VI. Law of the Sea

Australian Legislation for a Contiguous Zone and an Exclusive Economic Zone

A Maritime Legislation Amendment Bill was introduced into the Australian Parliament in 1993, and the second reading speech was set out in the *Aust YBIL* 1994, vol 15, p 461. The legislation applies to Australia and its external territories. The principal operative provisions of the Bill as adopted by the Parliament, dealing with the Contiguous Zone and the Exclusive Economic Zone (and also with the extent of the Continental Shelf and of the Territorial Sea), are as follows:

> Maritime Legislation Amendment Act, No. 20 of 1994
>
> **Definitions:** In consequence of the above Act, in the Seas and Submerged Lands Act 1973 (the Principal Act):
>
> **'contiguous zone'** has the same meaning as in Article 33 of the Convention;
>
> **'exclusive economic zone'** has the same meaning as in Articles 55 and 57 of the Convention;
>
> **'continental shelf'** has the same meaning as in Article 76 of the Convention;
>
> **'territorial sea'** has the same meaning as in Articles 3 and 4 of the Convention;
>
> **'the Convention'** means the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982
>
> **Sovereign rights in respect of exclusive economic zone:**
>
> A new Section is inserted in the Principal Act as follows:
>
> > "10A. It is declared and enacted that the rights and jurisdiction of Australia in its exclusive economic zone are vested in and exercisable by the Crown in right of the Commonwealth."
>
> **Rights of control in respect of contiguous zone:**
>
> A new Section is inserted in the Principal Act as follows:
>
> > "13A. It is declared and enacted that Australia has a contiguous zone."

The new legislation was brought into effect on 1 August 1994. The following is the text of a press release issued by the Attorney-General, Mr Michael Lavarch, on 31 July 1994:

> New Australian maritime zones taking effect from 1 August 1994 will provide an exclusive economic zone and enhanced coastal security, Attorney-General Michael Lavarch said.
>
> Mr Lavarch said the gains from the 1982 Law of the Sea Convention were an important example of why the Federal Government is an energetic participant in the international treaty-making process.

"It shows why those who campaign against our involvement in the process of setting international standards can be actually arguing for a weakening, rather than a strengthening, of our sovereignty," Mr Lavarch said.

"Australia now has two additional zones—a 200 nautical mile exclusive economic zone and a 24 mile contiguous zone.

"Within the exclusive economic zone, Australia may explore, exploit, conserve and manage the living and non-living natural resources.

"It also has jurisdiction over off-shore installations, marine scientific research, protection and preservation of the marine environment, and controls over the dumping of waste.

"The declaration of an exclusive economic zone will serve as a basis for further environmental measures such as controls over marine pollution.

"Declaring a contiguous zone enables certain enforcement powers to be extended from 12 nautical miles to within 24 nautical miles of the coast.

"This will assist in combating drug importation and in enforcing migration and quarantine laws.

"The legislation which comes into force today also contains a more precise definition of Australia's continental shelf, taken from the 1982 Law of the Sea Convention. The Convention itself comes into force in November.

"This new definition enables Australia to claim a larger continental shelf and has the potential to increase our offshore petroleum and mineral resources," Mr Lavarch said.

These changes flow from amendments to the Seas and Submerged Lands Act 1973 made earlier this year by the Maritime Legislation Amendment Act 1994. They complete a process bringing Australia's maritime zones into line with the 1982 United Nations Convention on the Law of the Sea.

"The process began in 1990 when the Government increased the width of the territorial sea from three to 12 nautical miles. Prior to the most recent changes, Australia claimed a continental shelf as defined in a 1958 treaty, a territorial sea and a 200 nautical mile fishing zone," Mr Lavarch said.

Progress towards Universal Acceptance of UNCLOS

The United Nations Convention on the Law of the Sea was adopted in 1982, but its coming into force has been a slow process for complicated reasons which have been discussed in previous volumes of the *Aust YBIL* and are discussed further below. The following is part of the answer to a question on notice (House of Representatives, *Debates*, 4 May 1994, p 281):

Mr Hollis asked the Minister representing the Minister for Foreign Affairs, upon notice, on 24 March 1994:

(1) Will the 1982 Convention on the Law of the Sea enter into force on 16 November 1994...

(3) ...what progress has been made in persuading the USA to support the Convention.

Mr Bilney—The Minister for Foreign Affairs has provided the following answer to the honourable member's question:

(1) The Law of the Sea Convention provides for entry into force one year after the sixtieth ratification. On 16 November 1993 Guyana deposited its instrument of ratification of the Convention bringing the number of ratifications to sixty. The legal effect of the ratification by Guyana will be to bring the Convention into force for the sixty ratifying nations on 16 November 1994...

(3) ...Australia has been in direct and regular contact with the United States Government on law of the sea issues since 1981 when the House of Representatives conveyed its unanimous resolution on the Law of the Sea Convention to the United States Government.

Australia, the United States and other countries have continued their participation in informal consultations taking place under the auspices of the UN Secretary-General to explore the concerns which industrialised countries, particularly the United States, have with the deep seabed mining provisions embodied in Part XI of the Law of the Sea Convention.

