealand and South Africa] and the Government of the Union of the Soviet Socialist Republics [concerning Propaganda] on the Resumption of Diplomatic Relations*, signed 20 December 1929, [1929] ATS 10 (entered into force 21 December 1929); *Agreement for an Exchange of Postal Parcels between the Commonwealth of Australia and the Union of Soviet Socialist Republics*, signed 29 June 1960, [1960] ATS 7 (entered into force 1 July 1960); *Trade Agreement between the Government of the Commonwealth of Australia and the Government of the Union of Soviet Socialist Republics*, [1965] ATS 19 (signed and entered into force 15 October 1965); *Agreement on the Development of Trade and Economic Relations between Australia and the Union of Soviet Socialist Republics*, [1973] ATS 8 (signed and entered into force 16 March 1973); *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Scientific–Technical Cooperation*, [1975] ATS 3 (signed and entered into force 15 January 1975); *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cultural Cooperation*, [1975] ATS 4 (signed and entered into force 15 January 1975). Treaties entered into during the period of transition towards perestroika were: *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cooperation in Agriculture*, [1986] ATS 27 (signed and entered into force 20 November 1986); *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cooperation in the Field of Medical Science and Public Health*, [1987] ATS 26 (signed and entered into force 1 December 1987); *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cooperation in Space Research and the Use of Space for Peaceful Purposes*, [1987] ATS 27 (signed and entered into force 1 December 1987); *Exchange of Letters Constituting an Accord between the Government of Australia and the Government of the Union of Soviet Socialist Republics relating to Cooperation in Civil Aviation*, [1989] ATS 19 (signed and entered into force 12 July 1989) ('*Civil Aviation Agreement*'). The actual content of these treaties is not discussed in this article as they were either framework agreements or merely amended earlier treaties. Their fate in a doctrinal sense is discussed in Part V.

[3] The following publications provide an excellent overall picture of Australia–USSR relations from the 1960s to the late 1980s: Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Perestroika: Implications for Australia–USSR Relations* (1990); Andrew Farran, *Changing Directions in the Soviet Union: Perestroika, Glasnost ... and Australia* (1988).

[4] [1990] ATS 8 (signed and entered into force 15 February 1990) (expired 14 February 1993 in accordance with art XVII(2)) ('*Fisheries Agreement*'). Soviet perspectives on this treaty are discussed in Teresa Shkolnikova, 'The USSR and Australia: A New Region of Collaboration' [1990] *Rybnoe Khoziaistvo* 31 (in Russian).

[5] *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on the Supply of Agricultural and Mineral Commodities from Australia to the Union of Soviet Socialist Republics*, [1990] ATS 9 (signed and entered into force 15 February 1990) (expired 14 February 1993 in accordance with art 8(1)) ('*Commodities Agreement*').

[6] *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics concerning the Peaceful Uses of Nuclear Energy*, signed 15 February 1990, [1990] ATS 43 (entered into force 24 December 1990) ('*Peaceful Uses of Nuclear Energy Agreement*'). This was a framework treaty of 15 clauses implementing the *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) and various subsidiary agreements.

human contacts and humanitarian cooperation;[7] cooperation in the field of protection and enhancement of the environment;[8] and consular relations.[9] Some of the treaties entered into force on 15 February 1990, whilst others were scheduled to enter into force at other times set out in the treaty text.

From the point of view of international relations, particularly the international relations of fishing, as well as international law,[10] the context of the treaties is particularly interesting since they were concluded at a time when the USSR was in an advanced, although not fully visible, process of dissolution[11] — the unravelling of the Soviet federal arrangements coming rapidly to a head in the last quarter of 1991.[12]

Officially, at least, the treaty negotiators could pay little attention to this gradual dissolution of one of the contracting parties, preferring to emphasise

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7 *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Human Contacts and Humanitarian Cooperation, and Protocol*, [1990] ATS 7 (signed and entered into force 15 February 1990) ('*Human Contacts and Humanitarian Cooperation Agreement*'). Part V provides more detail on the fate of this treaty.

8 *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cooperation in the Field of Protection and Enhancement of the Environment*, [1990] ATS 10 (signed and entered into force 15 February 1990) ('*Environmental Cooperation Agreement*'). This was a framework treaty of 10 mainly exhortatory provisions. Part V provides more detail on the fate of this treaty.

9 *Treaty on Consular Relations between the Commonwealth of Australia and the Union of Soviet Socialist Republics*, signed 15 February 1990 (did not enter into force).

10 The areas of international law doctrine and diplomatic practice raised by the collapse of the Soviet Union are many and complex. They include continuity/succession with respect to treaties, termination of treaties according to their terms, the impact of fundamental change of circumstances on treaties, and the doctrines of effectiveness and desuetude. Part V discusses the various doctrinal aspects. See also references cited below n 27.

11 Writing a few months after the collapse, Bothe and Schmidt observed: '*La dissolution de l'URSS constitue un processus progressif qui commence au plus tard en 1989 et qui est terminée à la fin de l'année 1991*' ('The process of dissolution of the Soviet Union was a progressive one starting in 1989 at the latest and coming to an end in late 1991'): Bothe and Schmidt, above n 1, 816. For various accounts and commentaries on the collapse, see Igor Kavass, *Demise of the Soviet Union* (1992); Alexander Dallin and Gail Lapidus (eds), *The Soviet System: From Crisis to Collapse* (revised ed, 1995); Marshall Goldman, *What Went Wrong with Perestroika* (1991); Alexander Dallin, 'Causes of the Collapse of the USSR' (1992) 4 *Post-Soviet Affairs* 279; Stephen Kotkin, *Armageddon Averted: The Soviet Collapse, 1970–2000* (2002). This last monograph is particularly interesting for its insights on how orderly the process of dissolution was, and the concern amongst all actors to avert any situations that would have gravely threatened international peace and security and perhaps caused a nuclear war.

12 The collapse accelerated after the failed coup of 19 August 1991 — an attempt to restore the pre-perestroika era of orthodox quasi-Stalinist rule. For further details, see references cited in above nn 1, 11, and discussion in Part V. On Soviet federalism, see generally Gregory Gleason, *Federalism and Nationalism: The Struggle for Republican Rights in the USSR* (1990); Graham Smith (ed), *The Nationalities Question in the Soviet Union* (1990).

high-sounding principles such as glasnost, *novoe politicheskoe myshlenie*[13] and perestroika,[14] as well as the purportedly expansive possibilities for further cooperation between the USSR and Australia.[15] The steady march of history was not to be denied however, and by 31 December 1991 the Soviet Union had rapidly completed its surprisingly orderly process of self-dissolution.[16] The official register of Australian treaties — the Australian Treaty List, as set out in the Australian Treaties Database[17] and periodically published by the Department of Foreign Affairs and Trade — records that these perestroika treaties had different fates. Some expired under the terms set out in the treaty text without having been implemented, whilst others were taken up and continued by the Russian Federation as the 'state continuer'[18] of the Soviet Union.[19]

Adopting perspectives from both international relations and international law, this article seeks to briefly rescue these treaties from the 'dustbin of history', focusing in some depth on: the political–economic content and context of the most important agreements in this cluster of treaties, namely the inter-linked *Fisheries Agreement* and *Commodities Agreement* (the political dimension);[20] and the broader questions for Australia of treaty law and state succession to treaties that were raised by the collapse of the Soviet Union and the Soviet bloc

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13 Glasnost means 'openness', whilst *novoe politicheskoe myshlenie* means 'new political thinking'. Both terms were underlying political principles within Gorbachev's reform programme. Glasnost applied more to the Soviet Union itself in that citizens were encouraged to more openly discuss social problems and criticise the government, whilst *novoe politicheskoe myshlenie* referred to the kind of new thinking and orientations that international relations required if nuclear war and destruction of the human race were to be avoided. See variously Mikhail Gorbachev, 'Address at the Forty-Third UN General Session, December 7, 1988' in Alexander Dallin and Gail Lapidus (eds), *The Soviet System: From Crisis to Collapse* (revised ed, 1995) 442; Mikhail Gorbachev, *Perestroika: New Thinking for Our Country and the World* (trans, 1987 ed) [trans of: *Perestroika i novoe myshlenie dlia nashei strany i dlia vsego mira* (first published 1987)].

14 Perestroika means restructuring, and signified the internal economic and institutional dimension to the reforms. At the time, perestroika captured the global public imagination and is recorded by the *Macquarie Dictionary* as being in widespread use as a term for reforms and restructuring: Arthur Delbridge et al (eds), *Macquarie Dictionary* (3rd ed, 1998) 1418.

15 See the preambles to the various treaties listed above nn 4–9.

16 See generally Rousseau, 'Chronique des faits internationaux: URSS', above n 1, 402.

17 See Department of Foreign Affairs and Trade ('DFAT'), *Australian Treaties Database: Treaties with the Union of Soviet Socialist Republics* and *Treaties with the Russian Federation* (2004) <http://www.info.dfat.gov.au/treaties> at 1 October 2005.

18 On the issue of continuity between the USSR and Russia, see, eg, Martti Koskenniemi and Marja Lehto, 'La succession d'Etats dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande' (1992) 38 *Annuaire français de droit international* 179, 183–90; Martti Koskenniemi, 'Report of the Director of Studies of the English-Speaking Section of the Centre' in Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (2000) 65; William Butler, *The Russian Law of Treaties* (1997) 9–13, 131–7; William Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States* (2002) 5–19.

19 The *Fisheries Agreement*, above n 4, and the *Commodities Agreement*, above n 5, both expired on 14 February 1993 as agreed under art XVII and art 8 of these treaties respectively. From early January 1992 until 14 February 1993, these treaties were effectively taken up by the Russian Federation as the 'state continuer' of the Soviet Union.

20 See below Parts II–IV.

or Council for Mutual Economic Assistance ('CMEA') economies generally (the jurisprudential dimension).[21]

The article attempts to achieve these objectives as follows. Part II, using an approach based on the political economy of global fisheries, analyses the *Fisheries Agreement* from the standpoint of the distant-water fisheries contracting party, providing a comprehensive picture of the place of Australian fisheries in the global fisheries resource access strategy of the Soviet bloc in the late 1980s. Issues highlighted include the little discussed subject of the importance of fisheries access agreements to the Soviet Union's Treasury, due to shortages of convertible currency in the Soviet Union and other Soviet bloc states, as their economies failed to compete successfully with the dynamic centres of the global capitalist economy in the 1980s.

Part III then provides a counterpoint by addressing Australian strategic motivations in some detail, these motivations being derived from Australia's mixed status as a coastal state (the law of the sea dimension), a *demandeur* of market access (the international trade dimension), a Cold War adversary of the Soviet Union and a core ally of the United States (the military–security dimension).

Part IV returns to the theme of fisheries access agreements as a subset of both law of the sea and international trade considerations and provides a detailed analysis of the text of the *Fisheries Agreement*.

Parts V and VI inject elements of doctrinal analysis into the discussion. Part V canvasses the strategy of treaty management[22] used by Australia and the Russian

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21 See below Part V. The analysis uses the terms 'Soviet', 'Soviet State', 'Soviet bloc' and 'CMEA countries' interchangeably in some instances. In the main, the focus is on the state practice and fisheries sector strategies of the Soviet Union or the Soviet State. However, in the area of marine capture fisheries, as, for example, in the area of military arrangements, it is inaccurate to focus only on the activities of the Soviet Union. The other 'socialist' countries had strong formal and informal ties with the Soviet Union and in general acted in concert with the Soviet Union. They followed similar marine fishing strategies; based their long-distance fishing on similar economic rationales, including excessive subsidisation of long-distance fleets to provide protein cheaply for domestic populations; used the same types of vessels, capture methods and at-sea processing technology (with vessels mostly built in the German Democratic Republic, the USSR and Poland); and had a complicated system for barter exchange and international marketing of marine fisheries products on a global scale, creating a recognisable 'socialist country' sector within global fisheries production and trade. It is in this sense that the article uses the term Soviet bloc fisheries. The term CMEA is also relevant since this was the formal international organisation within which coordination of Soviet bloc fisheries occurred, whilst informal coordination was generated by similar approaches to higher level training, shared technical journals and other informal methods of coordination (see also below n 30). At its zenith, the CMEA consisted of Bulgaria, Cuba, Czechoslovakia, GDR, Hungary, Poland, Romania, the USSR and Vietnam. On Soviet and Soviet bloc fisheries, see generally Vladimir Kaczynski, 'The Economics of the Eastern Bloc Ocean Policy' (1979) 69 *American Economic Review* 261; Vladimir Kaczynski, 'Controversies in Strategy of Marine Fisheries Development between Eastern and Western Countries' (1977) 4 *Ocean Development and International Law* 399; Elizabeth Dunning, *Soviet Distant-Water Fishing after Extended National Jurisdiction* (MA Thesis, University of Washington, 1984). On the CMEA see André Loeber, *East–West Trade: A Sourcebook on the International Economic Relations of Socialist Countries and Their Legal Aspects* (1976).

Federation to phase out or, as appropriate, continue the treaties of the Soviet Union, with the discussion placed against the backdrop of highly developed state practice in Europe. Part VI concludes the paper by examining the extent to which various treaty law doctrines can be used to assess the 'twilight zone' status of the *Fisheries Agreement*, given that it was rapidly rendered obsolete by the collapse of the Soviet Union.

The detailed treaty framework set out in the *Fisheries Agreement* — an instrument closely linked in a political sense with the *Commodities Agreement* — may well come as a surprise to many observers of Australian international relations and treaty practice, and thus requires some preliminary comment. The two treaties effectively traded export access to Soviet markets for fisheries rights for Soviet fleets. Essentially, the principal Soviet interest in negotiating these treaties was to secure access to Australian resources as well as domestic processing capacities (and to a lesser degree, its internal market). The *Fisheries Agreement* crystallised longstanding, previously frustrated,[23] but well-grounded Soviet aspirations to secure access to Australian waters and shore-based infrastructure. The background to the Soviet interest was the intimate knowledge of Australian resources accrued by Soviet captains and fisheries scientists

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22 The term 'strategy of treaty management' is adapted from the title of Arie David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* (1975). For excellent accounts of the strategies of treaty management used by various parties to address the problem of termination/continuance by the Soviet bloc, see generally Anthony Aust, *Modern Treaty Law and Practice* (2000) (see especially ch 22); Dieter Papenfuss, 'The Fate of the International Treaties of the GDR within the Framework of German Unification' (1998) 92 *American Journal of International Law* 469; Dieter Papenfuss, 'Les traités internationaux de la RDA dans le cadre de l'établissement de l'unité allemande: une contribution pragmatique au problème de la succession d'états en matière de traités internationaux' (1995) 41 *Annuaire français de droit international* 207; Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (2000).

23 The first attempt by the Soviets to establish joint venture fish catch and processing agreements in Australia had foundered in 1978–79 due to Australian imposition of trade sanctions on the Soviet Union following its widely condemned invasion of Afghanistan. See the following and other remarks by Michael Duffy as set out in Commonwealth, *Parliamentary Debates*, House of Representatives, 21 December 1988, 3950–1 (Michael Duffy, Minister for Trade Negotiations) ('Parliamentary Remarks regarding Negotiations with the Soviet Union'):

> There have been discussions between the Governments of Australia and the USSR on fisheries-related questions such as those which have now been proposed for approximately a decade (essentially since Australia proclaimed its [Australian Fishing Zone] in 1979). Indeed, prior to the Soviet invasion of Afghanistan, the Australian Government had given its approval to Australian–USSR joint ventures in feasibility fishing.

Dunning, above n 21, 67 lists the Australian companies that had entered into these joint ventures.

through annual research campaigns in Australian waters from 1965 to 1978.[24] In 1978 Soviet trips ceased due to Australia's declaration of an Exclusive Fishing Zone, which effectively abrogated the freedom of fishing principle that had permitted Soviet vessels to annually chart the state of Australian resources. In 1989, when the *Fisheries Agreement* was negotiated, the Soviets were desperate to capitalise on their knowledge of Australian resources as they sought new global configurations to address the crisis in their pre-perestroika strategies and arrangements.[25]

Finally, the doctrinal aspect needs to be placed in its political–diplomatic context. Essentially, given the large number of treaties and other informal instruments between the Soviet bloc and non-Soviet bloc states, the collapse of the Soviet bloc in the 1990s threw up a large number of difficult areas of general international law for all states in the international system.[26] Many of the issues that needed to be addressed by diplomatic and treaty offices during a period of intense change to the framework of global arrangements lay at the points of convergence of two particularly difficult areas of international law: the law of state succession and the law of treaties. A number of accounts of how states other than Australia managed their treaty portfolios with the Soviet Union and

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24 Until 1978, in accordance with classical law of the sea doctrine, Australia had maintained a territorial limit of three and then six nautical miles, with the area beyond this zone demarcated as high seas for fisheries purposes under the Old Law of the Sea (see below n 98). Soviet vessels utilising these freedoms and the times of their research surveys were: *Berg-1*, March – May 1965; *Berg-2*, January – June 1966; *Seskar*, January – June 1966; *Raduga*, August 1966 – March 1967; *Lira*, February – August 1967; *Berg-3*, May – July 1967; *Korifei*, February – June 1968; *Lira*, June – October 1968; *Pr Deruygin*, September 1968; *Prometey*, November 1968 – March 1969; *Sutchan*, July 1968 – January 1969; *Alba*, September 1969; *SRTM 8-449*, March – July 1969; *Prometey*, February – July 1970; *Alba*, September 1970; *Alba*, March – April 1971; *Poseidon*, July – August 1971; *Equator*, September – October 1971; *Raduga*, June – November 1972; *Pr Deruygin*, October 1972 – March 1973; *Alba*, October 1973; *Lira*, April – October 1973; *Shantar*, October – November 1973; *Pr Deruygin*, May 1974; *Shantar*, May – October 1974; *Bacaevo*, June – July 1975; *Pr Deruygin*, December 1975 – May 1976; *Kamensky*, July – October 1976; *Poseidon*, April – September 1977; *Pr Deruygin*, January – May 1977; *Pulk Meridian*, August 1977; *Tichookeanscy*, March – April 1977; *Tichookeanscy*, October 1977 – January 1978; *Mys Tichy*, March – April 1978. See Anthony Koslow et al, Commonwealth Scientific and Industrial Research Organisation Australia, *Exchange and Analysis of Historical Soviet Fishery Survey Data from the Waters around Australia*, Fisheries Research and Development Corporation Project 1993/239 Final Report (1993). On Australia's progressive extension of national maritime jurisdiction, see Gareth Evans and Michael Duffy, 'Australia Extends Territorial Sea' (1990) 61 *Australian Foreign Affairs and Trade* 816; Brian Opeskin and Donald Rothwell, 'Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles' (1991) 22 *Ocean Development and International Law* 395; Bill Campbell, 'International Law Notes — *Maritime Legislation Amendment Act 1994*' (1994) 5 *Public Law Review* 141; Ivan Shearer, 'Australia's New Maritime Zones' (1995) 69 *Australian Law Journal* 26.

25 See below nn 39–54 and accompanying text for a detailed discussion of Soviet objectives.

26 The Soviet Union was reportedly a signatory to more than 16 000 treaties: Långström, above n 1, 742. Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18, 468 puts the number at 20 000 treaties and informal instruments.

the rest of the Soviet bloc are available in the literature.[27] The significance of Part V of this article is that it provides the sole publicly available discussion of how Australia and the Russian Federation managed, and continue to manage, the portfolio of treaties between Australia and the USSR — a matter of some degree of doctrinal as well as historical interest to scholars of international law.

II THE AUSTRALIA–USSR *FISHERIES AGREEMENT*: SOVIET IMPERATIVES[28]

A *Soviet Distant-Water Fisheries*

A brief historical introduction to the development of the Soviet fishing industry is provided in the Library of Congress' *Soviet Union (Former): A*

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[27] See generally Aust, *Modern Treaty Law and Practice*, above n 22, ch 22; Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22; Koskenniemi and Lehto, above n 18; Butler, *The Russian Law of Treaties*, above n 18; Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18; Jan Klabbers et al (eds), *State Practice regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe* (1999); Geneviève Burdeau and Brigitte Stern (eds), *Dissolution, continuation et succession en Europe de l'Est* (1994); Mojmir Mrak (ed), *Succession of States* (1999); Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (1998); International Law Association, Committee on Aspects of the Law of State Succession, 'Rapport final sur la succession en matière de traités' in International Law Association, *Report of the Seventieth Conference* (2002) 574; International Law Association, 'Rapport préliminaire sur la succession d'Etats en matière de traités' in *Report of the Sixty-Seventh Conference* (1996) 655; Rein Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42 *International and Comparative Law Quarterly* 473; Rein Müllerson, 'New Developments in the Former USSR and Yugoslavia' (1993) 33 *Virginia Journal of International Law* 299; Oscar Schachter, 'State Succession: The Once and Future Law' (1993) 33 *Virginia Journal of International Law* 253; Detlev Vagts, 'State Succession: the Codifiers' View' (1993) 33 *Virginia Journal of International Law* 275; Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *American Journal of International Law* 569; Jean Charpentier, 'Les déclarations des douze sur la reconnaissance des nouveaux états' (1992) 96 *Revue générale de droit international public* 343.

