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Source: *The International and Comparative Law Quarterly*, Oct., 1992, Vol. 41, No. 4 (Oct., 1992), pp. 788-807

Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law

Stable URL: https://www.jstor.org/stable/761031

THE INCLUSION OF SEDENTARY FISHERIES WITHIN THE CONTINENTAL SHELF DOCTRINE

S. V. SCOTT*

ONE of the first issues to arise in the Australia–Japan relationship after the Second World War was that of Japan's right to engage in pearl-shelling operations in the waters off the Australian coast. Australia feared that its own industry would not be able to compete with the long-range Japanese fleets when they returned to "Australian" waters after the lifting of occupation restrictions. Classical international law did provide precedents for the view that a State is entitled to the exclusive control of the sedentary fisheries off its coast,[1] but even to the extent that prescription was the accepted basis of those rights, Australia recognised that it could not be said to have claimed that right, without protest, since "time immemorial". Officials therefore seized the opportunity afforded by the new doctrine of the continental shelf, and successfully guided its development so that the emergent rule of law would provide suitable justification for Australia's position *vis-à-vis* Japan. This article provides a historical account of the process by which Australia secured the inclusion of sedentary fisheries within the continental shelf doctrine as formulated in the 1958 Convention on the Continental Shelf.[2]

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1. Perhaps most cited is E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1916, trans. by C. G. Fenwick), Vol.3, p.107. Some imposed certain requirements: see M. C. Calvo, *Le Droit International Théorique et Pratique* (1887–1888), p.481 and G. Gidel, *Le Droit International Public de la Mer* (1932), Vol.1, pp.500–501. For an excellent discussion of the historical context of this issue, see D. P. O'Connell, *The International Law of the Sea* (1982, Ed. I. A. Shearer), Vol.1, pp.450–457, 498–503.

2. The intention is therefore to present developments as perceived by Australian officials at the time, based on documentary material from the Australian Archives. For relevant contemporary legal debate see, *inter alia*, E. Borchard, "Resources of the Continental Shelf" (1946) 40 A.J.I.L. 53–70; H. W. Briggs, "Jurisdiction over the Sea Bed and Subsoil beyond Territorial Waters" (1951) 45 A.J.I.L. 338–342; G. Gidel, "The Continental Shelf", in *University of Western Australia Annual Law Review* (1954), pp.87–107; L. F. E. Goldie, "The Occupation of the Sedentary Fisheries off the Australian Coasts" (1953) 1 Sydney L.Rev. 84–104, "Australia's Continental Shelf: Legislation and Proclamations" (1954) 3 I.C.L.Q. 535–575, and "Some Comments on Gidel's Views" (1954–56) 3 U. Western Australia L.Rev. 108–123; L. C. Green, "The Continental Shelf" (1951) 4 C.L.P. 54–80; B. A. Helmore, "The Continental Shelf" (1954) 27 A.L.J. 732–734; H. Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 B.Y.I.L. 376–433; W. M. Mouton, *The Continental Shelf* (1952); D. P. O'Connell, "Sedentary Fisheries and the Australian Continental Shelf" (1955) 49 A.J.I.L. 185–209; S. Oda, "The Territorial Sea and National

I. THE CONTINENTAL SHELF DOCTRINE AND AUSTRALIA

THE continental shelf doctrine was at the vanguard of the post-Second World War revolution in the law of the sea. By the so-called Truman Proclamation of 28 September 1945 the United States claimed sovereign rights of jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf adjacent to its territorial sea, although this was not to affect the legal status of the high seas above the continental shelf.[3] The Truman Proclamation, though not claiming to be based on any recognised principles of law but solely on that which was "reasonable and just", met little opposition,[4] and set a precedent which many other nations chose to follow. More than 20 nations followed the United States' lead over the next eight years. The doctrine appeared to have become a convenient vehicle for a general extension of seaward State jurisdiction,[5] but only the more extensive claims of certain South American nations evoked international protest.