During the course of these consultations it has been acknowledged by all participants, whether from industrialised countries or developing countries, that global political and economic changes since the adoption of the Law of the Sea Convention in 1982 had raised questions as to the appropriateness of certain aspects of Part XI. The major advance at the most recent consultations has been the development of a text which was put forward by key delegations including Australia, the United States and other developing and industrialised countries. The text contains a draft agreement which identifies all major questions at issue between industrialised and developing states and which would institute a number of significant revisions to Part XI to bring it into line with current needs. The text has attracted widespread support.

At the most recent consultations, held from 4 to 8 April 1994, agreement was reached on the two major outstanding issues relating to Part XI, with all participating delegations generally accepting the resulting text. Negotiations were not, however, formally concluded because of a perception among developing countries that, as a matter of principle, those States which have not participated in the consultations should have the opportunity to study the text and express their views. The final round of the informal consultations will take place from 31 May to 4 June 1994, with the first day set aside for country statements on the text and the remaining three days for drafting changes and for the harmonising of language texts. Significantly, all participating delegations have agreed that the agreement will be adopted by a resolution at a resumed session of the General Assembly during the week of 25–29 July 1994.

Although some uncertainties remain, the Australian Government considers that an agreement on implementing Part XI of the Law of the Sea Convention is now within reach. This would enable Australia, as well as the United States and other industrialised countries, to give serious consideration to ratifying the Law of the Sea Convention, hence ensuring that it becomes the universally accepted law on the subject. Interdepartmental discussions have already begun the process of considering Australian ratification of the Law of the Sea Convention.

Following new and successful negotiations in New York the Foreign Minister, Senator Gareth Evans, issued the following press release on 1 August 1994:

The Minister for Foreign Affairs, Senator Gareth Evans, today welcomed the signature on 29 July, by Australia, along with 40 other countries, of a new

agreement enabling universal participation in the Law of the Sea Convention. The agreement, which establishes a regime for deep sea bed mining, was adopted by the United Nations General Assembly by an overwhelming majority.

Senator Evans said that the adoption of the agreement paves the way for universal participation in the Law of the Sea Convention, a goal which has eluded the international community for a decade. The agreement represents the culmination of four years of negotiations, in which Australia played a central role, aimed at resolving differences between industrialised and developing countries on the deep sea bed mining provisions of the Law of the Sea Convention. Senator Evans said that the agreement secures a fair and competitive environment for Australia's land based mining industry by creating a regime which limits subsidised sea bed mining activities.

Senator Evans said that the adoption of the agreement would also enable Australia, and other industrialised countries, to ratify the Law of the Sea Convention prior to its entering into force on 16 November 1994. This is a major milestone which will secure a comprehensive and widely accepted legal order for the world's oceans.

In consequence of these developments, Australia ratified the Convention, and the July Agreement, on 4 October 1994, by the following instrument:

WHEREAS the United Nations Convention on the Law of the Sea, done at Montego Bay on the tenth day of December, One thousand nine hundred and eighty-two, was signed for Australia on that date; and

WHEREAS Australia may, pursuant to Article 306, ratify the Convention; and

WHEREAS the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 1992, done at New York on the twenty-eighth day of July, One thousand nine hundred and ninety-four, was signed for Australia on the twenty-ninth day of July, One thousand nine hundred and ninety-four; and

WHEREAS Australia may, pursuant to Article 4, paragraph 3(b), ratify the Agreement:

THE GOVERNMENT OF AUSTRALIA, having considered the said Convention and Agreement hereby RATIFIES the Convention and RATIFIES the Agreement, for and on behalf of Australia.

IN WITNESS WHEREOF, I, GARETH JOHN EVANS, Minister for Foreign Affairs, have hereunto set my hand and affixed my seal.

DONE at New York this fourth day of October, One thousand nine hundred and ninety-four.

(Signed) Gareth Evans

Minister for Foreign Affairs of Australia

On 16 November 1994 the Foreign Minister, Senator Gareth Evans, issued the following press release:

The Australian Government welcomes the entry into force today of the 1982 United Nations Convention on the Law of the Sea for all ratifying parties. The Convention provides a comprehensive code of legal principles covering issues

such as navigation rights, the protection of the marine environment, marine resource management, maritime delimitation, maritime zones and mining of the deep seabed. On behalf of the Australian Government, I passed Australia's instrument of ratification to the Convention to the United Nations Secretary-General Boutros Boutros Ghali on 5 October this year.

The entry into force of the Convention represents the culmination of negotiations which have taken place over two decades and is a major achievement for the United Nations system.

It is appropriate during the 50th anniversary of the United Nations to recognise the role it has played in promoting international cooperation in a multilateral framework. Its role in the negotiation of the Convention on the Law of the Sea—one of the most important legal regimes in history—has been crucial.

Australia played a leading role throughout the negotiations and was instrumental in achieving agreement on a number of key issues. It provides a clear example of how Australia can influence treaty negotiations—particularly in the multilateral context—to protect and promote our interests.

The Government decided to ratify the Convention after extensive consultations with the States, industry and other interest groups. In addition, State representatives have participated on a regular basis in Australian delegations to the law of the sea meetings. Australia's obligations under the Convention, and many of the benefits, have been implemented in Australia by a combination of legislation already passed by the Commonwealth and the States and Territories.

Australia is one of the major beneficiaries of the Convention, giving us access to marine resources and providing protection of the marine environment. For an island continent like Australia, the Convention's guarantees of global transport and communication will allow Australian industry to invest in the development of global markets and preserve Australia's access to important overseas markets, including Asia.