[28] The following publications in the public domain permit a retrospective picture of Soviet Union and Soviet bloc distant-water fisheries policy to be constructed: Kaczynski, 'The Economics of the Eastern Bloc Ocean Policy', above n 21; Kaczynski, 'Controversies in Strategy of Marine Fisheries Development', above n 21; Jan Solecki, 'A Review of the USSR Fishing Industry' (1979) 5 *Ocean Management* 97; Vladimir Kaczynski, 'Distant-Water Fisheries of the East European Countries: Their Present Economic Status and Future Activities in the Northeast Pacific' (1979) 6 *Ocean Development and International Law* 73; Iain MacSween, FAO, *Markets for Fish and Fishery Products in Eastern Europe*, Fisheries Technical Paper 241 (1983); William Black, 'Soviet Fishery Agreements with Developing Countries — Benefit or Burden?' (1983) 7 *Marine Policy* 163; Jan Solecki, 'The Soviet Union's Fishing Industry and the USSR's Foreign Trade in Fishing Industry Products' in *Proceedings of the Second Conference of the International Institute of Fisheries Economics and Trade* (1984) vol 2, 1; Clarence Pautzke, Executive Director, North Pacific Fishery Management Council, 'Russian Far East Fisheries Management' (Report to the 105th Congress, Washington DC, US, 30 September 1997) available at <http://www.fakr.noaa.gov/npfmc/summary_reports/rfe-all.htm> at 1 October 2005; Elena Pashkova, 'Russia: Distant-Water Fishing — A Shoulder to Lean On' (2003) *Samudra* 24. Quasi-confidential and/or previously classified government reports which further flesh out the picture are cited below nn 33–34, 36, 39–40.

Country Study (1989):

> Fish has always been a prominent part of the Soviet diet. Until the mid-1950s, the bulk of the Soviet catch came from inland lakes, rivers, and coastal waters. Thereafter, the Soviet Union launched an ambitious program to develop the world's largest oceangoing fishing fleet, which consisted of 4222 ships in 1986. The Soviet Union became the world's second leading fish producer, trailing Japan by a small margin throughout the 1970s and 1980s. In 1986 Soviet production amounted to 11.4 million tons, most of which was caught in marine fisheries. The Atlantic Ocean supplied 49.2 percent of the total catch in 1980, while the Pacific Ocean yielded 41.3 percent. … In 1982 more than 96 percent of the frozen fish, 45 percent of the canned fish, 60 percent of the fish preserve, and 94 percent of the fish meal delivered to market was processed at sea by large, modern [but generally inefficient] factory ships.[29]

Agreements granting access to fishing grounds controlled by coastal states and to adjacent ports ('fisheries access agreements') were essential to this worldwide fishing project, as such agreements provided a framework for the USSR to both exploit resources in waters under the national jurisdiction of other states, and use ports and other relevant terrestrial facilities (including airports) to facilitate fish transhipments, air freight exports and fishing crew changeovers.

Over the period from the mid-1950s to 1990–91, therefore, the Soviet Union and its CMEA[30] or Soviet bloc partners entered into and/or renewed an extremely large number of fisheries access agreements with other countries around the world.[31] This led to a period of Soviet bloc pre-eminence within global marine capture fisheries, at least in terms of catch volumes for small

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29 US Library of Congress, Federal Research Division, *Soviet Union (Former): A Country Study* (1989). See the section on 'Fishing', in 'Agriculture in the Soviet Union', ch 13, available at <http://lcweb2.loc.gov/cgibin/query/r?frd/cstdy:@field (DOCID+su0364)> at 1 October 2005. For more detail see also Solecki, 'The Soviet Union's Fishing Industry', above n 28; Dunning, above n 21.

30 The key CMEA states active in global fisheries were Poland, the GDR, Cuba, Bulgaria and Romania. A crucial document constituting the fisheries aspect of the Soviet bloc was the *Agreement between the Governments of the German Democratic Republic, the Polish People's Republic and the Union of Soviet Socialist Republics concerning Cooperation in Marine Fishing*, opened for signature 28 July 1962, 450 UNTS 230 (entered into force 22 February 1963). Bulgaria, Romania and Cuba joined this *Agreement* later, on 19 September 1964, 1 September 1966 and 24 March 1978 respectively. The objectives of the *Agreement* were: the development of marine fishing, fishing techniques, fish processing technology and scientific research into the condition of live marine resources; cooperation in the development of fishing in the open sea; cooperation on practical matters relating to the organisation of fishing; and cooperation on the exchange of results of exploration for new fishing grounds and of other research.

31 The exact number of the Soviet Union's fisheries treaties is difficult to establish. The FAO's Fisheries Agreements Register ('FARISIS') is currently the most comprehensive register of fisheries treaties. FARISIS was reviewed comprehensively by the author in late 1999, and recorded 245 entries for bilateral treaties entered into and/or renegotiated by the USSR. FARISIS is further described in FAO, Committee on Fisheries, *FAO's Fisheries Agreements Register*, 23rd sess, FAO Doc COFI/99/Inf.9 (1999) <http://www.fao.org/docrep/meeting/w9885e.htm> at 1 October 2005. See George Ginsburg and Robert Slusser, *A Calendar of Soviet Treaties 1958–1973* (1981) for an excellent listing of Soviet fisheries treaties from 1958 to 1973.

pelagics.[32] There was ongoing refinement of these agreements[33] from the early 1960s until the demise of the Soviet bloc's fisheries sector in the early 1990s.[34] The key elements of Soviet agreements over the period are summarised in Table 1 below.

This network of long-distance fishing by the Soviet bloc was essentially pulse fishing[35] to provide low-cost protein[36] for domestic populations, with little

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32 The sheer magnitude of Soviet catches from the 1950s to 1992 can be seen in the data on Soviet fishing activity from 1950–91, to be found at University of British Columbia, Fisheries Centre, Sea around Us Project, *Web Products: High Seas Areas* (2005) <http://seaaroundus.org/eez/highseas.aspx> at 1 October 2005.

33 Kwame Mfodwo, *The Implementation of the New Regime of Extended Jurisdiction over Marine Living Resources: A Study of State Practice in Africa's Atlantic Region (1967–1985)* (MA (International Law) Sub Thesis, The Australian National University, 1987); Black, above n 28; Kieran Kelleher et al, 'Fisheries Access Agreements in West Africa' in FAO, *Improvement of the Legal Framework for Fisheries Cooperation, Management and Development of Coastal States of West Africa*, FAO Doc GCP/RAF/302/EEC (1996) available at <http://indigo.ie/~fishybiz/projects2.html> at 1 October 2005.

34 The following publications provide a good picture of the demise of the Soviet bloc's fisheries sector, chronicling the process of transition towards market norms and the staged retreat from indiscriminate distant-water fishing: FAO, *Analysis of the Estonian Distant-Water Fisheries*, FAO Doc TCP/RER/2352–001/FIOD (1995) available at <http://www.fao.org/docrep/field/373973.htm> at 1 October 2005; GLOBEFISH, 'The Fishery Industries in Bulgaria, Romania, Hungary and the Former Czechoslovakia' (1993) 25 *Globefish Market Research Programme*; GLOBEFISH, 'The Fishery Industry during the Transition of the Former USSR to CIS' (1993) 24 *Globefish Market Research Programme*; GLOBEFISH, 'The Fishery Industries in the Baltic States: Estonia, Latvia and Lithuania' (1994) 28 *Globefish Market Research Programme*; GLOBEFISH, 'The Fishery Industries in Estonia' (1996) 42 *Globefish Market Research Programme*; GLOBEFISH, 'The Fishery Industries in Russia' (1996) 43 *Globefish Market Research Programme*; GLOBEFISH, 'The Fishery Industry in Poland' (1996) 45 *Globefish Market Research Programme*; Jolanta Zieziula, 'Polish Distant Water Fisheries in the Nineties: Problems and Possibilities of Overcoming Them' (Paper presented at the 10th Biennial Conference of the International Institute of Fisheries Economics and Trade, Oregon State University, Corvallis, US, 10 July 2000) available at <http://oregonstate.edu/dept/IIFET/2000/papers/zieziula.pdf> at 1 October 2005; Carmelo Cannarella, 'Fisheries in the East German Länder: Some Aspects of the Integration Process' (1997) 34 *Ocean and Coastal Management* 95.

35 Pulse fishing, as practised by Soviet bloc fleets, involved extremely highly concentrated efforts in one region, leaving the area, and then returning to fish in an equally highly concentrated way after a period of time. Pulse fishing was only possible as a viable harvest strategy when most of the world's fisheries stocks were free to all under the freedom of fisheries principle, as set out in the *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82, art 2 (entered into force 30 September 1962). As a result of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1835 UNTS 261 (entered into force 16 November 1994) ('*UNCLOS*'), and with the establishment of 200 mile Exclusive Economic Zones ('EEZs'), pulse fishing ceased to be an effective strategy, since it would have required coastal state permission. The attractiveness of the Southern Ocean, and hence of an agreement with Australia, lay in the fact that the Southern Ocean contained large expanses of sea with no coastal states or EEZs. Pulse fishing as a strategy was thus in principle still sustainable on what we now know are the highly fragile stocks of the Southern Ocean. An excellent account of Soviet pulse fishing strategy can be found in Kaczynski, 'The Economics of the Eastern Bloc Ocean Policy', above n 21, 262–4.

TABLE 1: USSR–COASTAL STATE FISHERIES AGREEMENTS[37]

Commitments by the USSR		**Commitments by Coastal States**	
Research	• Cruises • Data sharing • Local scientists on board	Allow access to resources	• Licensed fleets • Joint enterprises • Transhipment at sea • Surveys of resources
Training	• Education in USSR • Local crew on board • Assist local schools	Allow access to infrastructure	• Ports • Supplies • Repair facilities • Crew transfer and import of equipment • Landing rights for Aeroflot
Development	• Principle established • Provide vessels • Provide infrastructure • Credit facilities		
Commercial Activities	• Cooperation in joint ventures • Investments paid in fish, or fish revenues		

regard for its true economic cost[38] or for conservation or ecological considerations. Although there were some differences, the fishing fleets of the Soviet bloc followed this broad approach in their long-distance fishing

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36 The dominant Soviet bloc view was that marine-origin protein cost far less (roughly 66 per cent less) to produce than meat-origin proteins, and thus access to and use of global marine resources were indispensable to the Soviet bloc economies: see Solecki, 'The Soviet Union's Fishing Industry', above n 28, 6; see also Vladimir Kaczynski, '200 Mile EEZ and Soviet Fisheries in the North Pacific Ocean: An Economic Assessment' in John Craven, Jan Schneider and Carol Stimson (eds), *The International Implications of Extended Maritime Jurisdiction in the Pacific: Proceedings of the 21st Annual Conference of the Law of the Sea Institute* (1987) 193, 193. See also various documents of the US Central Intelligence Agency, Directorate of Intelligence: *Share of Animal Protein Supplied by Fish in the Soviet Diet*, Document No 4815, Accession No NN 3–263–01–005 (9 October 1975; declassified 21 March 2001); *The Nutrient Content of the Soviet Food Supply*, Document No 22267, Accession No NN 3–263–01–005 (1 December 1984; declassified 21 March 2001); *Gorbachev's Food Problem: Sources and Strategies*, Document No 23502, Accession No N3–263–01–005 (1 February 1990; declassified 21 March 2001) (all archived at NARA Archives II, Modern Military Reference Branch Building, US National Archives, College Park, Washington DC, US ('NARA Archives II Holdings'), consulted 24 January 2003).

37 Information extracted from Black, above n 28, 167.

38 A persuasive argument that the basis of Soviet bloc distant-water fishing (excessive subsidisation of input costs and low onboard wages to produce low cost protein) was economically unsustainable was first popularised in the English language marine policy literature by Kaczynski in two publications: 'Controversies in Strategy of Marine Fisheries Development', above n 21, and 'The Economics of the Eastern Bloc Ocean Policy', above n 21. Elena Nikitina and Peter Pearse make the same argument in a post-collapse analysis: 'Conservation of Marine Resources in the Former Soviet Union: An Environmental Perspective' (1992) 23 *Ocean Development and International Law* 369, 373.

throughout the 1960s and 1970s,[39] as well as the early 1980s,[40] with Soviet bloc pulse fishing eventually suffering a crisis with the widespread declaration of 200 mile Exclusive Economic Zones ('EEZ'). The political objective, given the imperatives of the Cold War, was projection of military power using fishing fleets as ancillary aspects of maritime power.[41]

Yet another objective was to establish a network of ports throughout the world, thereby facilitating access to and transit from all the distant theatres of Soviet bloc fishing operations. Such ports were intended to serve as quasi-home bases for the various Soviet and allied fleets given that the premier Soviet ports in the Baltic were thousands of miles away from key theatres of operation such as the Southern and Indian Oceans — the Antarctic, for example, being as far as 14 000 miles away from the Baltic ports.[42]

As the EEZ oceans enclosure movement gathered pace, a particularly important Soviet objective was to secure year-round access to the southern oceans. These oceans were seen by Soviet fisheries planners as the next frontier for expansion, with an economic bonanza expected from the exploitation of the seemingly endless sources of krill, squid and other deepwater resources. This

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39 For Soviet distant-water fishing in the 1960s and 1970s, see Kaczynski, 'Controversies in Strategy of Marine Fisheries Development', above n 21; Kaczynski, 'The Economics of the Eastern Bloc Ocean Policy', above n 21; Black, above n 28; Dunning, above n 21. See also various documents of the US CIA, Directorate of Intelligence: *Construction and Imports of Fish Factory Trawlers for the Soviet Fishing Fleet 1955–67*, Document No 19689, Accession No NN 3–263–01–005 (13 May 1959; declassified 21 March 2001); *Construction and Imports of Vessels for the Fishing Fleets of the USSR 1950–60*, Document No 12228, Accession No NN 3–263–99–001 (13 May 1959; declassified 11 December 1998); *Estimated Construction of Ships for the Soviet Fishing Fleet During the Seven Year Plan 1959–65*, Document No 2105, Accession No NN 3–263–98–002 (1 January 1962; declassified 28 October 1997); *Soviet Fishing in International Waters*, Document No 112301, Accession No NN 3–263–99–001 (1 August 1963; declassified 11 December 1998); *Soviet Fisheries and Maritime Aid to Less Developed Countries*, Document No 19887, Accession No NN 3–263–00–001 (1 June 1976; declassified 19 November 1999); *Soviet Ocean Shipping and Fishing*, Document No 6260, Accession No NN 3–263–00–001 (6 February 1976; declassified 19 November 1999); *Soviet Maritime and Fisheries Assistance to Less Developed Countries: 1973 Developments* Document No 22334, Accession No NN 3–263–01–005 (7 June 1974; declassified 21 March 2001); *Merchant and Fishing Fleet Working Group*, Document No 5854, Accession No NN 3–263–99–001 (18 May 1973; declassified 6 May 1999); *Information to Update ONI 36–2B Sections on Soviet Fishery Agreements with Less Developed Countries in the Free World*, Document No 5541, Accession No NN 3–263–99–001 (27 August 1968; declassified 6 May 1999); *Developments in the Soviet Merchant and Fishing Fleets*, Document No 3055, Accession No NN 3–263–98–002 (1 July 1970; declassified 28 October 1997) (all archived at NARA Archives II Holdings, consulted 24 January 2003).

40 For a discussion of Soviet distant-water fishing policy in the 1980s see FAO, *Analysis of the Estonian Distant-Water Fisheries*, above n 34; Pautzke, above n 28; Kaczynski, '200 Mile EEZ and Soviet Fisheries in the North Pacific Ocean', above n 36.

41 For an excellent discussion of the military dimension to the Soviet distant-water fleet see Viktor Sebek, *The Eastern European States and the Development of the Law of the Sea* (1979) 80–4. It has now been conclusively demonstrated that Soviet fishing vessels were dual purpose vessels and could be rapidly converted to military use: see below n 55 and accompanying text.

42 Hobart and Melbourne were excellent candidates for quasi-home port status and both governmental and private Australian interests were wooed by the Soviet authorities on this score: see Peter Mickleburough, '1000 Soviet Jobs for Vic', *Herald Sun* (Melbourne, Australia), 29 October 1991, 1–2. This article stated that following the Australia–USSR *Fisheries Agreement* of 1990, Melbourne was to be made available as a repair and servicing point for the Soviet Antarctic fleet, whilst up to 10 Soviet vessels were expected to be based permanently in Hobart — the principal Australian port facing the Southern Ocean.

exploitation was to be facilitated by the principle of freedom of fishing on the high seas.[43]

Studies of Soviet distant-water fishing undertaken in the 1980s also indicate that fisheries access agreements (especially the joint venture element) had by the mid-1980s become part of a global fish supply and marketing strategy. Under this strategy, the Soviet Union had divided up the world into a number of fishing zones, endeavoured to secure joint ventures in each zone, and sought to use fish caught by these joint ventures to underwrite the extensive global Soviet barter trade in fish.[44] The joint venture provisions set out at art VIII of the *Fisheries Agreement* are to be viewed in this light.

B *Fisheries Agreements and Access to Convertible Currency*

With the consolidation of economic crisis in the Soviet bloc,[45] including a crisis in the supply of fish products,[46] more complex arrangements incorporating

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[43] Krill, a shrimp-like crustacean, was of particular interest to Soviet fleets since its large aggregations and the huge quantities of it available were ideal for the kind of large-scale vacuum and pulse fishing undertaken by Soviet fleets. Antarctic krill had been the focus of commercial fishing by various Southern Ocean fleets since 1972. The fishery market expanded quickly in the 1970s and was dominated by the Soviet Union and Japan. By 1982 the annual catch was over 500 000 tonnes, 93 per cent of which was taken by the Soviet Union. The Commission for Conservation of Antarctic Marine Living Resources reports that the collapse of the Soviet Union led to a lull in fishing with levels of catch dropping to around 100 000 tonnes per annum in the mid-1990s. The main fishing countries are now Japan and Poland. It should also be noted that with respect to orange roughy and Patagonian toothfish, currently the subject of much international concern, Soviet fleets were in a position to undertake effective large-scale removal of these resources given their detailed, if not unparalleled, knowledge of these waters. From this perspective, the collapse of the Soviet global fleet was particularly timely. Even so, significant levels of illegal, unauthorised and unregulated fishing by Russian vessels has been reported by Greenpeace and the World Wide Fund for Nature: see generally Kwame Mfodwo, *The Fisheries of the Southern Ocean: Analysis of Major Fisheries at Risk, Associated Management Regimes and Related Non-Governmental Organisations*, commissioned by the Pew Charitable Trusts, US (1997) (copy on file with author); Dunning, above n 21, 76–81; Stephen Nicol and Yoshi Endo, FAO, *Krill Fisheries of the World*, Fisheries Technical Paper 367 (1997) (see especially ch 4.1) <http://www.fao.org/documents/show_cdr.asp?url_file=//DOCREP/003/W5911E/w5911e00.htm> at 1 October 2005; Greenpeace, *Mauritius: Indian Ocean Haven for Pirate Fishing Vessels* (2000) <http://archive.greenpeace.org/oceans/southernoceans/expedition2000/haven.pdf> at 1 October 2005; Mary Lack and Glen Sant, 'Patagonian Toothfish: Are Trade and Conservation Measures Working?' (2001) 19(1) *Traffic Bulletin* <http://www.traffic.org/toothfish/toothfish.pdf> at 1 October 2005.

[44] MacSween, above n 28, 13; Kaczynski, 'The Economics of the Eastern Bloc Ocean Policy', above n 21, 261.