What can often be a slow process of developing customary law was in this case speeded up by the work of the International Law Commission. At its first session in 1949, the Commission decided to give priority to the codification of the regime of the high seas. This was to include the continental shelf,[6] which was considered to fall within the scope of law

Resources" (1955) 4 I.C.L.Q. 415–425; G. Scelle, *Plateau Continental et Droit International* (1955); F. A. Vallat, "The Continental Shelf" (1946) 23 B.Y.I.L. 334–338; C. H. M. Waldock, "The Legal Basis of Claims to the Continental Shelf" (1951) 36 Trans. Grot. Soc. 115–148; R. Young, "The Legal Status of Submarine Areas Beneath the High Seas" (1951) 45 A.J.I.L. 225–239.

3. Presidential Proclamation No.2667 (1946) 40 A.J.I.L. Supp. 45–46. The Truman Proclamation of 28 Sept. 1945 is generally considered to be the first announcement and classic statement of the doctrine. This is not to deny any importance to the Gulf of Paria (Annexation) Order issued by the UK on 6 Aug. 1942 or the UK–Venezuela Treaty of 26 Feb. 1942; but the Truman Proclamation is of greater significance as a starting point for continental shelf developments for, as Prof. Lauterpacht, *idem*, p.380, pointed out, it represented the first usage of the term "continental shelf" in an official instrument and the first attempt to provide a philosophy of the doctrine.

A second "Truman proclamation" of 28 Sept. 1945 announced US policy on the establishment of "conservation zones in those areas of the high seas contiguous to the coasts of the US wherein fishing activities have been or in the future may be developed and maintained on a substantial scale": Proclamation by the President with Respect to Coastal Fisheries in Certain Areas of the High Seas (1946) 40 A.J.I.L. Supp. 46–47.

4. Indeed, there was a notable lack of scholarly interest in the whole subject, which Sir Cecil Hurst attributed to the lawyers' concentration with the peace: C. Hurst, "The Continental Shelf" (1951) 36 Trans. Grot. Soc. 155.

5. A number of the claimant States did not even have a continental shelf in the geological sense. Hollick makes the point that the US proclamations were not a direct stimulus to the 200-mile claims, although Chile and Peru, for example, made some effort to model theirs along the lines of the US proclamations. See A. Hollick, "The Origins of 200-Mile Offshore Zones" (1977) 71 A.J.I.L. 494–500.

6. (1949) Y.B.I.L.C. Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly. Report of the Commission, p.281. The International Law Association also paid considerable attention to the continental shelf at its conferences from 1948 to 1954.

requiring progressive development rather than codification. At its second session, the Commission decided that the continental shelf should not be considered either *res nullius* (belonging to no one and hence available for unilateral acquisition on the basis of effective occupation) or *res communis* (common property and therefore not available for national acquisition). Rather, a littoral State should be able to exercise control and jurisdiction over the seabed and subsoil of the submarine areas situated outside its territorial waters independent of the actual existence of a continental shelf in the geological sense, but this would not imply any concept of territoriality or depend on the concept of occupation. These views were incorporated in the set of draft articles on the continental shelf provisionally adopted by the Commission at its third session, held from 16 May to 27 July 1951,[7] which was then submitted to governments for comment.

One of the issues to be determined by the Commission was that of the resources to which the new doctrine was to apply. Although the Truman Proclamation had been worded so as to encompass all "natural resources", there was little doubt that it had been inspired by the burgeoning US offshore oil industry,[8] and so it was unclear as to whether the Proclamation could be presumed to cover jurisdiction over living resources. During its early deliberations the Commission clearly considered the continental shelf doctrine to apply only to mineral resources.[9] Australia took no immediate action in response to the Truman Proclamation and in September 1951 an inter-departmental committee established to consider the question of Australia's making a continental shelf claim advised against any such action. The committee concluded that Australia's principal concern regarding waters beyond territorial limits was for the control of fisheries, in particular, sedentary fisheries. It appeared that these were unlikely to be covered by the new doctrine, so it was recom-

7. "Draft articles on the continental shelf and related subjects. Annex to Report of the ILC to the General Assembly. Report of the ILC covering the work of its third session, 16 May–27 July 1951" UN Doc.A/1858.