Most importantly, because of Australia's extensive coastline, the Convention accords us significant areas of continental shelf and exclusive economic zone (EEZ), which extends 200 nautical miles from Australia's baselines. By giving Australia the right to explore and exploit the living and non-living resources such as fisheries, genetic materials and hydrocarbon and gas deposits within these zones, the Convention establishes a stable climate in which Australian industries may formulate strategies for the sustainable development of natural resources. In addition, the Convention regime for deep seabed mining secures a fair and competitive environment for Australia's land-based mining industry by limiting the possibility of subsidised seabed mining activities.

The following is an extract from the statement of the Australian Deputy Permanent Representative, Mr Richard Rowe, in the Plenary of the UN General Assembly on 6 December 1994, after the first meeting of the States Parties to the Convention:

Mr President,

...Australia welcomed the inaugural meeting of the International Seabed Authority—a symbolic beginning of this new phase. And we look forward to

working with other States to ensure the operational success of the Authority and of its subsidiary organs. As we have previously stressed, the Authority, if it is to sustain international credibility, must operate *inter alia* on the principle of cost effectiveness—a requirement reflected in the terms of the Implementing Agreement and of the current resolution.

Mr President,

Australia supported the decision by the first meeting of States Parties to the Convention, held in New York 21–22 November 1994, to defer the establishment of the International Tribunal for the Law of the Sea until 1 August 1996, so as to allow States which have not yet ratified the Convention a reasonable time to complete their ratification procedures. Australia considers that the Convention's innovative and flexible dispute settlement provisions will play a vital role in ensuring consistent implementation of the Convention's provisions and in creating a body of international law which will interpret those provisions in a uniform manner. We also believe that the Tribunal will play a central role in the dispute settlement process. The one-off deferment will, however, ensure a more equitable representation of judges from different legal systems and geographic groups, and will allow the Tribunal to operate from a broader legal and financial base. For these reasons, the one-off deferment can only strengthen the base from which the Tribunal will commence its functioning and enhance its international legal stature. We look forward to beginning work towards the establishment of such an effective and efficient Tribunal at the next meeting of States Parties to be held 15–19 May 1995.

On 4 November 1994, Ms Penny Richards, Legal Adviser A in the Department of Foreign Affairs and Trade, addressed a Seminar at the University of Wollongong on the background to Australia's ratification of the Convention. The following is the text of her paper:

INTRODUCTION

The aim of this paper is to discuss recent developments relating to the 1982 United Nations Convention on the Law of the Sea (the Convention) and to outline the reasons why the Australian Government decided to ratify the Convention.

...

2. In brief, following the adoption of the Convention in 1982, industrialised countries decided not to ratify the Convention largely because of differences with developing countries over Part XI of the Convention, which relates to deep seabed mining. On 28 July 1994, however, following informal consultations under the auspices of the UN Secretary-General aimed at resolving these differences, a resumed session of the UN General Assembly adopted the Agreement relating to the Implementation of Part XI (the Implementing Agreement). Australia signed the Implementing Agreement the following day together with 40 other States (including all EU member States, Brazil, China, India, Indonesia, Japan, Nigeria and the US). The Implementing Agreement addressed industrialised countries' concerns with Part XI and paves the way for universal participation in the Convention. The Convention will enter into force on 16 November 1994 for ratifying States—at this stage, following the ratification by Germany on 14 October, there are 67 ratifiers.

3. With those few remarks to set the scene, I'd like to address three questions:

- First, why did Australia sign the Convention in 1982?
- Second, why did we wait until 5 October 1994 to ratify the Convention?
- Third, why did Australia finally decide to ratify the Convention?

WHY DID AUSTRALIA SIGN THE CONVENTION IN 1982?

4. The Convention provides a comprehensive code of legal principles governing human activities at sea. It consists of 320 Articles, divided into 17 parts, and nine annexes. It covers such diverse issues as maritime zones, delimitation of maritime boundaries, fisheries conservation and management, piracy, transit passage through international straits, protection and preservation of the marine environment, marine scientific research and mining of the deep seabed.

5. During the law of the sea negotiations, Australia's overriding objective was the adoption of a widely accepted and comprehensive Convention which met Australia's substantive interests. The Government in 1982 accepted that the text as negotiated met Australia's long term specific objectives, particularly in freedom of navigation and in access to living and non-living resources.

6. I will run through some of the specific benefits for Australia of the Convention package.

New Maritime Zones—EEZ and Extended Continental Shelf

7. Australia is one of the major beneficiaries of the Convention. Because of our extensive coastline, the Convention entitles us to significant areas of exclusive economic zone (EEZ), which extends up to 200 nautical miles from a coastal State's baselines, and continental shelf. Within its EEZ, Australia has the right to explore and exploit the living resources—such as fisheries and genetic materials—and non-living resources—such as hydrocarbon and gas deposits. On its continental shelf—and the Convention allows Australia to claim one of the largest continental shelf areas in the world—Australia has the right to explore and exploit the resources of the shelf.

Fisheries Conservation and Management

8. The Convention provides important benefits for Australian fisheries conservation and management resulting in improved conditions for the Australian fishing industry. It sets up an international regime for the world's oceans and clearly defines areas of jurisdiction. States may declare a 200nm exclusive economic zone (EEZ) within which they have sovereign rights over living and non-living resources. Australia's EEZ was proclaimed on 1 August 1994. The Convention also sets out standards for sustainable management of the living marine resources, providing a reference point for responsible fisheries management. This provides a basis for the establishment of national, regional and global standards.