[45] See Ed Hewett, 'Is Soviet Socialism Reformable?' in Alexander Dallin and Gail Lapidus (eds), *The Soviet System: From Crisis to Collapse* (revised ed, 1995) 311; US CIA and Defense Intelligence Agency, 'Beyond Perestroyka: The Soviet Economy in Crisis' in Alexander Dallin and Gail Lapidus (eds), *The Soviet System: From Crisis to Collapse* (revised ed, 1995) 322; Marshall Goldman, 'The Effort Collapses' in Alexander Dallin and Gail Lapidus (eds), *The Soviet System: From Crisis to Collapse* (revised ed, 1995) 337.

a number of commercial non-fisheries elements became important in fisheries access agreements. The prime objective was to ensure that the Soviet partner was able to use the catch taken to gain convertible currency.[47] One tactic to implement this strategy, widely used in the context of African area resources by the mid-1980s, was for the Soviet partner to segment the marketing of its catch into three parts: first, the sale of low-value species such as mackerel to major African markets such as Nigeria, Ghana and Zaire; second, the return by transport vessel to the USSR of a portion of the catch to meet the food supply requirements allocated to that particular enterprise under the relevant Five Year Plan; and third, the sale in Japan or Europe of the high-value portion of the catch through air-based transhipment via the airports of the coastal state concerned.[48] Writing in 1982–83, Ian MacSween provided a picture of this network of arrangements for the Food and Agriculture Organization:

> [T]he necessity to conserve foreign exchange has meant that much of the trade with the Soviet Union is conducted on the basis of barter arrangements. Rather than being paid in money for the fish supplied by the Soviet Union, the supplier is paid in the form of other products and usually fish. So a company supplying fish to the Soviet Union will normally receive fish in return. The fish supplied by the Soviet Union can then be sold in either the domestic or international markets and the money for the original supply can thus be recouped. The products offered in return by the Soviet Union will depend upon what is available at any particular time from their own fleet. In some cases the Soviet Union may be in a position to offer high value products such as shrimps in exchange for supplies of fish, whilst in other cases they may offer lower value species such as horse mackerel. Thus it is not uncommon for the Soviet Union to pay for its supplies of Atlantic mackerel by giving the supplier quantities of horse mackerel which it (the Soviet Union) will agree to deliver to a West African port. Generally the pattern that has evolved is that the Soviet Union will supply those products for which there is a relatively limited domestic demand or those which can command a high and easily obtained price on the international market. Trade on this basis with the Soviet Union requires a considerable amount of information regarding the international market for fish. Such information is necessary to be able to convert what is being offered in return into actual money.[49]

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46 The productivity crisis in Soviet high seas fisheries in the 1980s and 1990s is well captured by the following commentaries: Pautzke, above n 28; GLOBEFISH, 'The Fishery Industry during the Transition of the Former USSR to CIS', above n 34; GLOBEFISH, 'The Fishery Industries in the Baltic States: Estonia, Latvia and Lithuania', above n 34; GLOBEFISH, 'The Fishery Industries in Estonia', above n 34; GLOBEFISH, 'The Fishery Industries in Russia', above n 34; Markus Vetemaa, Margit Eero and Rögnvaldur Hannesson, 'The Estonian Fisheries: From the Soviet System to ITQs and Quota Auctions' (2002) 26 *Marine Policy* 95; Vetemaa et al, 'Collapse of Political and Economical System as a Cause for Instability in Fisheries Sector: An Estonian Case' (Paper presented at the 10th Biennial Conference of the International Institute of Fisheries Economics and Trade, Oregon State University, Corvallis, US, 10 July 2000) available at <http://oregonstate.edu/dept/IIFET/2000/papers/vetemaa.pdf> at 1 October 2005.

47 The fisheries aspects of the convertible currency issue are discussed by MacSween, above n 28, 13; Kaczynski, 'The Economics of the Eastern Bloc Ocean Policy', above n 21, 261–2.

48 See MacSween, above n 28, 13.

49 Ibid.

Another technique was for the Soviet Union to grant the coastal state access to the Soviet commodities markets (grain, wool, etc) in return for the coastal state granting Soviet interests access to its fisheries zones. Although a form of barter trade, the Soviet catch was as likely to be sold on the international market as returned to the Soviet Union for use as food. For this strategy to work, the targeted fisheries zones had to contain high value species or have domestic markets with strong currencies. The Australian agreements discussed in this article were of the latter type.

C *Strategic Significance of the Australia–USSR* Fisheries Agreement

Returning then to the specific theme of Australia–USSR fisheries relations as a subset of global Soviet fisheries policy, internal dissension within the USSR meant that by the end of 1989, reconfiguring Soviet international fisheries strategy had become a particularly urgent matter for the Soviet authorities. Restiveness and threats of secession — as evident in the European Republics of Latvia, Lithuania and Estonia[50] — as well as ongoing tensions between the Ukraine and the central Soviet authorities in Moscow were all harbingers of doom for Soviet fishing. For it was the coastlines and ports of these now increasingly dissident republics that provided the largest home bases for the global Soviet fishing fleet and hosted the major fish processing enterprises. Targets of interest for the new Soviet strategy to respond to these challenges included the Southern Ocean and its reputedly rich resources, the relatively underexploited tuna fisheries of the Indian Ocean and the Pacific, and the fishing grounds of the North Pacific, including those adjacent to the US, Canada, Japan and the Korean peninsula.[51]

It is these imperatives which explain the drive for a fisheries agreement with Australia, despite the relative poverty of Australia's fisheries resources. More

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50 See the chronology of the collapse of the USSR at Part V below and Bothe and Schmidt, above n 1, 816–18.

51 See Pautzke, above n 28, ch 2.5.

specifically, the key sources of attraction were:

- the prospect that, through the participation by Soviet states in joint Australian–USSR fishing enterprises, Australia's convertible currency economy would ensure dollar returns for the cash-strapped Soviet Treasury;[52]
- the prospect that Australian infrastructure (ports, airlines, fish processing facilities, markets) could be used to service the Soviet presence in the Southern Ocean;
- the prospect that Australian infrastructure and relative physical proximity to both the South Pacific (the raw materials source) and Japan (the principal world market) could provide a platform to facilitate Soviet latecomer entry into the lucrative convertible currency-based tuna fisheries of the South Pacific.[53]

Finally, the detailed Soviet knowledge of Australian resources would justifiably have been expected to enhance the production and marketing prospects of the Australian–Soviet joint ventures envisaged under the *Fisheries Agreement*.[54]

III AUSTRALIAN PERSPECTIVES ON THE *FISHERIES* AND *COMMODITIES AGREEMENTS*

A *Cold War Fears*

In light of both the steady expansion of global Soviet distant-water fishing activity from the mid-1960s onwards, and Soviet overtures to enter into port access arrangements to facilitate access to the Southern Ocean, Australia and other states in Oceania periodically had to confront the question of whether or not to enter into treaty-based fisheries sector relations with the Soviet Union. Whilst there was interest, and in some commercial fishing quarters, excitement, there was also fear — fear that Soviet fishing fleets would be used to advance

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52 See MacSween, above n 28. Pautzke, above n 28, ch 2.5 also points out that in the late 1980s and early 1990s access to convertible currency was viewed as crucial to modernising and repairing the ageing Soviet fleet.

53 The access agreements that the USSR signed with Vanuatu, Papua New Guinea and Kiribati in the mid-1980s demonstrate this objective: see below n 58 and accompanying text. Doulman provides a succinct description of the laggard status of USSR tuna fisheries fleets, explaining that their skills and technologies were far inferior to those of fleets from the US, Japan, Taiwan and South Korea: David Doulman, 'The Kiribati–Soviet Union Fishing Agreement' (1987) 28 *Pacific Viewpoint* 20, 34.

54 See above n 23 and accompanying text.

Soviet military and expansionist designs.[55] Less often discussed but, with hindsight, potentially as damaging, was the real possibility that fisheries access and other arrangements would have a serious adverse effect on the sustainability of stocks, given the harm done in other oceans by Soviet pulse fishing.[56] Finally, there was the related fear that radical states such as Libya could gain influence in the region, given Libya's significant oil wealth and its espousal of a form of 'Third World revolution' through ideas set out in *The Green Book* — a manual for radical change ostensibly authored by Colonel Gaddafi.[57]

Australia had an inconsistent position on the issue of fisheries access. The Australian authorities strongly opposed the negotiation of fisheries agreements between the USSR and various South Pacific island states[58] on the basis that these states did not have a security apparatus sophisticated enough to cope with a significant Soviet presence. In contrast, it was felt that Australia and New Zealand could adequately manage any untoward activity by the Soviets, hence such agreements, although not positively welcome, would be tolerated. The Australian authorities thus raised no objections to the 1978 treaty and subsequent

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55 It has now been conclusively established that the Soviet authorities systematically constructed a fishing fleet with a three-sided capability — fishing, intelligence gathering and military use — with many vessels altered or codesigned by naval architects. In particular, heavy steel plates and military-type construction created ships quickly convertible to military use on the high seas without a need to return to Soviet ports to be refitted, whilst larger boats could withstand heavy gunfire and deploy machine guns and cannons. Additionally, highly sophisticated radar and sonar gear used for fishing also had military applications. Evidence of these capabilities comes from an excellent source: engineers involved in the extensive refitting and retooling of old Russian trawlers in Western and Asian ports and dockyards over the last decade: see, eg, Steve Morgan, 'Lake Union Shipbuilding Firm Refits Russian Trawlers', *The Seattle Press* (Seattle, US), 15 July 1998 available at <http://www.seattlepress.com/article-137.html> at 1 October 2005. Ironically this 'naval' approach made Soviet fuel costs prohibitive and was one of the long-term factors leading to the economic crisis in the USSR's fishery supply sector after petroleum prices rose in 1973.

56 See generally Nikitina and Pearse, above n 38; Kaczynski, 'Controversies in Strategy of Marine Fisheries Development', above n 21; Kaczynski, 'Distant-Water Fisheries of the East European Countries', above n 28.

57 See for instance, David Hegarty, *Libya and the South Pacific* (Working Paper No 127, Strategic and Defence Studies Centre, The Australian National University, 1987); David Hegarty, *South Pacific Security Issues: An Australian Perspective* (Working Paper No 147, Strategic and Defence Studies Centre, The Australian National University, 1987). Current Australian policy to prevent 'failed states' in the South Pacific supporting terrorism echoes elements of these earlier fears: see, eg, Australian Strategic Policy Institute, *Our Failing Neighbour — Australia and the Future of Solomon Islands* (2003) <http://www.aspi.org.au/board.cfm?pubID=30> at 1 October 2005. Current Australian Government policy towards the South Pacific reflects many of this report's recommendations. On *The Green Book*, see 'The Green Book' in US Library of Congress, Federal Research Division, *Libya: A Country Study* <http://countrystudies.us/libya/80.htm> at 1 October 2005.

58 Three South Pacific island states exercised their sovereign rights to enter into such treaties: see *Agreement between the Government of Kiribati and the Sovrybflot of the Union of Soviet Socialist Republics concerning Purse Seine and Longline Fishing within the Exclusive Economic Zone of Kiribati* (1985) available from <http://www.intfish.net/treaties/bilaterals/c-index.htm#Kiribati> at 1 October 2005 (details regarding the content of this *Agreement* and the circumstances surrounding its formation are discussed in Doulman, above n 53, 27–9); *Papua New Guinea–Union of Soviet Socialist Republics, Agreement concerning Fisheries* (1989); *Vanuatu–Union of Soviet Socialist Republics, Agreement concerning Fisheries* (1986).

exchanges of letters between New Zealand and the USSR,[59] whilst, as this article recounts, Australia negotiated its own fisheries access treaty with the Soviet Union in 1989, in addition to having approved and then cancelled private sector joint ventures in 1978–79.

At its height, the controversy over Soviet fisheries agreements in the Pacific was debated vigorously in Australian and Asia-Pacific academic journals[60] as well as the Australian broadsheet press.[61] For its part, the US Government also commissioned expert reports to assess the extent to which fisheries relations were a surrogate for military encroachment and ideological infiltration by the Soviet bloc.[62] It is reasonable to argue that the detailed security measures set out in the *Fisheries Agreement*, and discussed in Part IV below, reflect a pragmatic compromise between the various positions expressed in the debates of the 1980s.

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59 *Agreement on Fisheries between the Government of New Zealand and the Government of the Union of Soviet Socialist Republics*, opened for signature 4 April 1978, [1978] NZTS 6 (entered into force 4 April 1979). The *Agreement* was renewed by various exchanges of letters between New Zealand and the Soviet Union from 1982–90 and between New Zealand and the Russian Federation from 1994–96. For the New Zealand–USSR instruments, see *Exchange of Letters between the Government of New Zealand and the Government of the Union of Soviet Socialist Republics Constituting an Agreement Extending the Agreement on Fisheries of 4 April 1978*, opened for signature 7 May 1982, [1982] NZTS 9 (entered into force 30 June 1982); *Exchange of Letters Extending the 1978 Agreement on Fisheries between the Government of New Zealand and the Government of the Union of Soviet Socialist Republics*, opened for signature 21 September 1984, [1984] NZTS 20 (entered into force 30 September 1984); *Exchange of Letters Constituting an Agreement between the Government of New Zealand and the Government of the Union of Soviet Socialist Republics Extending the Agreement on Fisheries of 4 April 1978*, opened for signature 24 September 1986, [1986] NZTS 5 (entered into force 30 September 1986); *Exchange of Letters Constituting an Agreement Extending the 1978 Agreement on Fisheries between the Government of New Zealand and the Government of the Union of Soviet Socialist Republics*, opened for signature 26 September 1990, [1990] NZTS 8 (entered into force 30 September 1990). For the New Zealand–Russian Federation instruments, see *Exchange of Letters Constituting an Agreement extending the Agreement on Fisheries of 4 April 1978*, [1994] NZTS 23 (signed and entered into force 30 September 1994); *Exchange of Letters Constituting an Agreement Extending the Agreement on Fisheries of 4 April 1978*, opened for signature 23 September 1996, [1996] NZTS 18 (entered into force 30 September 1996). The 1978 *Agreement* appears still to be in force, presumably awaiting the day the Russian Federation reassumes an active position in the fisheries of the Western Central Pacific and the Southern Ocean.

60 See, eg, Martin Tsamenyi and Sam Blay, 'Soviet Fishing in the South Pacific: The Myths and the Realities' (1989) 5 *Queensland University of Technology Law Journal* 155; Doulman, above n 53; Robert Kiste and Richard Herr, 'The Potential for Soviet Penetration of the South Pacific Islands: An Assessment' (1986) 18(2) *Bulletin of Concerned Asian Scholars* 42; Richard Herr, 'Regionalism, Strategic Denial and South Pacific Security' (1986) 21 *Journal of Pacific History* 170.

61 See, eg, Warren Merrill and Peter Samuel, 'Soviets May Soon Have Pacific Base, Says Fraser', *The Australian* (Sydney, Australia), 24 April 1985, 3; Ean Higgins, 'Pacific Islands Warned about Soviet Threat', *The Australian Financial Review* (Sydney, Australia), 4 April 1985, 14; Peter Hastings, 'Australian Concern as Soviets Offer Vanuatu $2m Deal', *Sydney Morning Herald* (Sydney, Australia), 15 December 1986, 1; 'Hayden Warns of Soviet Infiltration through Fishing Deals', *The Canberra Times* (Canberra, Australia), 14 December 1986, 1.

62 US Central Intelligence Agency, Directorate of Intelligence, *The Soviet Pacific Fishing Fleet: After More than Fish*, Document No 22210, Accession No NN 3–263–01–005 (1 March 1982; declassified 21 March 2001) (archived at NARA Archives II Holdings, consulted 24 January 2003).

B *Access to the Soviet Market*[63]

The commodities that Australian enterprises expected to export to the USSR under the *Commodities Agreement* were wheat,[64] butter,[65] greasy wool,[66] sugar,[67] manganese ore,[68] bauxite,[69] alumina,[70] mutton,[71] barley,[72] and various protein crops.[73] In return for these market access commitments from the USSR, Australia offered fisheries access as an explicit trade-off.[74] Article 8 of the *Commodities Agreement* confirms this linkage across the two sectors:

> 1. This Agreement shall enter into force on the date of signature [15 February 1990] and shall remain in force for three years subject to the [*Fisheries Agreement*] being valid at the same time if Parties have not agreed otherwise.
>
> …
>
> 3. Before expiry of the validity of this Agreement the Parties shall consider the possibility of its prolongation or conclusion of a new and similar Agreement with due regard to the experience of the Parties in the implementation of this Agreement, and subject to agreement between the Parties on co-operation in Fisheries being current.[75]

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63 For more detail, including an account of Australian exports to the USSR, see the discussion in Senate Standing Committee on Foreign Affairs, Defence and Trade, above n 3, app 3, chs 1, 4.

64 From 1979–80 to 1988–89 wheat exports to the USSR were as follows: 1979–80: A$432 021 000; 1980–81: A$421 670 000; 1981–82: A$385 980 000; 1982–83: A$196 259 000; 1983–84: A$257 773 000; 1984–85: A$370 823 000; 1985–86: A$593 830 000; 1986–87: A$164 217 000; 1987–88: A$7 755 000; 1988–89: A$44 285 000; see Senate Standing Committee on Foreign Affairs, Defence and Trade, above n 3, 81.

65 Soviet butter purchase commitments were for 37 500 tons over three years: see *Commodities Agreement*, above n 5, sch.

66 Soviet greasy wool purchase commitments were for 260 000 tons over three years: ibid. At the time the USSR was Australia's second largest export market for greasy wool at around 114 000 tons, valued at A$866.5 million. The USSR at the time had the world's largest net domestic consumption of wool. See also Senate Standing Committee on Foreign Affairs, Defence and Trade, above n 3, 88.

67 Subject to determination through long-term commercial contracts, sugar purchase commitments were for 300 000 tons over three years: see *Commodities Agreement*, above n 5, sch.

68 Soviet manganese purchase commitments were 300 000 tons over three years: see ibid.

69 Soviet bauxite purchase commitments were 900 000 tons over three years: see ibid.

70 Soviet alumina purchase commitments were 180 000 tons over three years: see ibid.

71 Mutton purchase commitments were less firm in that Soviet organisations agreed to provide Australian organisations with an opportunity to supply mutton on a short or a long-term competitive basis: see ibid.

72 Barley purchase commitments were even more open-ended as they depended on consultation between the various parties under art 4 and *Commodities Agreement*, above n 5, sch.

73 See *Commodities Agreement*, above n 5, sch.

74 The evolution of this trade-off is described fully below Part IV(A) and accompanying text.

75 Above n 5.

The preamble to the *Commodities Agreement* also stated that the *Commodities Agreement* takes into consideration the 'signing of the [*Fisheries Agreement*] done at Canberra on 15 February 1990'.[76]

Of course, in addition to the hard-nosed commercial details set out in the treaty text, Australia also viewed its trade and fisheries relationships as deepening perestroika and glasnost — seen on both sides of Australian politics as fundamental changes deserving of support.[77] Finally, from the economic point of view, fisheries access was an additional bargaining chip to bolster Australia's position against its much more powerful competitors for the Soviet market — the US, Canada and the European Union — countries able to comprehensively and directly subsidise exports to the USSR through farm-gate subsidies, assisted sales, export insurance and export refunds.[78]

C *Fisheries Objectives*

Australian fisheries interests and objectives can be summarised as follows:

- Australia sought to capitalise on Soviet fisheries expertise and worldwide trading networks, whilst subsuming Soviet fisheries within its general framework for control of foreign fishing, with a particular focus on intensive management of the Soviet security risk;
- Australia desired an agreement that granted the Soviet Union a level of port access and other terrestrial resources whilst limiting possible damage to Australian security and defence interests;
- Australia sought to gain access to Soviet expertise and hard data relating to both Australian resources and those of the Southern Ocean;
- Australia saw this three year agreement as a first cautious step in establishing fisheries sector relations provided implementation of the *Fisheries Agreement* demonstrated an absence of significant costs.

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76 Ibid.

77 See Senate Standing Committee on Foreign Affairs, Defence and Trade, above n 3, 7–16, 91–9, which shows that part of the Australian rationale for the *Human Contacts and Humanitarian Cooperation Agreement*, above n 7, and the attached *Protocol*, was facilitation of travel by Australians so as to further enhance the prospects of democracy through inter-country contact.

78 The best evidence of this conflict between Australia and its traditional allies is in the protests made in the 1980s by the Hawke Labor Government regarding EU and US subsidisation of wheat exports to the USSR under the US Export Enhancement Program and the EU Common Agricultural Policy. The Australian Government and leading farmers' groups argued in the 1980s within the Cairns Group and international trade negotiations that these exports were destroying Australian markets in the USSR and that this was doing significant damage to an important US ally. High-level Australian delegations undertook visits to the US in what proved to be an unsuccessful attempt to force a change of US policy: see Roy Eccleston and Paul Downie, 'PM May Send Anti-Subsidy Lobby to US', *The Australian* (Sydney, Australia), 20 February 1991, 4. See also 'Bilateral Relations and Increased Trade' in Senate Standing Committee on Foreign Affairs, Defence and Trade, above n 3, 69. In contemporary terms, current Australian concerns at being pushed out of Iraqi markets by American suppliers after the defeat of Saddam Hussein's regime continue this narrative of clamouring for market access: see ABC Radio, 'Opposition Fears Post-War Wheat Claim from US', *Rural News*, 27 February 2003 <http://www.abc.net.au/rural/news/stories/s794319.htm> at 1 October 2005.

D *Integrating Soviet Fisheries into General Australian Policy on Foreign Fishing in Australian Waters*

The Australian policy framework of the time was set out in the *Guidelines for Applications for the Use of Foreign Fishing Vessels in the Australian Fishing Zone*.[79] Under this document, Australia officially allowed three types of foreign fishing activity: foreign fee fishing,[80] collaborative fishing,[81] and foreign feasibility fishing.[82] Foreign fishing was subject to the fundamental management principle that preference be given to fishing operations owned by Australian interests and conducted from Australian vessels.[83] Under the *Guidelines*, where foreign operations were permitted, the overriding objective was 'to maximise genuine, tangible and assessable benefits to Australia'.[84] In general, foreign fishing operations were only permitted where they targeted stocks that were under-utilised by Australian enterprises, or where it was considered that foreign participation would result in net benefits to Australia.[85] The determination of whether a stock was under-utilised or not was guided by an assessment of whether or not the existing Australian fleet had the capacity to harvest those particular stocks, and also whether there were Australian enterprises willing to exploit the resource within a reasonable time.[86]

The basic principle was set out as follows:

> The Government recognises that there will be circumstances in which the use of foreign fishing vessels may offer significant advantages to Australian companies involved in high risk exploratory or developmental work.
>
> Where little is known of a resource and the costs of exploration are high, the use of a foreign vessel under temporary lease or charter may reduce the risks to both the operator and the community in general. The investment required to assess the resource can be minimised and, should the resource prove unproductive or the vessel prove unsuitable, resources elsewhere in the AFZ [Australian Fishing Zone] need not be subject to the pressure which might otherwise arise had the vessel been permanently imported.[87]

Another stated objective of feasibility fishing was that it should act as a catalyst for Australian fisheries development through encouraging situations in which the foreign partner would locate new resources and assist with evaluation of their commercial potential, test new gear and vessels with minimal risk to the Australian partner, and explore new possibilities for processing and marketing of Australian products.[88] As argued above, the Soviet fleet was particularly well

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79 See Australian Fisheries Service, *Guidelines for Applications for the Use of Foreign Fishing Vessels in the Australian Fishing Zone* (1989) ('*Guidelines*').
80 Ibid 4.
81 Ibid 6–7.
82 Ibid 5.
83 Ibid 1.
84 Ibid.
85 Ibid 2.
86 Ibid 2 (fn 4).
87 Ibid 2.
88 Ibid 5.

primed to undertake feasibility fishing effectively given its extensive knowledge of Australian resources.