8. The preamble to the Truman Proclamation stated that the US government, "aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged": Pres. Proc. 2667, *supra* n.3, at p.45. In her study of the Truman Proclamations, Ann Hollick gave three goals of the continental shelf proclamation: to facilitate conservation of shelf resources, to provide protection against foreign exploitation of those resources, and to promote domestic investment in offshore mining by assuring US industry security of tenure: "US Oceans Policy: The Truman Proclamations" (1976) 17 Va.J.I.L. 24. Despite the number of continental shelf claims made thereafter, only four nations were actually engaged in offshore drilling operations by 1954: R. Cullen, *Australian Federalism Offshore* (1985), p.7.

9. The ILC's 1951 draft articles dealt with the subject of sedentary fisheries in a separate part. See *op. cit. supra* n.7, at Part II. Related subjects. Article 3.

mended that further consideration of a continental shelf claim await resolution of the fisheries problem.[10]

Problems in the pearling industry were not to be conducive of early settlement, however. It was not to be long before inclusion of sedentary fisheries within the group of resources to be covered by the emerging rule of law was to appear as the only achievable means of resolving the foreign policy dilemma brought about by crisis in the Australian pearling industry.

II. THE AUSTRALIAN PEARLING INDUSTRY[11]

THE Australian pearling industry can be dated from the discovery of the *sugillata* pearlshell at Shark Bay, Western Australia, in 1850.[12] Although leases and licences were issued the following year, it was the discovery of the larger *pinctada maxima* shell on the north-west coast in 1867 that heralded the beginning of a valuable industry. Early activities in Western Australia were concerned with retrieving pearls from shell gathered on the flats at low tide. However, the shell itself quickly became the mainstay of the industry, being gathered from offshore beds by divers working from luggers. Pearl shell was exported,[13] primarily for the button industry, but also for use in the manufacture of knife handles, ornaments and instrument dials.

As a major export industry, pearling was of considerable economic importance to Australia's sparsely populated north,[14] but a recurrent

10. "Report of departmental committee consisting of representatives of the departments of commerce & agriculture, external affairs, territories, navy, and shipping & transport, and of the attorney-general's department, on the continental shelf and related subjects, particularly fisheries" (17 Sept. 1951): Australian Archives (hereafter AA) CRS A432 53/3122.

11. See, *inter alia*, C. L. A. Abbott, *Australia's Frontier Province* (1950); M. A. Bain, *Full Fathom Five* (1983); "The Pearling Industry of Australia" report prepared for the Commonwealth government by J. P. S. Bach, 1954; Northern Australia Development Committee, *The Pearl Shell, Bêche-de-Mer and Trochus Industry of Northern Australia* (1946); D. C. S. Sissons, "The Japanese in the Australian Pearling Industry" (1979) 3(10) Queensland Heritage 9–27; M. L. Taylor (Ed.), *The Pearling Industry of Western Australia 1850–1985* (1985).

12. Bach, *idem*, p.4.

13. After the First World War, the US took over from Great Britain as the most important market for Australian shell. During the two decades between 1914 and 1936, Australia was the major influence on the American market, Australian shell representing an average of 47.9% of the quantities handled. The largest annual quantity was 2,200 tons, in 1929: "Report on the Market for Ocean Pearl Shell in the United States 1940" Queensland Premier's Department Batch 329, 1.

14. The Broome industry reached its peak in 1912, at which stage 3,000 men were employed on more than 400 luggers. In the Torres Straits, pearling came to represent the sole source of employment on Thursday Island. And the industry became the third most important to the Northern Territory, following only the mining and pastoral industries in terms of numbers employed and the value of production: Abbott, *op. cit. supra* n.11, at p.132.

problem for the industry was a lack of skilled labour.[15] Following the amendment of the Bakufu edict in 1866, under which the Japanese had been forbidden to leave Japan, permission was granted for the first Japanese labourers to work overseas—as divers and crewmen in the Australian pearling industry. They soon became indispensable to the industry; master pearlers feared that they would one day take over the industry altogether.[16]