National Standards

9. Australian sovereign rights over fish stocks in its exclusive economic zone have important implications for fishing operations in Australian waters. Australia has the right to control access by foreign fleets to its zone. This enables us to impose conditions on access to Australian fisheries resources which cover a wide

range of requirements including access fees, licensing, catch limits, requirements to carry vessel monitoring equipment, data sharing and catch reporting. It also enables us to deny access to foreign fleets with unfavourable standards of conduct.

Regional Standards

10. Strong fisheries conservation and management measures taken by Australia within its EEZ contribute to wider improvement in regional standards. A recent example of this is the entry into force of the Convention for the Conservation of Southern Bluefin Tuna (SBT) to which Australia, New Zealand and Japan are parties. The SBT Convention is established under the Law of the Sea Convention which obliges States to cooperate to ensure conservation and promote optimum utilisation of highly migratory species. Another example is the banning of large-scale driftnet fishing within the Australian EEZ in accordance with General Assembly resolutions and the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.

Global Standards

11. The Convention also provides a framework for the establishment of more detailed international regimes for fisheries conservation and management. In 1993 the United Nations convened an Inter-Governmental Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks which aims to develop a regime, consistent with the Convention, for regulated fishing of these stocks. This Conference result has the potential to affect conservation and management of the tuna stocks in the South Pacific and could provide a basis for securing improved standards of conduct from distant water fishing operations in the region. The FAO has also commenced a parallel process to develop a Code of Conduct on Responsible Fishing to provide practical principles and guidelines for responsible fisheries.

Environmental Protection

12. Part XII of the Convention, entitled "Protection and Preservation of the Marine Environment", sets out a comprehensive framework of marine environment protection. In the EEZ, coastal States have jurisdiction over the protection and preservation of the marine environment, including broad powers to manage and conserve their resources and to prevent pollution of the environment. States have an obligation to protect and preserve the marine environment (Article 192) and must exploit their marine resources in accordance with this duty (Article 193).

Enforcement Powers

13. In some areas the Convention is innovative. For example, the Convention provides for enforcement of pollution laws by port States in addition to the traditional enforcement powers available under international law to coastal and flag States. It also details the not inconsiderable enforcement (including physical investigation and arrest) powers available to coastal States for breaches of their pollution laws. Australia has implemented these particular provisions through the Transport and Communications Legislation Amendment Act 1994.

Framework

14. However, while the Convention provides a wide ranging regime on the uses of the oceans, it is not intended to be the final word on all these issues. Rather, it acts as an umbrella or framework agreement encouraging States to develop more detailed rules on specific issues in international bodies, such as the International Maritime Organisation (IMO, the specialised UN agency dealing with shipping and navigation issues), the International Whaling Commission and United Nations agencies such as UNEP. Indeed, in Article 197, the Convention places an obligation on States to cooperate on a global and, where appropriate, on a regional basis to establish international rules and procedures for the protection and preservation of the marine environment.

Transport and Communication—Navigation Rights

15. The Convention contains great benefits for Australia's transport links, providing concrete guarantees of freedoms of navigation through straits, archipelagic waters, coastal States' territorial seas and other maritime zones. For reasons of geographic, geopolitical and economic reality these are particularly important to Australia—an island continent, economically and socially dependent on the free passage of sea trade and sea-based communications, often for example through the archipelagic waters of our island neighbours. The effect of these guarantees, combined with the very large number of States which have become party to the Convention, is to significantly enhance Australia's trade security. The Convention thus forms an important link in Australia's long-term trading and economic future.

Transport and Communications—Submarine Cables

16. The Convention also deals with some areas of modern telecommunications technology. It guarantees the right of States parties to lay submarine cables and pipelines on the bed of the high seas and (subject to certain conditions) the continental shelves of coastal states. For Australia the freedom to lay submarine cables is clearly essential to its ability to communicate with the rest of the world. The international legal right to do so enhances Australia's future strategic communications environment.

WHY DID AUSTRALIA WAIT UNTIL 5 OCTOBER 1994 TO RATIFY THE CONVENTION?

17. So let me ask why, in spite of that upbeat sales pitch, Australia didn't move quickly to ratify the Convention after signature in 1982. The short answer is that the difficulties which many industrialised nations had with Part XI meant that widespread adherence to the Convention was extremely unlikely.

18. The basis of the original of the Convention package is the notion that the enjoyment of rights and benefits involves the concomitant undertaking of duties and obligations. The various subject areas of the Convention often became "mini-packages" of delicately balanced compromises. Trade-offs and compromises were made by various interest groups; developed and developing countries could be divided into sub-groups such as coastal states, distant water fishing nations, maritime nations, landlocked states, island states etc, depending on the issue.