To support these objectives, agreements on feasibility fishing were expected to contain provisions requiring such operations to report back, providing comprehensive information on the nature and extent of the resource, catch rate and species composition, vulnerability to and selectivity of fishing gears, economic viability of the fishing activity undertaken, marketability of catch, and potential opportunities for Australian involvement in catching, processing or marketing the resource.[89]

Australian policy of that period also sought to encourage such forms of collaborative fishing activity or joint ventures as would develop long-term fishing capability and related facilities in the catching, processing and marketing sectors.[90] To ensure that sustainable enterprises were established, the *Guidelines* required that every effort be made to distinguish genuine productive foreign joint ventures from arrangements that did no more than facilitate short-term commercial access for foreign operators.[91] To ensure that the ability of foreign fishing operations to 'open up' areas for later, more intensive fishing was properly targeted, in general, only fisheries or areas currently under-utilised by Australians were to be opened up to collaborative fishing ventures.[92] However, there was some flexibility in these criteria, since applications for collaborative ventures were permitted in established fisheries where the activity prima facie seemed likely to offer benefits to Australia over and above those obtainable through existing operations.[93] The *Guidelines* stated, for example, that foreign entry into a particular sector might be approved where the venture intended to assess new fishing techniques which were not currently used by Australian enterprises in that fishery, but which appeared to have significant potential to increase returns.[94] Australian authorities would clearly have expected that at least some of these benefits would accrue to Australian interests through the joint ventures that were anticipated under the *Fisheries Agreement* with the USSR.

E *Joint Venture Fisheries and Shore-Based Benefits*

Although fee-based fishing was allowed under the *Guidelines*, it was collaborative or joint venture fishing that was of greatest interest to the parties.[95] In fact, two vessels were allowed to commence feasibility fishing in areas off Western Australia immediately after the *Fisheries Agreement* was signed.[96] Various press reports also anticipated significant economic benefits to flow from

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89 Ibid.
90 Ibid 6–7.
91 Ibid 6.
92 Ibid 7.
93 Ibid.
94 Ibid.
95 Joint Statement by the Minister for Foreign Affairs and Trade, Senator Gareth Evans and the Minister for Primary Industries and Energy, the Hon John Kerin, 'Progress Made on Australia/USSR *Fisheries* and *Commodities Agreements*', 2 March 1989 ('March Joint Statement').
96 Ibid.

the Soviet presence, with reports that arrangements had been entered into with state authorities in Tasmania and Victoria.[97]

F *Access to Soviet Fisheries Data on Australian Fisheries*

With the benefit of hindsight, another less emphasised Australian objective stands out more clearly — securing access to Soviet data regarding Australian fish stocks. To understand this objective it is useful to recall that the Soviets accumulated extensive knowledge and experience of southern fisheries generally and, in particular, a detailed knowledge of stocks in Australian waters. This latter dimension was due to their exploitation of what can now be viewed as a 'loophole' in Australian strategic fisheries policy — namely Australia's adherence to the three and then 12 nautical mile territorial sea limit under the Old Law of the Sea.[98] Under that framework, Soviet vessels had been free to come very close to the Australian land mass in their investigation of fish stocks.

The presence of this objective is confirmed in public statements made by Australia's Fisheries Research and Development Corporation ('FRDC') in 1993.[99] In that year, the FRDC approved a project to retrieve fisheries data from the collapsing Soviet Union and analyse the data in Australia. The relevant segments of the project description and rationale read:

> Consistent, long-term fishery-independent survey data are invaluable, but they are costly, particularly for a country such as Australia, with a vast coastline and relatively small fisheries. In the 1960s and 1970s, the Soviet Union carried out extensive fishery surveys on the shelf and upper slope of northern, western and southern Australia. The data set provides a unique record of the relative abundance of Australian fishes over an approximately ten-year period, but for many years the data were not accessible to researchers outside the Soviet Union. This changed, however, with the collapse of the Soviet Union. … Despite the limitations of the data, the data set provides a valuable historical benchmark for Australian fisheries.[100]

The importance of this objective within the *Fisheries Agreement* is demonstrated by the alacrity with which the FRDC funded the requested research project. With the *Fisheries Agreement* and the state that signed it both obsolete, it made much more sense to go directly to the central archives to obtain and

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97 See above n 42.

98 The 'Old Law of the Sea' was built around the dichotomy between the territorial sea and the high seas. In the territorial sea, the coastal state was sovereign. On the high seas, freedom of use of the seas prevailed (freedom to fish; to lay submarine pipes and cables; freedom of navigation; freedom of high seas overflight; as well as other freedoms), with all states allowed to exercise this freedom together with a duty to have reasonable regard for the interests of other states. The conventions laying out these rules were: *Geneva Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Geneva Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entry into force 10 June 1964); *Convention on the High Seas*, above n 35; *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966).

99 See the project terms of reference as set out in Koslow et al, above n 24.

100 Fisheries Research and Development Corporation, *Exchange And Analysis Of Historical Soviet Fishery Survey Data From The Waters Around Australia: Non Technical Summary* <http://bookshop.frdc.com.au/miva/merchant.mv?Screen=PROD&Product_Code=HD1993-239&Category_Code=&Store_Code=B> at 1 October 2005.

analyse the masses of data which would otherwise have had to be prised out of the Soviets under the *Fisheries Agreement*.

IV THE *AGREEMENT BETWEEN AUSTRALIA AND THE USSR RELATING TO COOPERATION IN FISHERIES*

A The *Travaux Préparatoires*

The *Fisheries Agreement* had its origins in a proposal made by the USSR in April of 1988 during an official visit by N P Kudryavtsev, Soviet First Deputy Minister for Fisheries.[101] The proposal had the following elements:

- Negotiation of a framework government-to-government fisheries agreement between Australia and the USSR;
- Exploratory fishing for commercial purposes in the AFZ, the results of which would be made available to Australia;
- Use of and access to an Australian port to enable Soviet fishing vessels operating in southern waters to undertake repairs, maintenance, revictualling and crew changes, with the port to be nominated by Australia;
- Access to one Australian airport for Aeroflot charter flights for crew changeover purposes only;
- Opportunities to land fish for sale in Australian retail outlets;
- Opportunities to land fish for further processing in Australian fish processing factories;
- Continuation of scientific research in the AFZ adjacent to Heard and McDonald Islands — an issue of critical importance to Soviet southern oceans strategy due to Australian enclosure of the high seas areas next to these islands.[102]

Further negotiations in September 1988 saw the Soviet side expand its aims to include: possible future commercial (as opposed to research) fishing in the AFZ;[103] the appointment of fisheries attachés;[104] the establishment of a joint fisheries sector committee to oversee and implement Australian–USSR relations;[105] and systematic, detailed long-term cooperation in the conservation and utilisation of marine living resources.[106] To implement these objectives concretely, the Soviet side further proposed the establishment of joint ventures in the harvesting, processing and marketing of fish,[107] as well as scientific/technical exchanges and programmes.[108]

Between April and September 1988, the Australian riposte was to link fisheries arrangements to commodity sector arrangements. A July 1988

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101 See Duffy, 'Parliamentary Remarks regarding Negotiations with the Soviet Union', above n 23, 3951.

102 Ibid.

103 *Fisheries Agreement*, above n 4, art III shows that this objective was substantially achieved.

104 Ibid art XIV shows that this objective was substantially achieved.

105 There was in fact no joint committee formally established under the *Fisheries Agreement*.

106 *Fisheries Agreement*, above n 4, art IV shows that this objective was substantially achieved.

107 Ibid arts IV, XIII and IX show that this objective was substantially achieved.

108 Ibid arts IV and VI show that this objective was substantially achieved.

communication to the Soviet Union indicated a willingness on the part of Australia to 'enter into negotiations on the basis of the Soviet proposals in the context of a broader package of measures involving long term arrangements for commodities'.[109]

The September negotiations, adverted to above, were the first serious round of negotiations. Further negotiations in February[110] and March[111] 1989 resulted in the completion of the *Fisheries Agreement*, which was signed on 15 February 1990, coming into immediate effect on that date in accordance with art XVII.

The linkage of the *Fisheries Agreement* with a commodities arrangement acceptable to Australia was reiterated in official statements in both February[112] and March[113] 1989. The February 1989 statement explicitly linked the two aspects by publicly stating that Australia would also be using the fisheries negotiations as an opportunity 'to seek more stable and improved trade for a range of agricultural and mineral commodities in line with the Australian Government's objective of achieving progress in areas of common interest as part of a balanced bilateral arrangement'.[114]

In March 1989, the Australian authorities, whilst indicating that the fisheries aspect of the bilateral package had been finalised in advance of the *Commodities Agreement*, nevertheless felt it necessary to delay implementation of the *Fisheries Agreement* until the Commonwealth Government could come to a 'judgement as to the overall balance in the fisheries/commodities package'.[115]

The consistent concern to publicly demonstrate that USSR fisheries access was conditional on a satisfactory commodities sector arrangement was almost certainly in anticipation of, as well as response to, those critics of Government policy most fearful of Soviet intelligence activity.

B *Australian Rights and Obligations*

Australia essentially agreed to grant certain circumscribed facilities and/or assistance to the Soviet Union, with these concessions under strict administration and supervision by the Australian party.[116] The principal obligation assumed was the granting of port access to USSR vessels subject to their compliance with specified guidelines.[117] Entry of USSR vessels was only to be granted to

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109 See Duffy, 'Parliamentary Remarks regarding Negotiations with the Soviet Union', above n 23, 3951. This reply was given to a Soviet delegation to Canberra led by Vladimir Kamentsev, Deputy Chairman of the USSR Council of Ministers and Minister responsible for the Fishing Industry from April 1984. His leadership of the delegation is one of the factors that suggest that, for the USSR, the fisheries aspects of the bilateral package were of greater importance. See in particular Solecki, 'The Soviet Union's Fishing Industry', above n 28, 15 for details on Kamentsev's position in the USSR's fishing industry hierarchy in the 1980s.

110 See Commonwealth of Australia, 'News Release on Fisheries Co-operation with the USSR' (Press Release, 10 February 1989) ('February News Release').

111 See March Joint Statement, above n 95.

112 See February News Release, above n 110.

113 See March Joint Statement, above n 95.

114 See February News Release, above n 110.

115 March Joint Statement, above n 95.

116 See especially *Fisheries Agreement*, above n 4, arts II, III, annexes A, B.

117 Ibid art II(1)–(2).

pre-designated points and ports.[118] Facilities offered were for the 'purpose of repairs, provedoring, revictualling, crew changeovers, crew rest, and such other purposes' as the Parties jointly decided.[119] The designated ports were to be established through an exchange of diplomatic notes.[120] Given the interests of both sides as described above, implementation of this obligation would have sought to achieve a balance between ports with facilities appropriate to Soviet needs and ports without important adjacent or integrated facilities of military or intelligence significance. Proximity to a major airport so as to allow rapid changeover of fishing crews by Aeroflot charter would also have been a key Soviet consideration.

The Australian party also had the right to assign different activities between different ports.[121] This right had the potential to affect the commercial imperatives of the Soviet partner given that time spent in port and commercially unjustifiable movement between ports could have significantly affected ongoing fisheries operations. However, the Australian authorities promised that facilities provided in any designated port would be no different from the 'usual practices applying to other vessels in Australian ports'.[122]

The controls over use of Australian ports by USSR vessels were detailed in annex A of the *Fisheries Agreement*.[123] It was explicitly stated in the annex that these controls were *additional* to the usual conditions imposed on entry into Australian ports under Australian law.[124] The key elements of this special regime of control were as follows:

- A list of vessels likely to seek port entry had to be provided to the Australian authorities six months prior to their possible entry into an Australian port;[125]
- This list had to be presented at the latest by the end of June and December of each year,[126] effectively providing the Australian authorities with an advance half-yearly list from which to facilitate the relevant security assessments;
- The Soviet party had to provide details of the month in which a particular vessel expected to seek port entry — a significant commercial constraint but justifiable from a security point of view;[127]
- A written application in respect of entry permission had to be made for each vessel at least 60 days before the anticipated date of entry;[128] and

118 Ibid art II(1).
119 Ibid. Note that 'provedoring' refers to supply of stores.
120 Ibid art II(3).
121 Ibid art II(5).
122 Ibid art II(4).
123 Ibid annex A.
124 Ibid annex A, art 4.
125 Ibid annex A, art 1.
126 Ibid.
127 Ibid.
128 Ibid annex A, art 2.

- Each application had to state a significant amount of information including: the quantity, species, and general description of fish aboard the vessel and the area in which it was caught; the proposed duration of stay in port; the total number of crew and those proposing to go ashore; details of all communication equipment (including transmitters and receivers) and their frequencies; all sonar equipment and their frequencies; a description of all aerials and their frequencies; details of photographic equipment on board the ship; and details of diving equipment.[129]

Other aspects of control included the requirement that vessels proceed to their berth in a designated port by the most expeditious means and direct route possible.[130] Permission to enter a designated port was explicitly stated to be subject to conditions[131] and could be refused by the Australian party with no requirement that reasons be given to the Soviet party.[132] Notification of a refusal of access for vessel(s) was to be communicated to the Soviet authorities at least 30 days before the anticipated date of port entry.[133] Finally, annex A also provided that these guidelines could be varied by the Australian authorities in 'special circumstances'.[134] Such variations were to be communicated to the local agent appointed under art VII of the *Fisheries Agreement* or to the Ministry of Fisheries representative established under art XIV.[135]

The second major obligation assumed by Australia was the grant of limited rights of feasibility fishing in certain areas of the AFZ.[136] This fishing had to be carried out in accordance with the *Fisheries Agreement* itself, associated subsidiary agreements, the governing procedures outlined at annex B of the *Fisheries Agreement*, and general Australian law.[137]

The essential elements of the governing procedures set out in annex B were:

- Soviet feasibility fishing could only be carried out in accordance with the periodic guidelines set for such fishing by the Australian Department of Primary Industries and Energy;[138]
- The licensing of all vessels and strict adherence to an agreed upon fishing plan;[139]
- The advance payment of lump-sum fees in Australian currency;[140] and

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129 Ibid annex A, art 3.
130 Ibid annex A, art 7.
131 Ibid annex A, art 6.
132 Ibid annex A, art 5.
133 Ibid.
134 Ibid annex A, art 8.
135 Ibid.
136 Ibid art III. An area off the Western Australian coast was actually made open to the Soviets, with a maximum of two Soviet vessels allowed to assist in assessing the nature and extent of deepwater trawl stocks in that vicinity: see March Joint Statement, above n 95, 1. It is unclear whether any vessels ever arrived to engage in feasibility fishing.
137 *Fisheries Agreement*, above n 4, art III(1).
138 Ibid annex B, art 1.
139 Ibid annex B, arts 2(a)–(d).
140 Ibid annex B, art 2(g).

- Strict enforcement procedures, including pre-fishing voyage inspections[141] and mandatory journeys back to shore when so ordered by the Australian authorities.[142]

Reporting requirements were also extremely strict. Vessels were required to report: on a daily basis, at a time specified by the Australian authorities, their position within the AFZ;[143] and every six days, the catch by species of the previous six days.[144]

Under art III(2), the already mentioned subsidiary agreements were expected to regulate areas of fishing operations, fee levels and other conditions. Additionally, absent specific permission, there was also a prohibition on the undertaking of 'activities related to fishing', as distinct from 'fishing' itself.[145] The term 'activities related to fishing' covered the processing of fish, its transhipment or other ancillary activities.[146] The ban on ancillary activity applied to the entire AFZ as well as activity within Australian internal waters.[147]

Although transhipments and other activities were prohibited, it can be argued that the Soviet fishing industry in fact gained an important strategic right within Australian waters, since specific permission could be sought whenever transhipments from Soviet vessels engaged in southern seas activity were envisaged. Had the network of fisheries relations become dense (creating a form of interdependence, but also giving the Soviet party bargaining leverage) it might well have become difficult for the Australian authorities to refuse transhipment requests. The Australian riposte was to make the transhipment regime as restrictive as possible. Australia also agreed to permit crew exchanges, with replacement crews flown in by Aeroflot charter in accordance with conditions determined by the Australian authorities.[148]

In relation to the exercise of Australia's enforcement of its fishing rights,[149] Australia was obliged to provide prompt notification to the Soviet authorities of any enforcement actions taken.[150] This was to be done through diplomatic channels,[151] whilst enforcement actions were to be taken in accordance with

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141 Ibid annex B, art 3(a).

142 Ibid annex B, art 3(b). Compulsory returns to shore often interrupt a fishing voyage and, in international fisheries law and practice, are a highly unusual requirement in the absence of an infringement by a foreign vessel. According to art 3(b) of annex B, the stated purposes for which the Australian authorities could require such returns to shore included, but were not restricted to, conducting an inspection, and briefing new members of the crew.

143 Ibid annex B, art 4(c).

144 Ibid annex B, art 4(d).

145 Ibid art III(3).

146 Ibid art I(2).

147 Ibid art III(3).

148 Ibid art X. See also *Civil Aviation Agreement*, above n 2. Aeroflot flights were critical to the Soviet fishing fleet since this was the only method through which fishing crews could be rotated, repositioned or refreshed. Aeroflot special charter flights could thus be used to exchange entire crews or particular specialised personnel between different ocean areas ensuring better targeting of specific expertise. It also allowed high-value perishable catch to be rapidly transported to key markets in Japan and Europe — a crucial issue in the search for convertible currency: see, eg, Black, above n 28, 170.

149 See especially *Fisheries Agreement*, above n 4, arts V, XII.

150 Ibid art XII(2).

151 Ibid.

art 73 of the 1982 *United Nations Convention on the Law of the Sea*.[152] It is to be noted that, in 1990, *UNCLOS* had not yet entered into force and neither the Soviet Union nor Australia were yet parties to it.[153] Reference to its provisions thus arguably indicated that the two parties either regarded the specific rules set out in art 73 as probably constituting customary law on the relevant issues or, alternatively, that the specific provisions stood on the cusp of becoming customary international law.

In addition to the regime of strict controls over port entry and feasibility fishing, the *Fisheries Agreement* generally accorded Australia rights over foreign fishing commensurate with its status as a coastal state. These included the right to apply Australian fisheries laws to all Soviet vessels provided these rules were consistent with international law.[154]

The *Fisheries Agreement* also specifically required gear stowage;[155] anticipated and permitted the placing of Australian observers on board Soviet vessels;[156] and required the facilitation of boarding, inspection and other enforcement activity by Australian officials.[157]

Participation by Australian private parties was also envisaged. There was thus a requirement that Australian citizens or corporate entities be appointed as agents for Soviet enterprises,[158] and also a provision permitting Australian private sector entities to undertake joint ventures with Soviet partners.[159] From the point of view of enforcement, as well as the provision of assistance with administrative matters,[160] the appointment of local agents was particularly useful. In the enforcement context, a local agent could be regarded as standing in for the principal in legal proceedings, especially where the offending vessel was not within the jurisdiction. Thus, action taken against the agent was, to some extent, action against the principal.

In summary, Australia secured a regime of control over Soviet fishing activity which, had implementation been required, would probably have addressed the security concerns over Soviet presence in Australian waters. Had the Soviet Union continued to exist, the question over the next three years would have been whether the control regime set out in the agreement significantly hampered overall Soviet fleet flexibility and the ability to switch fleets rapidly to target new resources, a flexibility that was an essential part of the USSR's worldwide fisheries strategy. It is certainly reasonable to surmise that the long lead times for notification that the Australian authorities required would have been likely to have limited Soviet ability to redeploy vessels already in, or headed for, Australian waters.

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152 Above n 35.

153 Australia ratified *UNCLOS* in 1994: see Shearer, above n 24, 26.

154 *Fisheries Agreement*, above n 4, art V.

155 Ibid art V(a).

156 Ibid art VI. Observer maintenance costs were to be met by the Soviet party. Such observers could be 'marine scientific' or 'fishing industry' observers and were to be given information on fishing operations, in addition to their own observations.