It was in the 1930s that the pearlers' fears began to be realised. Operating from the mandated island of Palau and sub-bases off Dutch New Guinea, the Japanese began to send their own fleets of up to 60 vessels to the Arafura Sea.[17] The huge influx of shell on the world market lowered prices and depleted known beds.[18] The Australian industry survived the decade only with government assistance.[19]

Public anger over alleged Japanese poaching of shell and trespassing on aboriginal reserves prompted an amendment to section 19AA of the Northern Territory Aboriginals Ordinance 1918–36. But the 1937 amendment, by which unauthorised vessels were to be forbidden within three miles of the coast of an aboriginal reserve, proved of more embarrassment than assistance, since appeals to the Supreme Court of the Northern Territory by Japanese arrested under the Ordinance resulted in heavy costs being ordered against the Commonwealth and the remaining cases being settled out of court.[20]

With the growth of international tensions in the 1930s, the presence of so many "marauding sampans" off the northern coast caused increasing

15. See A. Jennison, "Labour in the Australian Pearl-shell Fisheries", *Fisheries Newsletter*, June 1946, pp.4–5; J. P. S. Bach, "The Pearlshelling Industry and the 'White Australia' policy" (1953) 10 Historical Studies: Australia and NZ 203–213.

16. H. Edwards, *Port of Pearls: A History of Broome* (1983), p.92.

17. The presence of Japanese sampans in waters adjacent to the Queensland coast was first reported in a communication, dated 4 Feb. 1933, from the Portmaster, Thursday Island, to the Collector of Customs, Brisbane, Queensland Premiers Dept., Batch 115. In 1936, 85 boats were operating; in 1937, about 100; and in 1938, 160: C. Hartley Grattan, "Australia and Japan", *Asia*, Nov. 1938, p.691.

18. Report, *op. cit. supra* n.13.

19. This included a £10,000 Commonwealth and Western Australian grant following the Broome cyclone disaster of 1935. A subsequent Tariff Board Enquiry rejected the payment of a bounty, but recommended that relief be granted in the form of non-payment of primage and customs duty. Following an investigation into the industry by the Department of Commerce in 1938, £64,000 of repayable advances were made by the Commonwealth and State governments to meet the difference between production costs and overseas prices, to pay off crews for 1938, and to prepare luggers for 1939: Northern Australia Dev. Comm., *op. cit. supra* n.11, at p.9.

20. See "Arrest of Japanese Pearlers", articles by Lieut. Com McKenzie, the technical adviser to the plaintiffs, in the *Sydney Morning Herald*, 7 and 8 Dec. 1938. For an article dealing primarily with the judicial phase of the episode, see W. R. Edeson, "Foreign Fishermen in the Territorial Waters of the Northern Territory, 1937" (1976) 7 Fed.L.Rev. 202–226.

concern within Australia.[21] Longfield Lloyd, the Australian Trade Commissioner in Japan, reported that the Japan Pearling Company, under which operations had been unified in 1938, was associated with the South Sea Development Company in which the Japanese Navy had strong interests. It appeared that pearling operations were a means by which information was being prepared for the much feared "southward advance".[22] Despite efforts in the late 1930s, the Australian government had found no diplomatic means by which to curb Japanese activities off its coastline prior to the outbreak of war.[23]

The Second World War and occupation controls on the movement of the Japanese fishing fleet provided the Australian pearling industry with a reprieve. In 1947 two bills were drafted which sought to protect the industry against foreign competition by drawing on the Commonwealth government's constitutional right to legislate for waters beyond territorial limits.[24] But these bills were withdrawn before reaching Parliament. Britain was afraid that any legislation which could be interpreted as an extension of the three-mile limit might jeopardise its position in the *Anglo-Norwegian* case shortly to be heard by the International Court of Justice.[25]

Concerned at the likely impact of the resumption of Japanese pearling operations following the restoration of sovereignty, the efforts of Australian officials to protect the Australian pearling industry were next directed towards the imposition of tough limitations via the Peace Treaty. This move was to no avail. The United States was adamant that Japan be treated as a future ally of the West and Dulles accepted a private assurance from Prime Minister Yoshida regarding fisheries of concern to the United States.[26] It became clear early in the Peace Treaty negotiations

21. Newspaper articles painted alarming pictures of the activities and intentions of Japanese pearlers. See e.g. "Hunt for Sampan by Launch and Air", *Courier Mail* (Brisbane), 9 Apr. 1934; "Those Mysterious Sampans!", *Telegraph*, 19 Mar. 1934. See also A. H. Charteris, "Sampans and Territorial Waters" (1958) 1(4) Austral–Asiatic Bull. 245–266.