19. Perhaps the most significant package was Part XI, which provides for a deep seabed mining regime in an area comprising the deep seabed and ocean

floor beyond national jurisdiction (described as "the Area"). The G77 sought the creation of an international body which would not only regulate mining activities on the deep seabed but carry out mining itself. It would also control mining by other licencees, with the royalties and its own profits to be distributed to all States. The developed States wanted the organisation to have limited power of registration and no powers of interference with national activities. On the other hand, there were pressures from geographically disadvantaged States (both developed and developing) to ensure that they would share in any profits. There were also moves by States with large and those with small continental shelves to protect or expand respectively their resource rights. The result was that Part XI contains the common heritage of mankind concept and a set of complicated rules for the creation and operation of a vast bureaucratic infrastructure—called the International Seabed Authority. The Authority was to administer the common heritage and regulate exploration and exploitation of the deep seabed's resources. Through its mining arm (the Enterprise, named after the space ship of Star Trek fame), the Authority was also to become involved in mining projects, operating parallel sites with commercial operators. The profits of these operations were to be redistributed through a taxation system to developing countries and to the companies involved.

US Objections

20. However, the US, with the new Reagan administration in power, rejected the Convention in 1982 because of concerns about the Part XI regime. The US concerns were based on an ideological rejection of the common heritage of mankind concept. The Reagan Administration, under heavy lobbying pressure from seabed mining interests, believed that the mining of the deep seabed should be on a first-come first-served basis—a new frontier for US companies. In view of this rejection, there was considerable hesitation among industrialised countries in adhering to the Convention, with the result that only Iceland and Malta had ratified the Convention since its conclusion. Other industrialised countries did not necessarily share the US's philosophical difficulties with Part XI (or at least not to such an extent) but were concerned at the cost of the vast and unwieldy bureaucracy that would have been set up—this was particularly so as their share would be greater without US participation. Land-based producers of the minerals found on the deep seabed, including Australia, were also concerned about the potential for subsidised deep seabed mining, and any consequential adverse effect on the competitiveness of our land-based mining industries.

Developed Countries' Reaction

21. Following its rejection of the Convention, the US played no part in the Law of the Sea Preparatory Commission, the body which met biannually from 1983 onwards in preparation for the entry into force of the Convention. The US action had been met with great bitterness by developing countries, which saw the US as backing out of the package deal of the Convention while seeking to have the benefit of what it considered the customary law status of other provisions. It left them with a deep sense of distrust and a combination of factors was required to restart the dialogue on Part XI and thereby pave the way for universal participation. I will list the most important of these factors briefly:

Changed Circumstances

22. The end of the cold war oiled the wheels for dialogue—the fall of communism and the consequent fall from favour of the socialist centrally based economy (upon which Part XI was based) meant that the G77 were more willing to look at creative and mutually beneficial alternatives. Also, it meant that the old alliances and allegiances were loosened thereby ensuring that hardline positions could be softened.

23. Similarly, the change in the US administration, and its focus on increased international cooperation, resulted in a willingness to revisit the issue.

24. The other factor—and I don't think that this can be underestimated—was the slow but sure approach of the sixtieth ratification. As the number of ratifiers moved gradually towards sixty, many countries realised that a solution would have to be found before entry into force, unless Parties were willing to rely on the Convention's own cumbersome amendment processes. Many agreed that it was preferable to find a consensus solution before the Convention entered into force. The result of the sixtieth ratification on 16 November 1993, and the inevitability of the entry into force of the Convention one year later, meant that the clock had started ticking.

United Nations Secretary General's Consultations

25. But let me step back a bit in time, because I certainly don't want to give the impression that there were no efforts being made to find a resolution to the differences between industrialised and developing countries over the deep seabed mining regime. Quite the contrary in fact, as in 1990, in view of the changed atmospherics to which I have just referred, the UN Secretary-General convoked informal consultations aimed at resolving differences. The consultations took place on three levels: Plenary, a discussion group and a core drafting group. The core drafting group, made up of representatives from Fiji, the UK, the US, Germany, Italy and Australia, produced a text known as the "Boat Paper" because of the graphic of a deep seabed mining vessel on its front cover. The group worked, often late into the night, fashioning draft texts and shaping compromises. And as many of you will be aware, involvement in such groups gives the delegations a certain amount of control over the direction a text will take and, importantly, the opportunity to ensure that one's interests are being protected. The "Boat Paper" was then discussed in the "Boat Group", which gathered at the Australian Permanent Mission in New York. This group was made up of some 20 countries including Australia, Brazil, Fiji, Indonesia, Italy, Jamaica, Nigeria, Tanzania, the UK and the US. Comments on the text and new drafts were then presented to the Plenary, which consisted of some 80 delegations. Australia played a leading role in the consultations—in the drafting of texts, in the negotiation of compromises, in the preparation of non-papers and in the regular consultation that was required with the UN Division of Ocean Affairs and Law of the Sea (which acted as the Secretariat). The outcome of these negotiations was a widely accepted agreement which identified all major questions at issue between industrialised and developing States.

26. I would like to look more closely at some of the difficulties faced by the drafters.

Retention of Concept of Common Heritage of Mankind

27. The drafters' first imperative was to achieve a regime for seabed mining which had binding force and which would attract the support of the industrialised world. It was also important to leave in place some of the basic building blocks of Part XI. Many commentators argue that the characterisation of the resources of the deep seabed as the common heritage of mankind is already part of customary international law and indeed some argue that it is *jus cogens*. In any case, developing countries would simply not have accepted any tampering with the common heritage concept. Thus it was not an option to remove Part XI from the Convention and start from scratch.

No Competing Regimes

28. A further imperative was to ensure that the new instrument be drafted so that there was no possibility of competing treaty regimes for seabed mining being created. The need for certainty was paramount in an industry in which large up-front capital expenditure is required.