157 Ibid art V(c).

158 Ibid art VII.

159 Ibid art VIII.

160 Ibid art VII.

C *Soviet Rights and Obligations*

The principal Soviet obligation was compliance with Australian rules governing port entry as well as fisheries activity within the AFZ. Another specifically stated obligation related to the provision of catch statistics and such other information as might be relevant to the management and conservation of AFZ marine resources.[161] Article XI also mandated that the Soviet authorities ensure prompt and adequate settlement of any claim for loss or damage made by the Australian State, Australian State organisations or Australian private sector entities. The most likely source of damage, in a physical sense, would have been by Soviet vessels to the fishing gear of other types of fisheries. This guarantee sought to avoid the sometimes contentious issue of sovereign immunity and the extent to which the Soviet Union might have sought to claim whatever benefits were available under that doctrine for its state-owned fishing vessels.[162]

It should be recalled that according to pre-perestroika Soviet legal doctrine, fishing vessels and fishing enterprises of the Soviet State were immune from suit or arrest without express permission in that regard from the USSR Council of Ministers.[163] This was because fishing vessels of the Soviet fleet were owned ultimately by the Soviet State (this was clearly evidenced by the fact that all vessels of the Soviet fleet were listed in Lloyd's Register of Ships as owned by the USSR) and were under the direction and control of the Ministry of Fisheries, which ultimately reported to the USSR Council of Ministers. Since Soviet law on all issues was in a state of extreme flux in the late 1980s and early 1990s, the Australian side appears to have sought to address these uncertainties by having such a clause inserted in the *Fisheries Agreement*.

Given the Soviet objective of integration of Australian zones into its worldwide fisheries and currency accumulation operations, one of the most important achievements under the *Fisheries Agreement* was the right to establish an office of the USSR Ministry of Fisheries in Australia.[164] Other rights conceded related to the possibility of joint venture establishment[165] and the

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161 Ibid art IV(3).

162 For a good discussion of classical Soviet assertions of sovereign immunity for Soviet fishing vessels, see David Windley and Carmen Blondin, 'Issues Raised by the Attachment of the *Suleyman Stalskiy*: Sovereign Immunity of Socialist Fishing Vessels and Liability for Damage to Fixed Fishing Gear by Vessels Fishing Mobile Gear' (1972) 4 *Journal of Maritime Law and Commerce* 141.

163 See Anatolii Volkov, *Maritime Law* (E D Gordon trans, 1971 ed) 21, 33 [trans of: *Morskoe Pravo*]:

> Vessels of the Soviet fishing industry, as is the case with all other state seagoing vessels, cannot be sold, bought or mortgaged, nor can the property in them be transferred to a private person. They are not liable to attachment in court actions or pursuant to court judgments.

For an analysis of fishing vessels registered with Lloyd's Shipping Register, including USSR fleets from 1985–92, see Andrew Smith, Fisheries Department, FAO, *Analysis of the Vessels over 100 Tons in the Global Fishing Fleet*, FAO Fisheries Circular No 949 (1999) available at <http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/X4360E/X4360E00.htm> at 1 October 2005; John Fitzpatrick and Chris Newton, *Assessment of the World's Fishing Fleet*, Report submitted to Greenpeace International (1998) <http://archive.greenpeace.org/oceans/globaloverfishing/assessmentfishingfleet.html> at 1 October 2005.

164 *Fisheries Agreement*, above n 4, art XIV.

165 Ibid art VII.

initiation of commercial activities directed at Australia's domestic market for fish products.[166] The right to export fish from Australia was also granted under art IX(2), subject to Australian legislation on fish exports, including regulations relating to protected and endangered species.[167] To address the possible security and intelligence dangers of allowing the establishment of an official fisheries representative with diplomatic status, the *Fisheries Agreement* required that 'as necessary, guidelines related to the work of the USSR fisheries representative in Australia would be developed with Australian officials'.[168]

D *Joint Obligations and Cooperation*

The joint obligations in the *Fisheries Agreement* related essentially to cooperative measures in a wide range of areas: scientific research for the purposes of effective conservation and optimum utilisation of Australian marine living resources;[169] research on marine living resources in areas outside the AFZ;[170] feasibility fishing;[171] post-harvest technology;[172] marketing of fishing products[173] and mariculture.[174] Technical exchanges were also envisaged, with specific attention to be paid to exchanges of specialists, scientists and students.[175] Other areas of prospective cooperation were to be through the commercial arena[176] and appropriate international organisations,[177] so as to ensure the conservation and management of marine living resources *in areas beyond* the AFZ[178] — a reference to the Indian Ocean and the Southern Ocean.

The other important joint obligation was the holding of periodic consultations regarding the implementation of the *Fisheries Agreement* and future cooperation under it.[179] Meetings to achieve this were to be held once a year.[180]

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166 Ibid art IX.
167 Ibid.
168 Ibid art XIV.
169 Ibid art IV(a).
170 Ibid art IV(1)(b).
171 Ibid art IV(1)(c).
172 Ibid.
173 Ibid.
174 Ibid.
175 Ibid art IV(1)(d).
176 Ibid arts IV(1)(e) and VIII.
177 The principal organisation would have been the Commission for Conservation of Antarctic Marine Living Resources, established under the treaty of a similar name. See *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982).
178 *Fisheries Agreement*, above n 4, art IV(2).
179 Ibid art XV.
180 Ibid.

E *Procedural Issues*

Dispute settlement and termination of the *Fisheries Agreement* were the principal procedural issues expressly regulated in the treaty text. Article XIII provided that consultation was to be the preferred mode for settlement of any disputes on interpretation or application of the *Fisheries Agreement* itself or of associated subsidiary agreements.[181]

Consultation was also mandated where a dispute arose in relation to the activities of a particular vessel.[182] However, the Australian authorities had a right to suspend the fishing rights of such a vessel until the dispute was resolved.[183] Consultations were also to be held promptly whenever requested by either party.[184]

The *Fisheries Agreement* was to remain in force for three years,[185] unless either Party gave notice through diplomatic channels of an intention to terminate treaty relations.[186] The notice of termination was to take effect one year after the day it was given, unless it was withdrawn at an earlier date.[187]

V MANAGEMENT OF THE POST-COLLAPSE TREATY PORTFOLIO: DOCTRINAL ISSUES AND DIPLOMATIC STRATEGIES

A *Overview*

The international relations and international political economy dimensions having been canvassed, it remains now to place the *Fisheries Agreement* and other perestroika treaties within the doctrinal/jurisprudential context generated by the Soviet bloc collapse. Through a discussion of the interplay between formalist doctrine and pragmatic diplomatic practice, this Part addresses the state succession aspects of the collapse, which arose as authorities in Europe, the former Soviet bloc and Australia sought to manage the thousands of treaties that were thrown into doubt.

Of the perestroika treaties, it was the *Fisheries Agreement* that was most significantly immobilised by these events. Indeed, as is explained further below, this treaty was arguably rendered obsolete in a very short space of time.[188] Part VI completes the doctrinal analysis by addressing how various treaty law doctrines — effectiveness, fundamental change of circumstances and desuetude — might be used to characterise the treaty law problems caused by the rapid collapse of the Soviet bloc's global fisheries system.

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181 Ibid art XIII.
182 Ibid art XIII(2).
183 Ibid.
184 Ibid art XIII(3).
185 Ibid art XVII(2).
186 Ibid.
187 Ibid.
188 Treaty obsolescence (a factual matter based on changed circumstances relating to politics, technology or economics making the treaty irrelevant) and state practice tacitly abrogating the treaty by mutual consent (a legal matter) are both central to desuetude: for a more detailed account, see below Part VI(E).

The discussion opens with a statement of some of the relevant concepts and principles of the law of state succession to treaties.

B *Some General Principles of State Continuity/Succession Law with respect to Treaties*[189]

Paraphrasing Brigitte Stern, it can be said that, with respect to treaties and other matters, continuity/succession issues arise because the identity of a state or other entity[190] is put in doubt by events of political crisis going to the very root of the political and territorial sovereignties associated with that state or entity.[191] Such events may be relatively isolated,[192] but are more usually associated with the significant but rare periods of rupture that periodically occur in international relations.[193] Irrespective of type, such ruptures have legal consequences, in that they modify both the internal conditions of the state, states, entity or entities in question as well as the configuration of associated international relations.[194] Deciding the exact character of the entity which replaces a predecessor entity is an important feature of the redefinition of international relations which flows from such periods of rupture and doubt. It is the task of the doctrines of state succession in international law to provide a framework within which interested parties (ie the replacement sovereign, other states and international

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189 See generally Stern, *Dissolution, Continuation and Succession in Eastern Europe*, above n 27. An earlier version is to be found in Burdeau and Stern, *Dissolution, continuation et succession en Europe de l'Est*, above n 27, 379–94, with even more detailed and nuanced reflections set out in Brigitte Stern, 'La succession d'Etats' (1996) 262 *Recueil des cours de l'Académie de droit international* 9. See also Konrad Bühler, 'State Succession, Identity/Continuity and Membership in the United Nations' in Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (2000) 187 (see especially 193–210); Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *European Journal of International Law* 142; Ian Brownlie, *Principles of International Law* (4th ed, 1990) 82–5, 654–78; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) 208–44; James Crawford, *State Practice and International Law in relation to Unilateral Secession*, Report to the Canadian Department of Justice (1997) available at <http://canada.justice.gc.ca/en/news/nr/1997/factum/craw.html> at 1 October 2005 (published subsequently in abridged form as James Crawford, 'State Practice and International Law in relation to Secession' (1998) 69 *British Year Book of International Law* 85). For classical pre-Soviet bloc collapse works, see Daniel O'Connell, *State Succession in Municipal Law and International Law* (1967) vols 1–2; Daniel O'Connell, 'Recent Problems of State Succession in relation to New States' (1970) 130 *Recueil des cours de l'Académie de droit international* 95; Daniel O'Connell, 'Reflections on the *State Succession Convention*' (1979) 39 *Zeitschrift für Auslandisches offentliches Recht und Volkerrecht* 725; Erik Castrén, 'Aspects récents de la succession d'états' (1951) 78 *Recueil des cours de l'Académie de droit international* 379; Annie Gruber, *Le droit international de la succession d'etats* (1986); Krystyna Marek, *Identity and Continuity of States in Public International Law* (1954); Giorgio Cansacchi, 'Identité et continuité des sujets internationaux' (1970) 130 *Recueil des cours de l'Académie de droit international* 1; James Crawford, *The Creation of States in International Law* (1979) 400–20.

190 For example, empires such as the Turkish, Austro-Hungarian, French or British empires.

191 Brigitte Stern, 'Concluding Remarks' in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (1998) 197, 198–9.

192 For example, the 1971 secession of Bangladesh (East Pakistan) from Pakistan. On this event, see generally Mizanur Rahman, *Emergence of a New Nation in a Multi-Polar World: Bangladesh* (1978); Richard Sisson and Leo Rose, *War and Secession: Pakistan, India, and the Creation of Bangladesh* (1990).

193 Stern, 'Concluding Remarks', above n 191, 199.

194 Ibid.

organisations) can determine whether a new identity is created (succession) or the old identity continues despite the usually significant modifications which have occurred (continuity). The distinction is believed by many to be important, since different sets of legal consequences theoretically flow from continuity as opposed to succession.[195]

To assist in this task a number of categories have been created by state practice and the scholars of state succession. These categories and analogies draw partly from the law of succession in private/municipal law — especially the categories of Roman law[196] — and/or have been created sui generis, and often overlap with other areas of international law.[197] Additionally, the realities of international relations (including the overwhelmingly political character of situations of rupture) and international politics (especially the politics of conflict) both shape, and are shaped by, the doctrines and concepts of state succession.[198] As Koskenniemi has observed:

> Legal commentary usually concentrates on … highlighting the instrumental weaknesses of State succession, its *ad-hoc* character, the absence of determining rules from relevant treaty law and custom … but while it may be true that State succession law does not offer much in terms of ready-made solutions to particular problems, its significance perhaps lies in two other directions. In the first place, State succession enables the articulation, in legal terms, of the character, direction and limits of political transformation. This it does for instance by providing principles of identification through which new communities have established themselves … In the second place it may be that the very flexibility of State succession makes it possible to manage sometimes dangerous political conflicts in an innovative way. The absence of clear-cut rules on continuation or disruption of treaty relations or a detailed list of fundamental rights of States, for instance makes it possible to combine continuation at the level of abstract status with important changes at the level of specific rights and duties … if the heterogeneity of State practice and the open-endedness of rules may seem like a *testimonium*

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195 For more on the distinction between continuity and succession and the legal consequences flowing therefrom, see Bühler, above n 189, 193–201; Brownlie, above n 189, 82–5, 654–78. Brownlie criticises this distinction as likely to 'make a difficult subject more confused' (at 83), whilst Koskenniemi doubts the validity of the distinction, arguing that it privileges status over the real content of legal relations: Koskenniemi, 'Report of the Director of Studies', above n 18, 119–25. On the other hand, Bühler and Crawford view the distinction as important in some contexts: Bühler, above n 189, 193–4; Crawford, *The Creation of States in International Law*, above n 189, 476.

196 See the short summary by Craven, above n 189, 147; and more expansively, O'Connell, *State Succession in Municipal and International Law*, above n 189, vol 1, 9–11. See also Ernest Feilchenfeld, *Public Debts and State Succession* (1931) ch 2.

197 A good example is the overlap between human rights law and the obligations of successor states: see Menno Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992) 127–90; Menno Kamminga, 'State Succession in respect of Human Rights Treaties' (1996) 7 *European Journal of International Law* 469; Malcolm Shaw, 'State Succession Revisited' (1994) 5 *Finnish Yearbook of International Law* 34; Wilfred Jenks, 'State Succession in respect of Law-Making Treaties' (1952) 29 *British Year Book of International Law* 105; Volkovitsch, 'Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts' (1992) 92 *Columbia Law Review* 2162. For a discussion of other areas of the overlap, see Koskenniemi, 'Report of the Director of Studies', above n 18, 96–119.

198 See Stern, *Dissolution, Continuation and Succession in Eastern Europe*, above n 27. For instance, under the doctrine of succession in private law, the predecessor entity typically disappears as a physical being and as a legal entity. With state succession, the legal entity may disappear but the physical components of the predecessor state remain.

> *pauperitatis* on the part of the international lawyer, it is useful to recall that State succession doctrines are resorted to in concrete struggles about the right of representation of human communities and the division of material and spiritual values between them. Succession, including the associated doctrines of identity and continuity, provides a publicly available means to wage those struggles, gives them shape and direction and delimits what alternatives seem available.[199]

For the purposes of this article the state succession categories of most interest are: dissolution;[200] extinction;[201] predecessor state;[202] continuing state;[203] successor state;[204] and newly independent state,[205] these being the key categories

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199 Koskenniemi, 'Report of the Director of Studies', above n 18, 66–9.

200 Stern suggests that, as a lexical and/or definitional term, the concept of dissolution is best used in a political rather than legal sense. By contrast, in her view, continuation and succession — both of which flow as possible outcomes from dissolution — should be viewed as legal categories: Stern, 'Concluding Remarks', above n 191, 197.

201 For a good overview of the topic of extinction of states in international law, see generally Ulrich Fastenrath, 'Extinction' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (2000) vol 4, 669. See also Långström, above n 1, 724–5.

202 Crawford, *State Practice and International Law in relation to Unilateral Secession*, above n 189, defines the concept of predecessor state as follows:

> The concern of the law of state succession is with the *consequences* of a change of sovereignty in such fields as succession to treaties, state property, archives and debt, the nationality of natural and legal persons, etc. … the state which has lost territory is referred to as the '*predecessor state*': at [6] (emphases in original).

203 Stern posits that continuation occurs where 'the State is considered to be an *identical legal entity persevering in its existence*, even though some of its constitutive elements have undergone some modifications': Stern, 'Concluding Remarks', above n 191, 197 (emphasis in original). Crawford, *The Creation of States in International Law*, above n 189, suggested in 1979 that

> the fundamental distinction between State continuity and State succession … [is that] between cases where the 'same' State can be said to continue to exist, despite changes of government, territory or population, and cases where one State can be said to have replaced another with respect to a certain territory: at 400.

Writing in 1997, James Crawford commented further in *State Practice and International Law in relation to Unilateral Secession*, above n 189:

> A cognate term which has recently gained currency is '*continuator state*'. This contrasts with 'successor state', and refers to a state which retains its legal identity and existence notwithstanding some significant change in its circumstances (e.g., loss of part of its territory and population, or foreign occupation). Thus the Russian Federation is regarded as continuing the legal personality of the former USSR … and the Baltic states are regarded as having recovered their independence lost in 1940: at fn 4 (emphasis in original).

For earlier instructive discussions on the concept of 'continuing state' in the context of dissolution, see Marek, above n 189, 15–24; O'Connell, *State Succession in Municipal Law and International Law*, above n 189, vol 1, 52–7; vol 2, 358–62.

204 Stern usefully defines succession as 'the situation where the successor State takes charge of the rights and obligations of the predecessor State with the benefit of an inventory': Stern, 'Concluding Remarks', above n 191, 201 (emphasis omitted). As Stern points out, the concept of succession implies, firstly, discontinuity; and secondly, substitution of one state by another: at 198.

for distinguishing continuity from succession and managing relations after categorisation has been achieved and identity determined.

Where continuity is found to exist — this finding involving iterative processes between the replacement sovereign and other interested parties — the doctrinal position is that the replacement entity is the same as the predecessor and is automatically subject to the same rights and obligations as before (a variant of the argument of universal succession in private law).[206] It should be noted that this interpretation of the legal significance of continuity has significant implications for succession to treaties, since it implies that there can be no doctrinal basis in the law of continuity/succession for interested parties (including the replacement sovereign) to argue for a review of the obligations or treaties.[207] In short, continuity and status as a 'continuing state' implies that the slate inherited from the predecessor is full and advocacy of any position that would try to wipe it 'clean' is doctrinally inconsistent.[208]

In opposition to the concept of continuity, where a state or entity is found to be extinct, the transmission of the rights and obligations of the predecessor state is determined by the doctrines and categories of state succession — the main areas of concern being: relations between the predecessor state and the successor state; relations between the successor state and other subjects of international law (principally other states and international organisations); and relations between the successor state and individuals/groups subject to its jurisdiction.[209]

Since, by default, most of the relations in the three categories listed above are carried out through treaties, the practical and diplomatic aspects of state succession generally end up being concerned principally with the fate of treaties — hence the practical importance of the principles underlying state succession to treaties and the bargains that are struck in the shadow of the various legal concepts.[210]

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205 The concept of 'the newly independent state' was at the time an innovation in the international law of state succession, responding to the view of the former colonies of Europe that their emergence constituted the creation of a new or sui generis category of states. See generally Okon Udokang, *Succession of New States to International Treaties* (1972); International Law Association, *The Effect of Independence on Treaties: A Handbook* (1965); Anis-ur-Rehman, 'Succession of Newly Independent States to Multilateral and Bilateral Treaties' (1985) 25 *Indian Journal of International Law* 67; Felix Chuks Okoye, *International Law and the New African States* (1972); Anthony Lester, 'State Succession to Treaties in the Commonwealth' (1963) 12 *International and Comparative Law Quarterly* 475.

206 See Långström, above n 1; Marek, above n 189, 5; Crawford, *The Creation of States in International Law*, above n 189, 402.

207 Koskenniemi, 'Report of the Director of Studies', above n 18, 83. As mentioned above, the law of treaties does, however, permit interested parties to argue for review of treaties to determine which treaties are affected by matters that might lead to their termination, amendment or replacement. Changed circumstances, desuetude, unequal treaties and other grounds can all be argued as a basis for treaty review.

208 See Wolfgang Fiedler, 'Continuity' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1992) vol 1, 806.

209 This categorisation is from Stern, 'Concluding Remarks', above n 191, 203.

210 See Koskenniemi, 'Report of the Director of Studies', above n 18, 66–9, 119–32.

C *Applying the Categories of State Continuity/Succession Law to the Collapse of the Soviet Bloc*

Drawing from the general principles set out immediately above, the collapse of the Soviet bloc can be categorised as follows:[211]

- secession, dismemberment, extinction and reconstitution of national, ethnic, cultural and religious identities (the situation of the Soviet Union[212] and Yugoslavia[213]);
- accession/incorporation (the situation of the German Democratic Republic relative to the Federal Republic of Germany and the EU);[214] and
- dissolution and devolution of responsibilities (the situation of the Czech and Slovak Republics).[215]

There was also the restoration of previously repressed sovereignties (the situation of Estonia, Latvia and Lithuania with respect to their pre-World War II identities),[216] as well as changes to political, social and economic regimes within

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211 The categorisations used here are borrowed from Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 471; Vagts, above n 27, 285–94; Stern, 'Concluding Remarks', above n 191, 198–201. See also Crawford's categorisations in Crawford, *State Practice and International Law in relation to Unilateral Secession*, above n 189, [35]–[37].

212 See Långström, above n 1; Kendall Butterworth, 'Successor States — Property Rights — Russia and Ukraine Agree to Share Control of the Former Soviet Union's Black Sea Fleet' (1992) 22 *Georgia Journal of International and Comparative Law* 659; Andrew Beato 'Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union' (1994) 9 *American University Journal of International Law and Policy* 525; Peter Juviler, 'Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union' (1993) 3 *Transnational Law and Contemporary Problems* 71.