22. Longfield Lloyd to the Secretary, Dept. of Commerce, 6 Oct. 1937, AA: CRS A601, I402/17/30; "Japanese Encroachment in Australian Waters", undated, AA: CRS A461, I345/1/3. See also J. G. Holmes, "Japan's Southward Expansion" (1938–39) 2 Austral–Asiatic Bull. 19.

23. See "Memo from Hodgson, Secretary, EA to the Secretary, PM's Dpt" 5 Oct. 1939. AA: CRS A461 345/1/3 Item 1.

24. S.51(x) of the Australian Constitution empowers the Commonwealth to legislate with respect to "fisheries in Australian waters beyond territorial limits".

25. Anderson, Director of Fisheries to Mr E. McCarthy, Dept. of Commerce & Agriculture, 9 June 1949 AA:A609 84/1/10 Pt.1. See also CRS A432 53/3122.

26. By the "Yoshida letter" of 7 Feb. 1951 the Japanese government promised to prohibit fishing operations in areas in which conservation measures were in force and in which the Japanese had not been fishing in 1940. The exchange of letters between Yoshida and Dulles is printed in DOS Bull. (26 Feb. 1951), p.351. See also discussion in F. S. Dunn, *Peace-Making and the Settlement with Japan* (1963), pp.166–171.

that no amendments to the US draft would be accepted.[27] The relevant article[28] read:

> Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Despite diplomatic efforts prior to the signing of the Treaty, Australian officials gained no more far-reaching commitment from Japan than that the government would restrict the activities of its nationals in the southern part of the Arafura Sea in accordance with Australian domestic legislation pending the conclusion of a long-term agreement with Australia.[29]

The urgent need was now for the implementation of domestic legislation. Accordingly, the Pearl Fisheries Act 1952 was enacted concurrently with legislation for ratification of the Peace Treaty.[30] The constitutional basis for the future implementation of specific conservation measures having thereby been established, plans were set in train for talks to be held on the issue. These were to be the first post-war Australia–Japan bilateral negotiations.

III. AUSTRALIA AND THE INTERNATIONAL LAW COMMISSION

IN preparing for the negotiations, Australian officials sought suitable justification for their determination to remove the threat posed by Japanese pearl fisheries operations off Australia's coast. The Solicitor-General, Sir Kenneth Bailey, considered that the only relevant legal doctrine was that of prescription. This concept of traditional international law provided the one exception to the territorial waters limit on coastal State rights. Under it a State could control all persons, including foreign nationals, engaged in sedentary fisheries adjacent to its coasts if it had claimed that right, without protest, for a very long period. However, even though the "Australian" beds had been worked by Malay and Indonesian divers "from time immemorial" and by the Japanese since the 1930s, the fundamental criterion—that the coastal State had asserted control over all persons engaged in the industry with the acquiescence of other countries—was absent. Australia appeared to be the only nation with substantial pearl resources which had not already acquired prescriptive title over those resources.[31]

27. Report, *op. cit. supra* n.10.
28. Art.9, Treaty of Peace With Japan Signed at San Francisco 8 Sept. 1951 with Related Documents: DOS Publication 4561, released May 1952, p.5.
29. Cable 537 from Tokyo, 29 Aug. 1951, AA: CRS A816 19/304/458.
30. Treaty of Peace (Japan) Act No.5 (1952), assented to 13 Mar. 1952.
31. Memo, K. H. Bailey to the Secretary, Department of Commerce & Agriculture of 12 Feb. 1953. Attachment to Cabinet Submission 402, AA: A4905/XM1 Vol.16.