Existing Ratifiers

29. The next problem faced by the drafters was the fact that the existing ratifiers had already accepted the Convention as it was. There was a need for a mechanism which could allow them to participate in a revised regime for Part XI. Some of these countries expressed concern at potential political difficulties because of reactions from their executive organs and ratifying chambers to what undoubtedly amounted to an amendment to the Convention. There was also a treaty law problem in that a new step would be required to alter the effect of the original instruments of ratification. The upshot of these problems was a request by the ratifiers that the new instrument not be presented as an amending treaty. By utilising different terminology, many of these countries believed they could more readily deal with the domestic constitutional and treaty law difficulties created by the new situation.

Seabed Miners' Slow Ratification Processes

30. The next hurdle was put in place by the prospective seabed mining countries (listed in Resolution II of UNCLOS III) which argued that many of them had constitutional processes which would take some years to conclude before they could accede to the Convention and to any new instrument. On the other hand, these countries, naturally, insisted that as potential seabed miners they ought to be represented on the institutions established to govern seabed mining activities from the outset, as it was anticipated that early action could be taken on the detailed rules required to govern seabed mining activities.

31. While accepting the practicality of having the seabed miners on board from an early stage, the developing countries argued that the potential seabed miners should be required to demonstrate a commitment to the revised seabed mining regime by being given a deadline for ratification. Developing countries also insisted that the potential seabed miners should be required to ratify the Convention and the new instrument in sufficient numbers to ensure the seabed mining regime worked. Indeed, all agreed that for reasons of certainty there would need to be clear deadlines and adherence thresholds to ensure a necessary degree of certainty.

WHY DID AUSTRALIA FINALLY DECIDE TO RATIFY THE CONVENTION?

32. Why has Australia now decided it is in our interests to ratify the package of the Convention and the Implementing Agreement? The reason is that the Implementing Agreement has successfully resolved problems created by the original text of Part XI of the Convention.

Treaty Amending Part XI

33. The Agreement is a treaty status instrument, the effect of which is to bring about significant changes to the regime elaborated in Part XI. The term "amendment" is never used—at the request of some developing countries—but there can be no doubt as to its intent: Article 2 states that the Agreement and Part XI shall be interpreted and applied together as a single instrument but in case of any inconsistency, the provisions of the Agreement shall prevail. Also, the Annex to the Agreement, which provides the specific changes to Part XI, states on a number of occasions that certain articles of Part XI "shall not apply". Therefore, from a treaty law perspective, the Agreement acts as an amending agreement, although the term "implementing agreement" has been preferred.

Link between the Convention and the Agreement

34. The Agreement establishes an unbreakable link with Part XI. No State may establish its consent to be bound by the Agreement before first establishing its consent to be bound by the Convention. And in an unusual piece of treaty law, Article 4(1) of the Agreement states that after the mere adoption of the Agreement, and therefore well before its entry into force, any instrument of adherence to the Convention shall also represent consent to be bound by the Agreement. This link was required to ensure there could be no competing regimes and to try to ensure that the steps being taken to revise Part XI would lead to a widely accepted Convention.

Simple Process for Existing Ratifiers

35. The problem faced by the existing ratifiers was addressed by means of a simplified adherence procedure. The Agreement allows these States to employ their normal treaty processes if they wish, but it also, in Article 5, gives them recourse to a simplified procedure whereby signature of the Agreement followed by a period of 12 months of silence by that State will establish consent to be bound by the Agreement.

Early Involvement of Seabed Miners—Chambered Ratification

36. The entry into force provisions of the Agreement require 40 ratifications but this is qualified by a requirement for chambered ratification. The 40 States ratifying the Agreement must include at least seven pioneer investor States, referred to in paragraph l(a) of Resolution II of UNCLOS III, at least five of which must be developed States. The countries are Belgium, Canada, China, France, Germany, India, Italy, Japan, Netherlands, UK, USA as well as South Korea (following the August 1994 final session of the Preparatory Commission) under sub-paragraph (iii) of paragraph l(a) of Resolution II. This provision will ensure that several of the seabed mining majors will be participants in any regime elaborated under Part XI as implemented by the Agreement.

Early Involvement of Seabed Miners—Provisional Application

37. The need to ensure participation by the potential seabed miners even before they become party to the Convention and the Agreement is achieved by the provisional application procedure in Article 7 of the Agreement. All States which participate in the adoption of the resolution to which the Agreement is attached will be eligible to participate provisionally in the institutions established under Part XI. The Agreement shall be applied provisionally from the date of entry into force of the Convention on 16 November 1994 if it has not entered into force by that date, an unlikely proposition. This will be so for those States which have consented to be bound by the Agreement and for those States which participated in the adoption of the resolution. All such States shall be treated as equal from the point of view of election to organs and responsibility for assessed contributions.

38. But provisional application shall cease on 16 November 1998 if at that time fewer than the seven States required in the chambered ratification provision have ratified the Convention or adhered to the Agreement. This places a reasonable four year deadline for provisional application and provisional participation.