213 *Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia*, 41 ILM 3 (2002) (signed and entered into force 29 June 2001); Sir Arthur Watts, 'Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia — Introductory Note', 41 ILM 1 (2002); Alexis Vahlas, 'A propos de trois questions récurrentes en matière de succession d'états: application au cas yougoslave' in Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (2000) 829; Juan Ortega Terol, 'The Bursting of Yugoslavia: An Approach to Practice regarding State Succession' in Pierre Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (2000) 889; Marco Martins, 'An Alternative Approach to the International Law of State Succession: *Lex Naturae* and the Dissolution of Yugoslavia' (1993) 44 *Syracuse Law Review* 1019; Vladimir-Djuro Degan, 'La succession d'états en matière de traités et les états nouveaux (issus de l'ex-Yougoslavie)' (1996) 42 *Annuaire français de droit international* 206.

214 Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22; Papenfuss, 'Les traités internationaux de la RDA', above n 22; Olivier Ribbelink, 'On the Uniting of States in respect of Treaties' (1995) 26 *Netherlands Yearbook of International Law* 139.

215 Jiri Malenovsky, 'Problèmes juridiques liés à la partition de la Tchécoslovaquie' (1993) 39 *Annuaire français de droit international* 305; Vaclav Mikulka, 'The Dissolution of Czechoslovakia and Succession in respect of Treaties' in Mojmir Mrak (ed), *Succession of States* (1999) 109; Koskiennemi, 'Report of the Director of Studies', above n 18, 81–3.

216 See Aust, *Modern Treaty Law and Practice*, above n 22, 314–15; Müllerson, 'The Continuity and Succession of States', above n 27, 480–7; Romain Yakemtchouk, 'Les républiques baltes et la crise du fédéralisme soviétique' (1990) 43 *Studia Diplomatica* 13; Romain Yakemtchouk, 'Les républiques baltes en droit international. Echec d'une annexion opérée en violation du droit des gens' (1991) 37 *Annuaire français de droit international* 259; Risto Pullat, 'The Restauration [sic] of the Independence of Estonia' (1991) 2 *Finnish Yearbook of International Law* 512; Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 *European Journal of International Law* 36; Långström, above n 1, 730–3.

the context of existing states suffering no significant rupture in their international status (Poland, Hungary, Romania and Bulgaria). With the exception of the dissolution of Yugoslavia,[217] all these changes were carried out with the consent of all relevant parties[218] and with due regard to the *Charter of the United Nations* and other rules of international law.[219]

Despite its generally peaceful character, the collapse nevertheless raised a number of urgent issues[220] with respect to the future of the tens of thousands of treaties[221] and informal instruments[222] generated by the diplomacy of the Soviet bloc.[223] Given the complexity of the forms of collapse, as well as the sheer number of treaties involved, it would not be an exaggeration to say that the events seriously tested state succession law.[224]

Urgency in a political sense arose for a great many reasons, including the seemingly open-ended and unforeseeable consequences of the collapse; the large geographical and economic areas affected by the collapse; the fact that some of the imploding states either had large conventional military establishments or nuclear weapons stationed in their territories; the wave of nationalist, and

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217 See now, however, the consensual arrangements set out in *Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia*, above n 213; Watts, above n 213.

218 See generally Soledad Torrecuadrada, 'Le rôle du consentement dans la succession d'Etats aux traités' (1997–98) 23 *Polish Yearbook of International Law* 127.

219 See Crawford, *State Practice and International Law in relation to Unilateral Secession*, above n 189, [35]–[37].

220 For instance: Who was responsible for the treaties? How was responsibility to be decided? Were bilateral treaties to be treated differently from multilateral treaties? Were the treaties obsolete? Were the treaties to be partially implemented or implemented on a temporary basis? Should they be regarded as informal instruments during a transition period towards more durable arrangements? How were the rights of individuals and companies affected? For an excellent discussion of these issues, see Stern, *Dissolution, Continuation and Succession in Eastern Europe*, above n 27, 197–210. See also the essays in Eisemann and Koskenniemi, *State Succession*, above n 22; Vladimir-Djuro Degan, 'Création et disparition de l'état (à la lumière du démembrement de trois fédérations multi-ethniques en Europe)' (1999) 279 *Recueil des cours de l'Académie de droit international* 195; Mrak, above n 27; International Law Association, Committee on Aspects of the Law of State Succession, 'Rapport final sur la succession en matière de traités', above n 27; other references are set out in above n 27.

221 The Soviet Union was reportedly a signatory to more than 16 000 treaties: see above n 26. Only approximately 600 of these were multilateral: Långström, above n 1, 742. The GDR was party to between 2200 and 2600 treaties. Papenfuss provides a partial explanation for the large number of treaties, at least in the case of the GDR: 'Struggling for international recognition, the GDR had set itself the political goal of concluding at least three hundred treaties per year': Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 484.

222 Papenfuss records that the GDR, for instance, had a large number of informal instruments, the true extent of which only became known after negotiations on the treaty survival dimension of German unification started: Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 484–5. On informal instruments generally, see Anthony Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 *International and Comparative Law Quarterly* 787.

223 See Grigorii Tunkin, *Theory of International Law* (William Butler trans, 1974 ed) 133 [trans of: *Voprosy Teori Mezdunarodnogo Prava* (first published 1962)], where it is posited that 'treaty norms presently occupy the principal place in international law as a result of the large growth in the number of international agreements'. The large number of Soviet treaties was arguably an attempt to generate the primacy asserted by Tunkin.

224 For evidence of this, see the essays in Eisemann and Koskenniemi, *State Succession*, above n 22.

eventually murderous, ethnic particularisms that emerged in some countries; and the high level of indebtedness of the Soviet bloc states.[225]

From a legal perspective, the problems raised were simultaneously old and new, since, as Stern[226] and Müllerson[227] have pointed out, each period of rupture in international relations raises its own peculiar issues of identity, continuity and succession. From the point of view of providing practical solutions, two sub-fields of international law competed to provide a framework for management of the various bilateral and multilateral treaty portfolios, the period of contest lasting from the early 1980s until the middle of the 1990s, when clear trends in diplomatic practice emerged in favour of the pragmatic 'case-by-case' approach.[228]

The competing approaches were:[229] (1) blanket transmission or rejection of treaty responsibility as appropriate, with choice in this regard based purely on doctrinal determinations of state identity[230] or status[231] (an approach characterised ascerbically by Daniel O'Connell in 1967 as 'arbitrary cataloguing'[232]); and (2) the more nuanced and pragmatic inventory-based[233] route offered by various doctrines of the law of treaties — namely the

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225 See, eg, Patrick Julliard, 'The Foreign Debt of the Former Soviet Union: Succession or Continuation?' in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (1998) 67, 67–86 (see especially 69–70).

226 Stern identifies four periods of rupture: the early 19th century decolonisation of Latin America; the post-World War I demise of the Austro-Hungarian and Turkish empires; the post-World War II decolonisation of the European overseas empires; and the 1990s dissolution of the Soviet bloc: Stern, 'Concluding Remarks', above n 191, 199.

227 Müllerson, 'The Continuity and Succession of States', above n 27, writes:

> The birth and death of States involving issues of succession do not occur every day or even every year. After a wave of emergence of new States (with Latin American States at the beginning of the 19th century, Eastern European States after the First World War, decolonisation in the 1960s, the dissolution of the USSR and Yugoslavia in the 1990s) there are usually long periods during which no State emerges or disappears. And every wave is unique in its nature. The rarity of such events, which occur in different political contexts, accounts for the existence both of different and mutually exclusive theories, and, even more so, of contradictory practice: at 473.

228 On the 'victory' of the pragmatic approach, see below nn 265–272 and accompanying text.

229 The most consistent analyst of the competition between these two approaches and their pragmatic merger has been Papenfuss: see Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22; Papenfuss, 'Les traités internationaux de la RDA', above n 22. See also Koskenniemi, 'Report of the Director of Studies', above n 18, 66–7, 103–14, 125–31.

230 Under the purist version of this approach, identification of a state as a 'continuing state', a 'successor state', or a 'newly independent state' had automatic consequences that could not be resiled from: Koskenniemi, 'Report of the Director of Studies', above n 18, 103–4 , 119–25.

231 Koskenniemi uses the term 'status': ibid 119–25.

232 These and other comments are to be found in O'Connell, *State Succession in Municipal Law and International Law*, above n 189, vol 2, vi. See also Koskenniemi, 'Report of the Director of Studies', above n 18, 103–4, 119–25. Both authors argue that a context-sensitive assessment of prevailing political and economic realities is required.

233 Gruber suggests that, before the decolonisation period significantly altered approaches to state succession, the pragmatic approach was the dominant one: Gruber, above n 189, 184–90. For further discussion of the pragmatic approach, see Koskenniemi, 'Report of the Director of Studies', above n 18, 88–9; Stefan Oeter, 'State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with respect to State Property and Debts in Cases of Separation and Dissolution of States' (1995) 38 *German Yearbook of International* Law 73, 74.

fundamental change of circumstances doctrine,[234] the doctrine of desuetude,[235] the doctrine of effectiveness,[236] and the overarching principle that parties to a treaty can terminate it by mutual consent.[237] Whilst the first approach was more concerned with doctrinal purity and elegance,[238] the second approach was predicated on the need to respond on a case-by-case basis to complex and unforeseen changed circumstances which clearly had materially paralysed many, if not most, of the treaties underpinning an entire network within the international system.

Another reason the collapse severely tested the law of state succession to treaties was because, as many authorities argue (for example, Oeter,[239] Vagts,[240] Koskenniemi,[241] Korman,[242] and Långström[243]), expert and doctrinal opinion in the preceding decades had been over-focused on viewing state practice in the decolonisation context as the principal template for the future of state succession as a whole, and state succession to treaties and informal instruments in particular.[244] The result was that the two systematisations of state succession law

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234 *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331, art 62 (entered into force 27 January 1980). See also references below nn 327–364 and accompanying text.

235 On desuetude generally, see Benedetto Conforti, 'Invalidity and Termination of Treaties: The Role of National Courts' (1990) 1 *European Journal of International Law* 44; Richard Plender, 'The Role of Consent in the Termination of Treaties' (1986) 57 *British Year Book of International Law* 133, 138–9; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice' (1992) 63 *British Year Book of International Law* 1, 94–6; Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1975) 47 *British Year Book of International Law* 273, 275; Nancy Kontou, *The Termination and Revision of Treaties in Light of New Customary International Law* (1992) 24–31; Mark Villiger, *Customary International Law and Treaties* (1985) 212–14.

236 On the doctrine of effectiveness, see Charles de Visscher, 'Observations sur l'effectivité en droit international public' (1958) 62 *Revue générale de droit international public* 601; Robert Jennings, 'Nullity and Effectiveness in International Law' in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965) 64; Jean Touscoz, *Le principe d'effectivité dans l'ordre international* (1964). For a more recent discussion, see Gerhard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonisation of Sub-Saharan Africa* (2004).

237 *Vienna Convention on the Law of Treaties*, above n 234, art 54.

238 Prior to the practical processes of unification exposing the difficulties of the doctrinal approach, its advocates were particularly strong in Germany: see Stefan Oeter, 'German Unification and State Succession' (1991) 51 *Zeitschrift für Auslandisches offentliches Recht und Volkerrecht* 349, who outlines these arguments well, although he does not necessarily support them. See also Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 470–1 and references cited therein.

239 Oeter, 'German Unification and State Succession', above n 238.

240 Vagts, above n 27, 275–6, 288, 295.

241 Koskenniemi, 'Report of the Director of Studies', above n 18 (see especially 125–31).

242 Sari Korman, 'The 1978 *Vienna Declaration on Succession of States in respect of Treaties*: An Inadequate Response to the Issue of State Succession' (1992) 16 *Suffolk Transnational Law Journal* 174.

243 Långström, above n 1, 774–9.

244 For criticisms that the ILC and Special Rapporteur Bedjaoui had been too preoccupied with postcolonial issues and had unnecessarily elevated the 'clean-slate' doctrine in the 1978 *Vienna Convention on Succession of States in respect of Treaties*, opened for signature 23 August 1979, 1946 UNTS 3 (entered into force 6 November 1996) see O'Connell, 'Reflections on the *State Succession Convention*', above n 189, 727; Gruber, above n 189, 43–60.

prior to the collapse (codifications with respect to state succession to treaties,[245] and state succession with respect to property, archives and debts[246]) had hardly anticipated many of the situations generated by the collapse of the Soviet bloc.[247]

D *Applying State Continuity/Succession Concepts to the Collapse of the Soviet Union*

Despite its status as the key event in a major historical rupture, the final collapse of the Soviet Union was a surprisingly orderly affair, triggered specifically by the famous failed coup of 19 August 1991.[248] Following the coup's defeat by forces led by Boris Yeltsin, the Soviet Union was dissolved and replaced through various political events and fora as follows:

- 23 August 1991: the banning of the Communist Party;
- 6 September 1991: the separation of the Baltic states of Latvia,[249] Estonia[250] and Lithuania[251] from the USSR;
- 8 December 1991: The Minsk Summit and *Declaration* establishing the Commonwealth of Independent States ('CIS'),[252] proclaiming the

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245 See *Vienna Convention on Succession of States in respect of Treaties*, above n 244; Matthew Maloney, 'Succession of States in respect of Treaties: The *Vienna Convention* of 1978' (1979) 19 *Virginia Journal of International Law* 885.

246 See *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, opened for signature 8 April 1983, 22 ILM 306 (1983) (not yet in force); Vladimir-Djuro Degan, 'State Succession — Especially in respect of State Property and Debts' (1993) 4 *Finnish Yearbook of International Law* 130; Jean Monnier, 'La *Convention de Vienne sur la succession d'états en matière de biens, archives et dettes d'états*' (1984) 30 *Annuaire français de droit international* 221; Rudolf Streinz, 'Succession of States in Assets and Liabilities — A New Regime? The 1983 *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*' (1983) 26 *German Yearbook of International Law* 198; International Law Association, Committee on Aspects of the Law of State Succession, *Provisional Report* (2004) available from <http://www.ila-hq.org> at 1 October 2005.

247 For the view that the *Vienna Convention on the Succession of States in respect of Treaties*, above n 244, and the *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, above n 246, proved fairly irrelevant to the management of the collapse of the Soviet bloc, see Koskenniemi, 'Report of the Director of Studies', above n 18, 70, 76–8, 88–9; Vagts, above n 27, 275–6, 288, 295.

248 The failed coup sought, in particular, to prevent signature of a treaty offering significant autonomy to the constituent republics of the USSR — Gobarchev and his close circle having decided to cede such autonomy following over 16 months of constant challenge to central Soviet authority, including limited internal armed conflict. Entities implicated in the conflict included rebellious constituent republics such as Lithuania, Armenia and Azerbaijan. The conference at which the treaty was to be signed was scheduled for 20 August 1991.

249 Latvia's independence from the Soviet Union was given legal effect by the *Resolution of the State Council of the USSR of 6 September 1991 on the Recognition of the Republic of Latvia*, as cited in Bothe and Schmidt, above n 1, 818 (fn 10).

250 Estonia's independence from the Soviet Union was given legal effect by the *Resolution of the State Council of the USSR of 6 September 1991 on the Recognition of the Republic of Estonia*, as cited in Bothe and Schmidt, above n 1, 818 (fn 10).

251 Lithuania's independence from the Soviet Union was given legal effect by the *Resolution of the State Council of the USSR of 6 September 1991 on the Recognition of the Republic of Lithuania*, as cited in Bothe and Schmidt, above n 1, 818 (fn 10).

252 See the *Minsk Declaration*, above n 1.

extinction of the Soviet Union[253] and announcing the separation of Russia, the Ukraine[254] and Belarus;[255]

- 21 December 1991: the Alma Alta Summit and *Declaration* finalising the creation of the CIS with the Russian Federation as the dominant partner;[256]
- 2–28 December 1991: the handing over of state power by Gorbachev to Yeltsin;
- 31 December 1991: the formal dissolution of the Soviet Union;
- 31 December 1991 – 31 January 1992: recognition of the Russian Federation as 'state continuer' of the USSR by 131 states.[257]

Application of the key analytical categories — dissolution, extinction, predecessor state, continuing state, successor state and newly independent state — reorganises these political events into legal categories as follows:

- political dissolution and then legal extinction for the predecessor state — the situation of the Soviet Union;
- the rapid emergence of an internationally recognised continuing state for the Soviet Union — the Russian Federation;[258]

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253 Ibid preamble.

254 Ukrainian independence from the Soviet Union was given legal effect by the *Alma Alta Declaration*, above n 1.

255 Belarus was previously Byelorussia, having changed its name on 19 September 1991. Belarus's independence from the Soviet Union was given legal effect by the *Alma Alta Declaration,* above n 1.

256 From the point of view of state succession/continuity, key documents associated with the Alma Alta summit were: a *Protocol* stating unanimous agreement that Russia should take over the permanent membership of the USSR in the UN Security Council; and a *Protocol* on membership of the CIS. The Baltic States and Georgia did not attend this meeting, whilst eight former republics not present at the Minsk meeting joined the CIS: see *Alma Alta Declaration*, above n 1.

257 Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18, 16 (fn 31).

258 The term 'state continuer' was used by the Russian Federation in various diplomatic documents from December 1991 to mid-1992. The term was given internal legislative expression in 1995 by art 1(3) of *The 1995 Federal Law on International Treaties of the Russian Federation*, as reproduced in translation in William Butler, *The Russian Law of Treaties* (1997) 9. Key diplomatic statements averring this status include: Message of President Boris Yeltsin to the Secretary-General of the United Nations, 24 December 1991, as cited in Koskenniemmi and Lehto, above n 18, 186 (fn 31); Note from the Russian Federation to the UN Secretary-General, 27 January 1992, as cited in Koskenniemi and Lehto, above n 18, 187 (fn 35). Given the need to prevent any vacuum in global politics, the claim of 'continuing state' status by Russia was rapidly accepted by the international community, with 131 states recognising Russia as continuing state by the end of January 1992. Although a number of commentators and an extremely limited number of states (principally Austria) initially contested the status of the Russian Federation as 'continuing state' for the USSR, there is now a general consensus that that is the position. In terms of state practice, on 7 February 1992 France clearly recorded this view in 'Signature du traité d'entente et de coopération du 7 février 1992' with its use of the term 'l'Etat continuateur de l'Union des Républiques socialistes soviétiques', whilst the UK stated on 26 December 1991 that it accepted the Russian claim of 'continuity of statehood' vis-à-vis the Soviet Union: see respectively Charles Rousseau, 'Chronique des faits internationaux: France et Russie' (1992) 96 *Revue générale de droit international public* 642; Colin Warbrick, 'Recognition of States' (1992) 41 *International and Comparative Law Quarterly* 473, 481. Statements of the British position are also recorded in Geoffrey Marston (ed), 'United Kingdom Materials on International Law' (1992) 63 *British Year Book of International Law* 615, 653–4; Geoffrey Marston (ed), 'United Kingdom Materials on International Law' (1993) 64 *British Year Book of International Law* 579, 636–7. The EC

- emergence of three continuing states: namely, Latvia, Lithuania and Estonia as continuators/continuers of their pre-World War II identities with, at least in principle,[259] no responsibility for any of the Soviet Union's obligations;
- emergence of 11 successor states: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan;[260]
- emergence of a transitional international organisation to manage relations between ratifying post-Soviet states — the CIS.[261]

Interestingly, although potentially applicable,[262] the category 'newly independent state' (and its corollary, the 'clean slate' approach to review of treaty relations) appears not to have been widely viewed as applicable to the post-Soviet context — the assumption being that the processes by which Tsarist Russia established domination over its European and Asian colonies,[263] and later, the Soviet Union over its neighbouring Eastern European satrapies, was generically different from the processes by which the overseas empires of Western Europe were established. Långström and Vagts question this assumption

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also recognised continuing state status for Russia in December 1991. In 'European Political Cooperation: Russia' (1991) 24(12) *Bulletin of the European Communities* 120, 121, the EC

> note that the international rights and obligations of the former USSR, including those under the *UN Charter*, will continue to be exercised by Russia. They welcome the Russian Government's acceptance of these commitments and responsibilities and in this capacity will continue their dealings with Russia, taking account of the modification of her constitutional status.

For a discussion of the limited number of dissenting views on the status of the Russian Federation as a continuing state, see Långström, above n 1, 723–6.

259 Various authors point out that, in practice, matters were not that simple, with the Baltic states continuing aspects of the Soviet Union's obligations and enjoying some of its rights, at least on an interim basis: see Müllerson, 'The Continuity and Succession of States', above n 27, 483–7; Långström, above n 1, 732–3. Stern, 'Concluding Remarks', above n 191, at 201 (fn 321) describes the complicated situation of the Baltic states as follows: 'the Baltic States have been considered to be in a situation of novation with respect to the rights and obligations of the former USSR, but in a situation of continuation with respect to the Baltic States as they existed before 1940'.

260 For a discussion of the position of the successor states, see Långström, above n 1, 733–5; Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18 (see especially 247–450).

261 On this issue, Stern, 'Concluding Remarks', above n 191, observes:

> [a] little surprisingly perhaps, the CIS … was at no time seen as continuing the USSR nor as its successor. Usually the creation of the CIS is referred to as a by-product of the dissolution: it is mainly a useful means of referring to the former Soviet Union minus the Baltic States: at 198.

Further, Långström, above n 1, 728 writes: '[t]he Commonwealth based on the equality of its members, is neither a State nor an entity superior to its members; therefore it cannot have inherited anything from the legal personality of the USSR'.

262 See Långström, above n 1, 734–5. A technical argument can be made that the regime is not applicable since the definition in art 2 of the *Vienna Convention on the Succession of States in respect of Treaties*, above n 244, excludes from the category 'newly independent state' situations in which the emergence of a new state is the result of a separation of part of an existing state or the uniting of two or more existing states: see Långström, above n 1, 734 (fn 58).

263 See generally Hugh Seton-Watson, *The Russian Empire 1801–1917* (1967).

of non-applicability, with Vagts pointing out that colonialism is no less colonialism merely because it takes place overland rather than by sea.[264]

E *Managing the Post-Soviet Treaty Portfolio: The 'Inventorisation'*[265] *Approach*

Once the appropriate status (continuation or succession) had been determined, the question facing interested parties was how best to address the fate of the treaties of the Soviet Union. As mentioned above, assuming the Russian Federation's status was juridically that of the 'continuing state', a doctrinal perspective tended to the view that universal succession had occurred as between the Russian Federation and the USSR and thus no review of the treaty portfolio was necessary. Yet, given the sheer number of Soviet treaties and the manifestly changed circumstances, this was clearly impractical. As a result, in the months following the collapse, diplomatic offices in affected countries developed a supple and pragmatic inventory-based approach, with initiatives implemented in the context of German reunification providing the template.[266]

By 1993–94 this approach (referred to from this point onward as the inventory-based approach) had become fairly routine, and indeed by 1996 had developed a formulaic character.[267] Comments made by Papenfuss (with respect to reorganising the GDR's treaties but equally applicable to the post-Soviet Union context) show how and why pragmatism prevailed over doctrine:

> The far-reaching, theoretical deliberations on the continuity or discontinuity of … treaties … that took place … generally proved to be unconvincing and fruitless. It was not until it came to actually discussing the individual treaties, for example, the first one on the list … that the parties reached a pragmatic solution: the treaties had not expired for reasons connected with legal theory or as a result of a formal termination 'agreement'. Instead, it was because of a fundamental change of circumstances that they expired automatically with the establishment of German unity.[268]

Butler, describing the contents of the *Russian Federation–Bulgaria Exchange of Letters*,[269] provides an idea of the formula:

> The Parties divided the relevant treaties into four annexes: (i) treaties and agreements which continue to operate in relations between the [Russian Federation] and Bulgaria; (ii) treaties and agreements which remain in force but require some adjustments; [these] will be revised or replaced by new treaties; (iii)

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264 Långström, above n 1, 734; Vagts, above n 27, 288.

265 See, eg, *Agreement in the Form of an Exchange of Letters between the Government of the Russian Federation and the Government of the Republic of Bulgaria with regard to the Results of the Inventorisation of Inter-State and Intergovernmental Treaties and Agreements Concluded between the USSR and the PRB during the Period from 1945 through 1991*, signed 27 April 1996, as cited in Butler, *The Russian Law of Treaties*, above n 18, 12 ('*Russian Federation–Bulgaria Exchange of Letters*').

266 For example, in the context of German reunification the inventory approach was used extensively. The unification renegotiations predated the Soviet collapse by some months. See generally Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22.

267 See, eg, *Russian Federation–Bulgaria Exchange of Letters*, above n 265.

268 Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 481, with other relevant comments at 469–75 and 484–8.

269 Above n 265.

> treaties and agreements to be considered individually in order to clarify the extent of rights and obligations for the two parties and for third States for which such rights and obligations arose as a consequence of the termination of the existence of the USSR; and (iv) treaties and agreements which are terminated, with the proviso that certain internal procedures are required to fully terminate them.[270]

The negotiations that generated and refined this inventory approach have been chronicled by a number of authors — the studies by Koskenniemi,[271] Müllerson,[272] Aust,[273] Butler,[274] Koskenniemi and Lehto,[275] Långström,[276] the International Law Association,[277] and the Council of Europe[278] amongst the most informative. Drawing from these sources, the brief survey of state practice, immediately below, provides a reference point for comparing the inventory-based approach with the more doctrinal approach eventually adopted by the Russian Federation and Australia.

Essentially, the various studies record that inventory-based reviews were completed particularly early in the case of the Finland–USSR[279] and Norway–USSR[280] treaty portfolios. However, given the density of treaty relations within the CMEA framework, reviews within the Soviet bloc network took much longer, as the *Russian Federation–Bulgaria Exchange of Letters* of 1996 shows.[281] Indeed, it may well be that review still continues.[282]

Inventory-based reviews were the norm in the case of the Czech and Slovak Republics[283] — despite their formal commitment to the continuity thesis[284] —

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270 Butler, *The Russian Law of Treaties*, above n 18, 12–13.

271 Koskenniemi, 'Report of the Director of Studies', above n 18.

272 Müllerson, 'The Continuity and Succession of States', above n 27 (see especially 482–3, 492–3).

273 Aust, *Modern Treaty Law and Practice*, above n 22.

274 Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18, 17–18.

275 Koskenniemi and Lehto, above n 18.

276 Långström, above n 1.

277 See International Law Association, *Rapport final*, above n 27; International Law Association, *Rapport préliminaire*, above n 27.

278 Klabbers et al, above n 27.

279 See *Notice on Terminated Treaties between the USSR and Finland*, Finnish Treaty Series No 102/1992 (terminating seven treaties); *Notice on Treaties between the Former USSR and Finland Continued in Relations between Finland and the Russian Federation*, Finnish Treaty Series No 102/1992 (continuing 70 treaties), both cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 83 (fn 69).

280 *Protocol between Norway and the Russian Federation of 22 April 1993*, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 84 (fn 70). This document confirms Russia's status as a continuation state, and lists a number of treaties that are to be continued and a number of treaties on which talks will continue. It also states that treaties not mentioned in it will lapse.

281 Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18, 17–18; *Russian Federation–Bulgaria Exchange of Letters*, above n 265.

282 Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, above n 18, 17, writing in 2002, said: 'the [Russian Federation] is in the process of agreeing with individual countries one by one the extent to which treaties concluded with the USSR may remain in force'. Review is thus probably still in progress.

283 Koskenniemi, 'Report of the Director of Studies', above n 18, 81.

284 Ibid.

and also took place between: the Netherlands and the Czech Republic;[285] the Netherlands and the Slovak Republic;[286] Germany and the Czech Republic;[287] Poland and the Slovak Republic;[288] and Finland and the Czech Republic.[289]

Inventory-based reviews also took place between concerned states and the Baltic states.[290] The Baltic case is an interesting one in that, as mentioned earlier,[291] these states have effectively adopted a clean slate thesis with respect to their responsibility for the treaties of the Soviet Union, coupling this position with a claim to continue the status in international law of their pre-World War II forebears. And yet pragmatic considerations have required that these states continue quite a few of the treaties of the Soviet Union, at least on an interim basis, whilst the practical reality is that lapse of time and changes in international relations have made many of the theoretically continued treaties of their pre-World War II forebears obsolete.[292] As Koskenniemi points out, this duality made, and continues to make, their claim to continuity more symbolic than real.[293]

Finally, inventory-based reviews were also extensive in relations between concerned states and some of the successor states to the former Yugoslavia.[294] Reviews on record include those between: Poland and Croatia;[295] the Netherlands and Slovenia;[296] Germany and Slovenia;[297] and Poland and Slovenia.[298]

In rejecting a purely doctrinal approach to the reorganisation of the treaty portfolio of the Soviet bloc, the treaty offices of the various implicated European states can be said to have been following the injunctions of O'Connell, who

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285 *Exchange of Letters between the Netherlands and the Czech Republic on Succession to Treaties*, 8 December 1994, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 81 (fn 61).

286 *Exchange of Letters between the Netherlands and the Slovak Republic on Succession to Treaties,* 9 December 1994, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 81 (fn 61).

287 *Exchange of Notes between the Czech Republic and Germany on Succession to Treaties*, 24 March 1993, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 62).

288 *Protocol between Poland and the Slovak Republic on Succession to Treaties*, 8 July 1993, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 63).

289 *Exchange of Notes between Finland and the Czech Republic*, 24 March 1994. This agreement continued 12 treaties and initiated procedures for the termination of one treaty, the 1949 *Agreement on Economic Relations* between the two states, which was considered obsolete in the light of changed circumstances: see Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 63).

290 See Långström, above n 1, 730–3.

291 See above n 259 and accompanying text.

292 Koskenniemi, 'Report of the Director of Studies', above n 18, 121–2.

293 Ibid.

294 Ibid 82.

295 *Agreement on Succession to Bilateral Treaties between Poland and Croatia*, 13 April 1995. This agreement contains a list of 18 continued treaties and four terminated treaties: see Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 66).

296 *Dutch–Slovenian Joint Declaration on Bilateral Treaty Relations*, 31 July 1992, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 66).

297 *German–Slovenian Exchange of Notes*, 13 July 1993, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 66).

298 *Agreement on Succession to Bilateral Treaties between Poland and Slovenia*, as cited in Koskenniemi, 'Report of the Director of Studies', above n 18, 82 (fn 66).

criticised the doctrinal approach in these terms as far back as 1967: 'To permit the solution of complex political and economic problems to depend on … arbitrary cataloguing is to divorce the law from the actualities of international life'.[299] The better approach, or the 'real question', in his view, was to assess

> the extent to which a treaty loses its effectiveness in the changed situation. If it be presumed that treaties in principle survive the change of sovereignty, as they survive the change of government, a wider spectrum of treaties is likely to be excluded from lapse on frustration than if the contrary be presumed; and the presumption might well vary according to whether the case is characterized as one of annexation, cession, federation, secession or independence. When the contracting State totally disappears as an administrative entity, it is likely that a wide range of treaties would cease to be performable in the changed circumstances, and the presumption might be against treaty survival. But when the change of sovereignty modifies the circumstances of performance only slightly, if at all, the presumption will be reversed.[300]

Koskenniemi, after his review of state practice in the context of state collapse,[301] came to similar conclusions, arguing effectively that the way the law of treaties handles the continuation or supercession of treaties is far superior to, and perhaps subsumes that postulated by, succession doctrine:

> it is doubtful if the rules on treaty succession are really independent from the general law on the effect of changed circumstances. … the *rebus sic stantibus* doctrine or equivalent norms of equitable application are always available to accommodate treaty obligations where important territorial or political changes have taken place and it is not clear that anything would be added to it by the doctrine of succession. Certainly, to focus attention on whether an entity is 'different' or 'identical' with a previously existing régime so as to assess whether or not continuity should be assumed provides altogether too crude a framework to deal with the variety of situations.[302]

F *Australian–Russian Federation Approaches to Review of Soviet Era Treaties*

As discernible from the official treaty record[303] and interviews with the responsible official,[304] the Australian–Russian Federation approach to management of the treaties of the Soviet Union era is based on the following principles: (1) Australian recognition of the Russian Federation as continuing state for the Soviet Union in 1992;[305] and (2) universal succession of the Russian Federation with respect to the treaties of the Soviet Union — the Russian

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299 O'Connell, *State Succession in Municipal Law and International Law*, above n 189, vol 1, vi.

300 Ibid vol 2, 3.

301 See generally Koskenniemi, 'Report of the Director of Studies', above n 18.

302 Ibid 104 (citations omitted).

303 See DFAT, *Treaties with the Union of Soviet Socialist Republics*, above n 17; DFAT, *Treaties with the Russian Federation*, above n 17.

304 Interview with officer in charge of Russian treaties, Australian Treaties Office, DFAT (Telephone interview, 4 October 2004).

305 All treaties with the Soviet Union in the Australian Treaty Database have an annotation explicitly stating this. See DFAT, *Treaties with the Union of Soviet Socialist Republics*, above n 17; DFAT, *Treaties with the Russian Federation*, above n 17.

Federation assuming Soviet obligations until such time as the treaty expires in accordance with its terms, is renewed, or is replaced[306] by another instrument. To date, this approach has generated the following results. First, as allowed for under art XVII and art 8 of their respective texts, the *Fisheries Agreement*[307] and the *Commodities Agreement*[308] have expired. These events (non-renewal of the treaties in accordance with their respective terms) provide good examples of what Benedetto Conforti describes as actions denoting 'tacit abrogation'[309] with respect to a treaty that is obsolete.

Second, a number of perestroika treaties continue in force, namely: the *Human Contacts and Humanitarian Cooperation Agreement*;[310] the *Environmental Cooperation Agreement*;[311] and the *Peaceful Uses of Nuclear*

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306 This has happened in the area of civil aviation. The *Air Services Agreement between the Government of Australia and the Government of the Russian Federation*, [1994] ATS 21 (signed and entered into force 11 July 1994) terminated the *Civil Aviation Agreement*, above n 2.

307 *Fisheries Agreement*, above n 4. Expiry occurred on 14 February 1993. The termination clause at art XVII(2) reads:

> 1. This *Agreement* shall enter into force on signature.
>
> 2. This *Agreement* shall remain in force for a period of three years unless either Party gives the other notice through diplomatic channels of its intention to terminate it. The notice of termination shall take effect one year after the day on which it was given unless earlier withdrawn.

308 *Commodities Agreement*, above n 5. Expiry occurred on 14 February 1993. The termination clause at art 8 reads:

> 1. This *Agreement* shall enter into force on the date of signature and shall remain in force for three years subject to the [*Fisheries Agreement*] being valid at the same time if Parties have not agreed otherwise.
>
> 2. During the currency of this *Agreement* the Parties shall, by mutual consent, hold consultations, in particular, within the framework of the USSR/Australia Mixed Commission on Trade and Economic Co-operation, to review the progress of the implementation of this *Agreement*.
>
> 3. Before expiry of the validity of this *Agreement* the Parties shall consider the possibility of its prolongation or conclusion of a new and similar agreement with due regard to the experience of the Parties in the implementation of this *Agreement*, and subject to agreement between the Parties on co-operation in Fisheries being current.

309 See Conforti, above n 235, 59.

310 Above n 7. The termination clause, art 13 reads:

> This *Agreement* shall enter into force from the date of its signature and shall remain in force for six months from the day upon which either of the Contracting Parties notifies the other through diplomatic channels of its wish to terminate the *Agreement*.

311 Above n 8. The termination clause, art X reads:

> 1. This *Agreement* shall enter into force on the date of signature.
>
> 2. This *Agreement* shall remain in force initially for five years, and thereafter shall remain in force until such time as one Contracting Party receives written notification from the other Contracting Party of its intention to terminate the *Agreement*. In this case the *Agreement* shall terminate 180 days after the receipt of such notification.
>
> 3. The termination of this *Agreement* shall not affect the validity of any arrangements and contracts concluded in accordance with Article VI of this *Agreement* between scientific, technical and other appropriate organisations of the two countries.

Energy Agreement.[312] The termination clauses for these treaties allow both parties to terminate them relatively smoothly should this be required. Other treaties which are still in force are as follows:

TABLE 2: OTHER PRE-COLLAPSE TREATIES IN FORCE BETWEEN AUSTRALIA AND THE RUSSIAN FEDERATION

Treaty	Details	Comment
Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cooperation in Space Research and the Use of Space for Peaceful Purposes, [1987] ATS 27.	Signed and entered into force 1 December 1987.	Entered into force on signature pursuant to art 9.
Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cooperation in the Field of Medical Science and Public Health, [1987] ATS 26.	Signed and entered into force 1 December 1987.	Entered into force on signature pursuant to art 9.
Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Cultural Cooperation, [1975] ATS 4.	Signed and entered into force 15 January 1975.	Entered into force on signature pursuant to art 14.
Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Scientific–Technical Cooperation, [1975] ATS 3.	Signed and entered into force 15 January 1975.	Entered into force on signature pursuant to art VIII.
Agreement on the Development of Trade and Economic Relations between Australia and the Union of Soviet Socialist Republics, [1973] ATS 8.	Signed and entered into force 16 March 1973.	Entered into force on signature pursuant to art 7(1).
Trade Agreement between the Government of the Commonwealth of Australia and the Government of the Union of the Soviet Socialist Republics, [1965] ATS 19.	Signed and entered into force 15 October 1965.	Entered into force on signature pursuant to art 7.

312 Above n 6. The termination clause, art XV reads:

> This *Agreement* shall enter into force on the date that the Parties, by an exchange of Notes, specify for its entry into force and shall remain in force indefinitely unless it is otherwise agreed by the Parties.

New treaties negotiated with the Russian Federation in its own right are as follows:

TABLE 3: NEW TREATIES BETWEEN AUSTRALIA AND THE RUSSIAN FEDERATION

Treaty	Details	Comments
Air Services Agreement between the Government of Australia and the Government of the Russian Federation, [1994] ATS 21.	Signed and entered into force 11 July 1994.	Entered into force on signature pursuant to art 22. Terminated previous Accord of 5 July 1989.[313]
Agreement between the Government of Australia and the Government of the Russian Federation on Cooperation in the Field of the Exploration and Use of Outer Space for Peaceful Purposes, [2004] ATS 17.	Signed 23 May 2001, entered into force 12 July 2004.	Entered into force pursuant to art 16(1) following an exchange of diplomatic notes.
Agreement between the Government of Australia and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol, [2003] ATS 23.	Signed 7 September 2000, entered into force 17 December 2003.	Entered into force pursuant to art 27.

In an interview with the relevant official, it was stated that no inventory-based review of the treaty portfolio had been undertaken,[314] the apparent rationale for this being: the rather small number of treaties that Australia had concluded with the Soviet Union; the equally limited number of treaties between Australia and the Russian Federation; and the absence of a dense network of relations under these instruments. Although this management strategy is based on clear doctrinal grounds and has clearly been effective in securing a smooth transition, it is equally obvious that it has led to a situation in which quite a few of the currently extant treaties do not adequately accommodate the contemporary realities of the Russian Federation.[315] This is arguably because they are in desuetude and have been affected by changed circumstances.

VI TREATY LAW DOCTRINES AND THE *FISHERIES AGREEMENT*

A *Overview*

The final section of this article analyses the doctrines of absence of treaty effectiveness, fundamental change of circumstances and desuetude as overlapping and interrelated rubrics for responding to situations in which the

313 *Civil Aviation Agreement*, above n 2.

314 Interview with officer in charge of Russian treaties, above n 304.

315 A good case in point is the *Human Contacts and Humanitarian Cooperation Agreement*, above n 7, which is based on the assumption that the Soviet-era restrictions on freedom of movement and freedom to organise politically still exist.

conditions for execution of a treaty have been profoundly modified and/or the political–economic assumptions underlying entry into the treaty have either disappeared or changed remarkably — the *Fisheries Agreement* being the treaty most seriously immobilised in this way.

B *Profound Modification of Operating Context — The Impact of the Soviet Collapse on the* Fisheries Agreement

For the *Fisheries Agreement*, the principal consequence of the Soviet collapse was that the Soviet fishing fleet — the main instrument for making it effective — was progressively and cumulatively dismembered.[316] Latvia, Estonia, Lithuania and Ukraine (previously the principal ports and staging centres for long-distance fishing activity in the Soviet Union)[317] all became independent states, none of which succeeded to any of the obligations or rights set out in the *Fisheries Agreement*. Over the following few years, these states turned inward towards their near-shore resources, privatised their fleets,[318] scaled down long-distance fishing,[319] and sought to supply their fisheries needs through imports of desired products rather than through direct capture of such resources by fleets flying the flag of the respective states.[320] Additionally, with respect to their international fisheries relations and diplomacy, the principal objective of these former linchpins of Soviet fishing became expansion of fisheries relations with the EU rather than the search for fishing opportunities around the globe.[321] Given these trajectories, Australian fisheries resources, infrastructure and markets ceased to be of real interest to the fisheries sectors of these newly-independent states. The Russian Federation also began to alter its priorities in long-distance fishing,

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316 For analysis of the collapse as well as re-emergence of the fleets of Latvia, Estonia and Lithuania, see variously: GLOBEFISH, 'The Fishery Industry during the Transition of the Former USSR to CIS', above n 34; GLOBEFISH, 'The Fishery Industries in the Baltic States: Estonia, Latvia and Lithuania', above n 34; GLOBEFISH, 'The Fishery Industries in Estonia', above n 34; GLOBEFISH, 'The Fishery Industries in Russia', above n 34; Pashkova, above n 28.

317 Part I has explained the long-distance fishing strategy of the Soviet Union and the place of enterprises based in Latvia, Estonia, Ukraine and Lithuania in some detail.

318 For a fuller discussion of the privatisation theme, see FAO/EASTFISH, *The Fishery Industry in Estonia*, FAO/EASTFISH Fishery Industry Profile No 5 (1997); Vetemaa, Eero and Hannesson, 'The Estonian Fisheries', above n 46; Vetemaa et al, 'Collapse of Political and Economical System', above n 46.