Costs of the International Seabed Authority Cut/Subsidised Deep Seabed Mining Prevented

The Implementing Agreement specifically addresses two key Australian concerns. First, costs to States Parties are reduced considerably by the Agreement. In brief, the functions of the Authority and its subsidiary organs are trimmed, and the operation of some of these organs is put on hold until deep seabed mining actually takes place. (It is not likely to be commercially viable until well into next century.) Second, and importantly for Australia, Section 6 of the Annex to the Agreement ("Production Policy") states that the development of the resources of the deep seabed shall be subject to sound commercial principles and that there shall be no subsidisation of mining activities. The new regime is based on applying the GATT/World Trade Organisation anti-subsidisation code to seabed mining in order to ensure fair competition between land-based and seabed mining. The final text on production policies, drafted by Australia, represents the achievement of one of Australia's major objectives in the informal consultation process.

SUMMARY

The 1982 Convention resulted in many benefits to Australia, including:

- new maritime zones;
- fisheries management prerogatives;
- environment protection powers; and
- transport and communication guarantees.

The 1994 Implementing Agreement overcame remaining problems caused by Part XI. It:

- cut the costs of the International Seabed Authority;
- eliminated the possibility of subsidised deep seabed mining; and
- introduced mechanisms which allow widespread adherence by industrialised countries, an outcome in respect of which Australia played a major role.

Therefore the Government reached the conclusion that our major objectives, namely a comprehensive and widely accepted Convention which met our substantive interests, had been achieved.

Australian Ratification

Consequently, following consultation with the States, industry and interested groups, the Government had decided that Australia should sign the Agreement after its adoption by the UN General Assembly and that it should ratify the Convention and the amending Agreement prior to the Convention's entry into force on 16 November 1994. Senator Evans, on behalf of the Government, deposited Australia's instrument of ratification to the Convention on 5 October 1994, thereby ensuring that Australia will be an original party. The Government believes that this is appropriate, given Australia's traditional role in the law of the sea negotiations—a role which has not only been a high profile and constructive one but which has allowed us on many occasions to operate as a bridge between developing and industrialised country positions.

NEXT STEPS—CREATION OF NEW INSTITUTIONS

With the entry into force of the Convention, a new phase of the law of the sea begins, and the emphasis turns to implementation of its provisions and to the establishment of a number of bodies created by the Convention. These bodies include the International Seabed Authority, the international organisation which will regulate deep seabed mining and which will meet for the first time in Kingston, Jamaica, 16–18 November 1994, its subsidiary bodies (the Assembly, the Council, the Legal and Technical Commission, the Finance Committee), the Commission on the Limits of the Continental Shelf and the International Tribunal for the Law of the Sea. Australia also considers that the Division for Ocean Affairs and the Law of the Sea at UN Headquarters in New York should be strengthened and consolidated to ensure that the Convention has a strong and effective secretariat.

So, although entry into force of the Convention closes a chapter—albeit a very important one—in the history of the law of the sea, it is by no means the end of the story. On the contrary, one could say it is really just the beginning.

Two New Agreements on Tuna Stocks

Further to the *Aust YBIL* 1994, vol 15, p 443, the following is the text of a press release issued by the Minister for Resources, Mr David Beddall, on 20 May 1994:

The Convention for the Conservation of Southern Bluefin Tuna (SBT) has been ratified by Australia, Japan and New Zealand and will significantly benefit the entire fishery, the Minister for Resources, David Beddall, announced today.

"The Convention was the culmination of eight years of negotiations, with Australia the driving force behind its development," Mr Beddall said.

"Now that all three nations have ratified the Convention, global management of southern bluefin tuna can take place under a legally binding international regime."

The Convention establishes the Commission for the Conservation of Southern Bluefin Tuna which will meet for the first time in Wellington, New Zealand, next week.

SBT are fished throughout the Southern and Indian Oceans and the Tasman Sea. Intensive fishing has severely depleted the stock and the fishery has been subjected to major catch restraints in recent years.

In adapting to quota cuts, the Australian SBT industry has undergone major structural change and focussed on value-adding opportunities such as fish farming and longlining.

Mr Beddall says the Convention will enhance prospects for the international cooperation required to secure a stable future for Australia's SBT industry.

"Australia, Japan and New Zealand are the founding parties to the Convention, but other countries fishing for SBT or through whose waters SBT migrate can join the Convention" Mr Beddall said.

"We will be seeking more direct involvement by Indonesia, the Republic of Korea and Taiwan in the conservation and management effort to ensure the fishery is managed on a sustainable basis."

Australia has offered to host the headquarters for the Commission when a secretariat is established.

The following is the text of a second press release issued by Mr Beddall on 21 December 1994:

Tighter management controls on Japanese tuna fishing in Australian waters are assured following the signing in Melbourne today of a new Australia-Japan agreement.

Signed by the Federal Minister for Resources, David Beddall, and the Japanese Ambassador, Mr Hasegawa, the agreement will limit to 250 the number of Japanese longliners permitted to fish in the Australian Fishing Zone (AFZ) during 1995.

Japanese vessels will also be required to have fitted satellite data transmission and monitoring equipment. This requirement will be phased in from 1 March, and by 1 November 1995 all vessels will have to report position and catch data on an Inmarsat based system.

"This is a significant step in improving the way in which foreign vessels fishing in the AFZ are managed," Mr Beddall said.

The Minister said Japanese longlining off Australia's east coast would again be limited to a maximum of 2575 fishing days, with up to 55 vessels permitted to operate during each four month period.

The Southern Bluefin Tuna (SBT) catch would also be limited—to 200 tonnes off the east coast and 400 tonnes off Tasmania. The tuna would be taken against Japanese SBT quota, not Australian quota.