319 At this time, distant-water fishing was an extremely low priority for the following reasons: first, it was economically unjustifiable given the parlous state of their economies, the removal of subsidies and the prohibitive price of petroleum products; and second, products of long-distance fishing hauled thousands of kilometres from West Africa or the Indian Ocean to the relevant home ports could not compete with high quality products imported from nearby Scandinavia and Europe. An excellent discussion of these issues is provided by Zieziula, above n 34. The comments made there pertain to Poland, but are fully applicable to post-Gorbachev Russia.

320 See especially Vetemaa, Eero and Hannesson, 'The Estonian Fisheries', above n 46; Vetemaa et al, 'Collapse of Political and Economical System', above n 46.

321 See the following agreements: *Agreement on Fisheries Relations between the European Economic Community and the Republic of Estonia*, opened for signature 17 July 1992, [1993] OJ L 56/2 (entered into force 2 March 1993); *Agreement on Fisheries Relations between the European Economic Community and the Republic of Latvia*, opened for signature 16 July 1992, [1993] OJ L 56/6 (entered into force 2 March 1993); *Agreement on Fisheries Relations between the European Economic Community and the Republic of Lithuania*, opened for signature 14 July 1992, [1993] OJ L 56/10 (entered into force 2 March 1993).

principally by increasing operations in the North Pacific — especially in the high seas areas close to Alaska, the Pacific Coastal regions of the US and Canada[322] — whilst the removal of subsidies made many long-distance projects virtually impossible. Although the changing trajectories of post-Soviet fisheries set out above were yet to fully unfold in 1991–92 (they in fact took more than half a decade to take their final shape), it was nevertheless clear by the end of 1991 that many of the assumptions underpinning the *Fisheries Agreement* were, at the very least, extremely tenuous.

C *Effectiveness*[323]

O'Connell's dictum urging that regard be had to 'the extent to which a treaty loses its effectiveness in the changed situation' has already been noted.[324] An effectiveness analysis shows that the effectiveness of the *Fisheries Agreement* diminished in significant, and arguably material, measure with the de facto, as well as de jure, partition of the key warm water ports in Latvia, Estonia, Ukraine and Lithuania from the Russian Federation. Indeed, it would appear that the greater proximity to Australia of Russian Federation ports such as Vladivostok in the Russian Far East did not provide enough of a reason to renew the *Fisheries Agreement*. The confusion in the fisheries sector of the Russian Federation[325] would also have provided little confidence in the future of the *Fisheries Agreement*, with the extremely disruptive impact of the withdrawal of subsidies one of the most pernicious factors.[326]

D *Fundamental Change of Circumstances and the* Fisheries Agreement

The question of when changed circumstances[327] provide a ground for abrogating, suspending or revising a treaty has proved one of the most controversial questions in international law.[328] The controversy arose in part because, in the earlier formative period of international law, various 18th and 19th century publicists had argued that an implied '*rebus sic stantibus*'[329] clause

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322 See especially Kaczynski, '200 Mile EEZ and Soviet Fisheries in the North Pacific Ocean', above n 36; GLOBEFISH, 'The Fishery Industry during the Transition of the Former USSR to CIS', above n 34.

323 See generally Jean-Pierre Cot, 'La conduite subséquente des parties a un traité' (1966) 70 *Revue générale de droit international public* 632.

324 Above nn 299–300 and accompanying text.

325 See, eg, GLOBEFISH, 'The Fishery Industry during the Transition of the Former USSR to CIS', above n 34.

326 See Pautzke, above n 28 (see especially ch 2.5).

327 The word 'circumstances' is to be understood broadly and covers legal, political, economic and other circumstances: see Akos Toth, 'The Doctrine of *Rebus Sic Stantibus* in International Law' [1974] *Juridical Review* 56 (in three parts, commencing on pages 56, 147 and 263 respectively) for an extremely diverse set of situations in which the principle has been argued or from which it could be inferred.

328 See generally György Haraszti, 'Treaties and the Fundamental Change of Circumstances' (1975) 146 *Recueil des cours de l'Académie de droit international* 1; Oliver Lissitzyn, 'Treaties and Changed Circumstances' (1967) 61 *American Journal of International Law* 895.

329 The term means 'as long as things remain the same'.

was inherent in all treaties.[330] The effect was that, at least in theory, treaties remained in force only so long as circumstances remained the same as those prevailing at the time of their conclusion. The opposing school argued that the maxim *pacta sunt servanda* (treaties must be observed) was paramount and that the *rebus sic stantibus* principle introduced unjustifiable uncertainty into the treaty system.[331]

It would appear that the implied term approach has been rejected by current international law.[332] The dominant view now is that the maxim *pacta sunt servanda* needs to be balanced by a complementary principle, under which treaty termination, treaty suspension, or requests for treaty revision are permissible where extremely exceptional fundamental changes of circumstance occur.[333] The restrictive and limited circumstances under which the change of circumstances principle currently operates are now set out in art 62 of the *Vienna Convention on the Law of Treaties*.[334] Under that *Convention*, the basic principle is that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty.[335] Exceptions to this rule (termination, withdrawal, suspension)[336] are only allowed if all of the following preconditions have been met:

- The change must be of the circumstances existing at the time of the conclusion of the treaty;[337]
- The change must have been fundamental;[338]
- It must have been unforeseen by the parties;[339]
- The existence of the circumstances that have changed must have constituted an essential basis of the consent of the parties to be bound by the treaty;[340]
- The effect of the change is radically to transform the extent of obligations of the party invoking the change;[341] and
- The obligation is still to be performed under the treaty.[342]

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330 Sir Gerald Fitzmaurice, *Second Report of the Special Rapporteur on the Law of Treaties*, UN Doc A/CN.4/107 (15 March 1957) in [1957] *Yearbook of the International Law Commission*, vol II, 56–65 (see especially [145]–[149]) ('*Second Report on the Law of Treaties*'); Sir Humphrey Waldock, *Second Report of the Special Rapporteur on the Law of Treaties*, UN Doc A/CN.4/156 (5 June 1963) in [1963] *Yearbook of the International Law Commission*, vol II, 80–5.

331 See Fitzmaurice, above n 330, [144] for a listing of critics of the *clausula rebus sic stantibus* principle.

332 Boleslaw Boczek, *International Law Dictionary* (2005) 327–8. See also, eg, Waldock, above n 330. Waldock argues that

> the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which on grounds of equity and justice, a fundamental change of circumstances, may, under certain conditions, be invoked by a party as a ground for terminating the treaty: at 83–4.

333 Boczek, above n 332, 327–8.

334 Above n 234.

335 Ibid art 62(1).

336 Ibid art 62(3).

337 Ibid art 62(1).

338 Ibid art 62.

339 Ibid art 62(1).

340 Ibid art 62(1)(a).

341 Ibid art 62(1)(b).

Additionally, under art 62(2)(a), boundary treaties cannot be impeached by invoking a change of fundamental circumstances argument. Finally, on equitable grounds, parties who contribute to or cause an alleged fundamental change of circumstances cannot invoke art 62 where it is their breach of the treaty in question, or their breach of other international obligations, which causes the alleged fundamental change in circumstances. Boczek captures the difference between art 62 and the earlier *rebus sic stantibus* doctrine as follows:

> The *Vienna Convention* formulates the principle of fundamental change of circumstances in … negative and conditional language, implying that in the interests of stability of treaty relations this plea shall be invoked and applied only in exceptional circumstances. In addition, to avoid any association with the discredited old doctrine of an implied *rebus sic stantibus* clause, the *Convention* does not use this Latin phrase in the text of the title of the relevant Art 62.[343]

As the factual discussion above[344] has demonstrated, the changed circumstances surrounding the *Fisheries Agreement* were quite dramatic — many observers viewing the collapse of the Soviet bloc as one of the most stunning and unexpected sets of political changes to have occurred in the last 50 years. Interestingly, however, the prevailing view of the International Court of Justice is that the Soviet bloc collapse, dramatic though it was, did not constitute a fundamental change of circumstances of the sort contemplated by art 62. The ICJ considered the matter in the *Case concerning the Gabčíkovo-Nagymaros Project*,[345] in which Hungary invited the Court to recognise art 62 as applicable to the changes that had occurred in Eastern Europe since the spiral of Soviet bloc dissolution started in 1989. The Court rejected Hungary's argument that profound political changes, diminishing economic viability of the particular project, progress in environmental knowledge, and the development of new norms of international environmental law cumulatively constituted a change of circumstances fundamental enough to justify suspension, and then abandonment, of a bilateral project with Slovakia (continuing state for the then

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342 Ibid.

343 Boczek, above n 332, 328.

344 See above nn 316–322 and accompanying text.

345 (*Hungary v Slovakia*) (*Judgment*) [1997] ICJ Rep 7, 59. This dispute between Hungary and Slovakia related to a bilateral treaty signed in 1977 by Hungary and Slovakia's predecessor state, Czechoslovakia. The *Treaty concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks*, signed 16 September 1977, Hungary–Czechoslovakia, 1109 UNTS 235 (entered into force 30 June 1978) contemplated construction and operation of dams on the river Danube to produce electricity and assist with flood control, as well as to improve navigation. Hungary suspended completion of the project in 1989 and, in 1992, abandoned the project altogether. Slovakia objected and insisted that Hungary carry out its treaty obligations under the *pacta sunt servanda* principle. For commentary, see Phoebe Okowa, '*Case concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia)' (1998) 47 *International and Comparative Law Quarterly* 688; Peter Bekker, '*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*' (1998) 92 *American Journal of International Law* 273; Daniel Reichert-Facilides, 'Down the Danube: the *Vienna Convention on the Law of Treaties* and the *Case concerning the Gabčíkovo-Nagymaros Project*' (1998) 47 *International and Comparative Law Quarterly* 837; Péter Kovács, 'Quelques considérations sur l'appréciation et l'interprétation de l'arrêt de la Cour internationale de justice, rendu dans l'affaire Gabčíkovo-Nagymaros' (1998) 41 *German Yearbook of International Law* 252.

Czechoslovakia).[346] The Court was of the view that stability of treaty relations required that art 62 be applied only in exceptional circumstances, and that the circumstances presented to it by Hungary were not extraordinary enough.[347]

By contrast, in its preliminary ruling in *A Racke GmbH & Co v Hauptzollamt Mainz*,[348] the European Court of Justice was prepared to recognise art 62 as operative in relations between the European Community and Yugoslavia, taking the view that the changed circumstances in Yugoslavia provided ample basis for the European Community to suspend[349] trade concessions offered to Yugoslavia under the previous *Agreement on Cooperation between the European Community and Yugoslavia*.[350]

Although the terms *rebus sic stantibus* or 'fundamental change of circumstances' do not appear to have been in systematic, explicit or liberal use within the various negotiations on treaty reorganisation discussed earlier,[351] accounts of these processes by official participants such as Papenfuss,[352] Koskenniemi[353] and Müllerson[354] show that changed circumstances, or the *rebus sic stantibus* doctrine — either as customary law or the more restricted art 62 version — was understood to be highly relevant to the situations faced by the negotiators.

In his account of the reorganisation of the GDR's treaty portfolio, Papenfuss, after initially fragmentary references to the changed circumstances principle,[355] provides a full discussion of the crucial role it played in the Federal Republic of Germany's negotiations with the GDR's many treaty partners.[356] He writes that most, if not all, states accepted invocation of the principle as providing an appropriate basis for complete expiry of the relevant treaties or their renegotiation.[357] He also records that, in the context of German unification, the GDR itself in its last days also invoked the doctrine in its relations with its

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346 *Case concerning the Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) (*Judgment*) [1997] ICJ Rep 7, 64.

347 Ibid 65.

348 (C-162/96) [1998] ECR I-3655. *Contra* Aust, *Modern Treaty Law and Practice*, above n 22, 240–2, 318.

349 See *Council Regulation No 3300/91 of 11 November 1991 Suspending the Trade Concessions Provided for by the* Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, [1991] OJ L 315/1.

350 *Council Regulation No 314/83 of 24 January 1983 on the Conclusion of the* Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, [1983] OJ L 41/1.

351 Above Part V(E) and accompanying text.

352 See Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22. Papenfuss was a member of the Federal Republic of Germany's team of negotiators.

353 Koskenniemi and Lehto, above n 18, 208–15; Koskenniemi, 'Report of the Director of Studies', above n 18. Koskenniemi was a counsellor for legal affairs to the Finnish Ministry of Foreign Affairs from 1978–94.

354 Müllerson, 'The Continuity and Succession of States', above n 27. Müllerson was Deputy Foreign Minister of Estonia from 1991–92.

355 Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 479–80.

356 Ibid 481–5.

357 Ibid 481–4 (see especially 481).

former *Warsaw Pact* partners:

> [U]pon the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, all international treaties previously concluded by the Ministry for National Defense of the GDR are terminated. … *A fundamental change of circumstances occurs under Article 62(1)(a) and (b) of the* Vienna Convention of the Law of Treaties. *The German Democratic Republic's consent to be bound by these treaties is thus withdrawn*.[358]

Koskenniemi initially addressed the role of the principle in 1992 (with Lehto)[359] and returned to the subject again in 1999.[360] In the earlier analysis, Koskenniemi and Lehto state that the progressive unravelling of the Soviet Union was, at least on the Finnish side, regarded as a fundamental change of circumstances necessarily impacting on bilateral treaty relations between Finland and the Soviet Union. This position was taken well before the acceleration of the political crisis in August – December 1991.[361] Thus, despite the absence of formal juridical capacity on the part of Russia, Finland had already begun dual track processes of treaty revision with both the Soviet Union and Russia before the Union collapsed.[362] Koskenniemi and Lehto argue that the relevant fundamental change of circumstances was the situation in Eastern Europe as a whole, and not just the official dismemberment of the Soviet Union that took place in December 1991.[363]

Koskenniemi, in his comprehensive study at the end of the decade, also concluded that the fundamental change of circumstances principle appears to have played an integral and often determinative part in the treaty portfolio reorganisations of the period.[364] Müllerson makes direct reference to the doctrine twice.[365] His entire discussion proceeds, however, on the basis that the concept of fundamental change of circumstances was applicable to Baltic circumstances and Baltic state treaty relations.[366]

Can it be said then that the doctrine of fundamental change of circumstances could have been successfully invoked by one or other party to the *Fisheries Agreement* had it wished to do so? Following the reasoning of the ICJ, as set out above,[367] the author inclines to the view that the circumstances of change that would have supported such unilateral action would probably fail the rather strict tests set out in art 62. However, the more flexible role that the doctrine of

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358 Cable from the GDR Minister for Disarmament and Defense to the GDR Missions in the *Warsaw Pact* Countries, 29 September 1990, as cited in Papenfuss, 'The Fate of the International Treaties of the GDR', above n 22, 179 (fn 68) (emphasis added).

359 Koskenniemi and Lehto, above n 18, 214–15.

360 Koskenniemi, 'Report of the Director of Studies', above n 18, 103–6.

361 Koskenniemi and Lehto, above n 18, 214–15.

362 Ibid 213–15. The principal treaty regarded from the Finnish side as both subject to the fundamental change of circumstances doctrine and having been rendered obsolete by the unfolding processes in Eastern Europe was the 1948 *Treaty of Friendship, Cooperation and Mutual Assistance between Finland and the Union of Soviet Socialist Republics*, signed 6 April 1948. The full text of this agreement is available at <http://www.country-data.com/frd/cs/finland/fi_appnb.html> at 1 October 2005.

363 Koskenniemi and Lehto, above n 18, 215.

364 Koskenniemi, 'Report of the Director of Studies', above n 18, 103–6.

365 Müllerson, 'The Continuity and Succession of States', above n 27, 489, 493.

366 See generally ibid.

367 See above nn 345–349 and accompanying text.

fundamental change of circumstances played in state-to-state negotiations demonstrates that a less strict interpretation of that doctrine is still relevant in international relations.

E *Desuetude and the* Fisheries Agreement

In his *Second Report on the Law of Treaties*, Sir Gerald Fitzmaurice, Special Rapporteur for the International Law Commission, pointed out that failure by both or all the parties over a long period to apply or invoke a treaty, *or other conduct evincing a lack of interest in a treaty*, may amount to a tacit agreement by the parties to disregard the treaty or to treat it as terminated.[368] This is the concept of desuetude. In a bilateral context, this concept has been described as abrogation by 'tacit mutual consent'[369] or 'parallel and convergent conduct'[370] with respect to a treaty — a situation in which the aggregate of contracting state conduct demonstrates that the parties view the treaty as no longer having any practical utility.

As the following discussion of the ILC's views shows, the legal basis for the termination of a treaty by desuetude is currently the consent of the parties as implied from their conduct in relation to the treaty, rather than the mere fact of the treaty's obsolescence (technological, economic, social or political causes may operate here) or the fact of its disuse by the parties.

Essentially, the ILC, in its review of the grounds for termination of a treaty by desuetude, separated out desuetude into two aspects: the factual aspect and the legal aspect.[371] Whilst the factual aspect consists of the events that have occurred (these events leading plausibly in some cases to the argument, if not the conclusion, of a lack of practical utility or obsolescence), the legal dimension looks to the conduct of the relevant states with respect to the treaty, rather than to the facts themselves. The ILC preferred the view that mere obsolescence was not enough, making a distinction between desuetude as a factual cause of termination of a treaty (essentially a question of whether the treaty is effective) and desuetude as the legal basis for termination.[372] The legal basis for termination, in the ILC's view, was 'the consent of the parties to abandon the treaty' (rather than merely its ineffectiveness), with the mutual 'consent of the parties to abandon the treaty … to be implied from their conduct in relation to the treaty'.[373] Conforti points out that both the factual and legal aspects require verification, with determination of the conduct constituting abrogation a 'delicate business' requiring a high standard of proof.[374]

As the detailed examination of the circumstances of the *Fisheries Agreement* demonstrates, the disappearance of the Soviet system of global fishing and the dismembering of the fishing fleet and associated home base infrastructure

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368 Fitzmaurice, above n 330, [143].

369 The phrase is from Conforti, above n 235, 60.

370 Ibid (endnote 54).

371 ILC, *Draft Articles on the Law of Treaties with Commentaries*, 18th sess, as reproduced in United Nations Conference on the Law of Treaties (First and Second Sessions, 26 March – 24 May 1968 and 9 April – 22 May 1969), UN Doc A/CONF.39/11/Add.2 (1971) 7, 57.

372 Ibid.

373 Ibid.

374 Conforti, above n 235, 60.

arguably made the *Fisheries Agreement* obsolete in the factual sense, although the precise point at which this occurred is difficult to determine. The presence of a termination clause in the *Fisheries Agreement* means, however, that the argument of desuetude did not have to be formally and legally advanced by either party. It was enough for both parties to wait for its expiry date to fall due and to decide not to renew it in view of the overlapping factors of changed circumstances, obsolescence and lack of effectiveness. During the interim period that the *Fisheries Agreement* was still in force, it is reasonable to view Soviet, and then Russian, conduct with respect to it as increasingly denoting a treaty in desuetude. Australia was engaged in similar 'parallel and convergent conduct'.[375]

VII CONCLUSIONS

This article has sought to analyse political and legal phenomena occurring at the juncture between treaty theory and actual diplomatic practice, focusing on: (1) the content of the principal treaties signed between Australia and the USSR immediately prior to the Soviet bloc collapse; (2) the rapid collapse of the assumptions underlying these treaties and arrangements; and (3) the response by Australia and the Russian Federation to the events that transpired.

As far as the political dimension is concerned, the detailed analysis of the treaty text and its overall context has shown that Australia was prepared to establish relations of potentially significant depth with the USSR, despite its status as a Cold War adversary and source of nuclear threat. Whilst the promise of reform held out by Gorbachev was a key driver of Australian willingness to enter into these treaty arrangements, the realpolitik of access to the large markets of the Soviet Union appears to have been an equally strong motivator — and this at a time when it was clear that the other contracting party was in a significant degree of internal disarray. Although the relevant authorities would hardly have intended their negotiations to have this status, Australia's 'last tango with Moscow' arguably provides a classic example of the uncertain politics of treaty-making and implementation where one or more of the contracting parties is facing a situation of debilitating but not yet fully visible collapse.

From the jurisprudential point of view, a number of concluding comments can also be made. The first relates to the place of the doctrines of fundamental change of circumstances and desuetude as appropriate standpoints for viewing the final phase of Australia–USSR treaty relations. Once the events in the fisheries sphere and the political sphere are closely investigated, there can be little doubt that both doctrines were given full play by the events that transpired. Desuetude comes to the fore when analytical prominence is given to the progressive disappearance of the Soviet Union and its particular approach to global fishing, whilst fundamental change of circumstances certainly applies to the pervasive (albeit temporary) paralysis which engulfed the Soviet Union and then the Russian Federation. Equally clearly, Australia lacked a desire to implement the *Fisheries Agreement* given the foreseeable difficulties of recovering payments and assuring performance in an economy in disarray. It is thus interesting to observe that there has been no official Australian commentary

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375 Ibid 60 (endnote 54).

linking the termination of the *Fisheries Agreement* to the fundamental but also controversial doctrines of international law which justify the strategy of treaty termination followed by the parties.