The Minister said the new fishing agreement includes continued Japanese cooperation in providing high seas catch data enabling Australian scientists to undertake research into tuna and billfish stocks fished within the AFZ.

"I am pleased to see moves towards using some of the bycatch taken by Japanese longliners, particularly Rays Bream," the Minister said. "In this context, the Japanese industry is very interested in a commercial arrangement with fish processors in Tasmania. I would be happy to see this fish used in Australia rather than wasted, but landings must have the full support of the Australian industry."

Japanese tuna companies will also pay an access fee of $4.225 million for the 1995 season.

Mr Beddall said that although this is less than the $4.7425 million paid last year, it is a very good result for Australia considering the fall in tuna prices on the Japanese market during the past year.

"This fee represents the highest return in the Pacific region in terms of percentage of value of the Japanese catch," Mr Beddall said.

International Whaling Commission—Southern Ocean Whale Sanctuary

The following is the text of a press release issued by the Foreign Minister, Senator Gareth Evans, and the Minister for the Environment, Senator John Faulkner, on 27 May 1994:

A proposal for a major whale sanctuary in the Southern Ocean has been adopted by the International Whaling Commission meeting in Mexico, the Minister for Foreign Affairs, Gareth Evans, and the Minister for the Environment, Sport and Territories, Senator John Faulkner, announced today.

The Ministers said that the Antarctic sanctuary, which was approved 23–1, is a great achievement for global conservation and will provide important long-term protection for all species of whales.

"This sanctuary, in conjunction with the Indian Ocean Sanctuary, will ensure that there is a vast area in the Southern Hemisphere where commercial whaling will be prohibited," the Ministers said.

The Ministers said that Australia has played a key role in the establishment of the new sanctuary and more generally in whale conservation.

"Australia has been fighting for whale protection for many years. It is very satisfying to see so many countries embrace the concept of the sanctuary today—a concept that Australia and France have been pursuing since 1992.

"As a major proponent of the sanctuary, Australia will ensure that there is effective research and monitoring of whale numbers in the sanctuary.

"Communities throughout the world are increasingly recognising that commercial whaling is unacceptable, that whale products are not essential and that whales are a very precious part of nature and deserve to be protected."

The Ministers also noted the economic value of the whale watching industry, which in Australia now ranks third in world terms, with an estimated value of over $30 million per year.

"For those who like watching whales, for the people who are part of the growing whale watching industry and for the largest number of people of all—who simply want whales to have better security—the sanctuary is good news."

On 23 December 1994, the Acting Foreign Minister, Senator McMullan, and the Minister for the Environment, Senator Faulkner, issued the following press release dealing with the Japanese attitude to the new Sanctuary:

The Acting Minister for Foreign Affairs, Senator Bob McMullan, and the Minister for Environment, Sport and Territories, Senator Faulkner, today expressed regret at the decision of the Japanese Government to continue its program under a Japanese permit to kill whales for supposedly scientific

purposes in waters that are now part of the newly-designated Southern Ocean Whale Sanctuary.

The Ministers said they had been advised the Japanese Government had informed the Secretariat of the International Whaling Commission (IWC) in Cambridge, UK, that the Japanese Government had issued a permit under Japanese legislation again authorising the killing of up to 330 Minke whales in an area of Antarctic waters to the south of Australia and New Zealand in the 1994–95 summer season.

"We have said on many occasions before that we strongly disagree with the continuation of this program of lethal research," the Ministers said.

"We acknowledge that the decision of the Government of Japan is within the letter of the 1946 Convention, but it is our firmly held view that the continued killing of whales in the Southern Ocean is of a scale and nature that subverts the intent of the IWC's moratorium on commercial whaling.

"In addition, the whales are to be taken from Antarctic waters that are now within the Southern Ocean Sanctuary.

"We have repeatedly put the strong view that, with modern techniques, the information essential for management and conservation could be gained without killing whales."

The Ministers also said the IWC had, at its meeting in Puerto Vallarta, Mexico, in May 1994, invited the Japanese Government to reconsider its proposed research killing of Minke whales in 1994–95 and to restructure its research program so that research needs can be satisfied with non-lethal methods.

Senator McMullan said that, on 16 August 1994, Senator Evans and the then Acting Minister for Environment, Sport and Territories, Senator Nick Bolkus, had expressed the Australian Government's regret at Japan's announcement on 12 August 1994 that it would lodge an objection to the inclusion of the Antarctic Minke whale in the Southern Ocean Whale Sanctuary.

"We are greatly disappointed that Japan continues to ignore international opinion as expressed in the IWC," Senator McMullan said.

"We call on Japan to follow the great majority of international opinion and to cease this unnecessary form of exploitation of whales."

The Ministers said that the permit granted by the Japanese Government specified that the proposed research catch would not be carried out in the Exclusive Economic Zone (EEZ) of any foreign country.

They noted that Australia's EEZ, proclaimed on 1 August 1994 in accordance with the 1982 Law of the Sea Convention, which recently entered into force, includes the waters off Australia and its external territories.

The Australian Government, through the Commonwealth *Whale Protection Act* of 1980, which now applies to all waters within the EEZ, has taken measures to provide the legislative basis for the protection of all species of whales, dolphins and porpoises in areas under its jurisdiction.