The only other possible legal basis appeared to be the continental shelf doctrine. But the recent *Abu Dhabi* ruling had brought home the fact that the doctrine could not yet be considered an "established" rule of law,[32] and developments in the International Law Commission had not been such as to warrant Australian optimism. The Commission's draft articles stated that sedentary fisheries, as resources of the sea, should be regulated independently of the resources of the continental shelf. Although the regulation of sedentary fisheries should be undertaken by the coastal State where such fisheries had long been maintained and conducted by nationals of that State, non-nationals were to be permitted to participate in the fishing activities on an equal footing with nationals.[33]

Sir Kenneth Bailey recognised that these articles meant that Australia's legal position in respect of the pearling issue was very weak. He therefore embarked on what he later referred to as a "mission", the specific goal of which was to effect change in the articles.[34] During 1953 Bailey held discussions with fisheries and legal officers in the United States, and in the United Kingdom with Mr G. G. Fitzmaurice, Legal Adviser to the Foreign Office, and with Professor Waldock of Oxford.

By this stage, Mr J. P. A. François, *rapporteur* on the regime of the high seas, had circulated his fourth report.[35] This contained a set of proposed revised draft articles on the continental shelf and related subjects. Substantial alterations meant that the articles were now even more unfavourable to Australia. That which had previously been implied was now made expressly clear: the continental shelf was to be "subject to the exercise by the coastal State of sovereign rights of control and jurisdiction for the purpose of exploring it and exploiting its mineral resources". An accompanying comment explained that sedentary fisheries were considered to be subject to their own system of regulation.[36]

In Geneva Bailey met privately with Professor Lauterpacht (Whewell Professor of International Law at Cambridge and a member of the Commission), Dr Liang (Secretary of the Commission) and Dr Sandberg of Sweden (Assistant Secretary), as well as putting forward Australia's views "at some length" during informal discussions with Mr François (Chairman of the Commission and *rapporteur*).[37] Bailey maintained that sedentary fisheries belonged to the regime in point of principle though not history, a position he stated in an *aide-mémoire* which he left "in the

32. *Petroleum Development Ltd* v. *Sheik of Abu Dhabi* (1951) 18 I.L.R. 155.
33. *Loc. cit. supra* n.9.
34. Secret Memorandum, K. H. Bailey to the Attorney-General, 7 July 1953, AA:A432 53/3122.
35. UN Doc.2894 A/CN.4/60, 4th Report on the Regime of the High Seas, the Continental Shelf and Related Subjects by J. P. A. François, Special Rapporteur, 19 Feb. 1953.
36. *Idem*, pp.124, 126.
37. Secret Memorandum, *op. cit. supra* n.34.

appropriate places" when forced to return to London before the Commission had acted on the issue.[38]

Meanwhile, the Australia–Japan negotiations on pearling which had begun in Canberra on 13 April 1953 had soon reached an impasse. Lacking a suitable legal argument but pressured to adopt a strong line by overriding domestic opposition to the government's acquiescence to a "soft" peace treaty,[39] the Australian negotiators had been forced to rely on the need for conservation of pearling beds. It was hoped that Japan's desire to regain its position in the "comity of nations" would persuade its representatives to accept "somewhat less in the negotiations than they would if they acted solely according to their assessment of the strict merits of their own case".[40] The team, led by Dr Westerman, Assistant Secretary of the Department of Commerce and Agriculture, argued that a division of grounds would enable Japan to control the activities of its own vessels, thereby preventing possible friction.[41] This justification proved inadequate; Japanese negotiators argued that the proposed solution was aimed merely to give Australia a monopoly and was unrelated to what they agreed was a need for the conservation of grounds. The Japanese suggested that a joint standing committee be established instead, to gather information necessary for a "scientifically based" conservation programme.[42] Japan was not prepared to compromise on what it regarded as the legal principle involved—that of high seas fishery.[43] With the negotiations in deadlock Australia reached the low point in its position on the issue.

However, on 7 July 1953 news was received from Bailey that his mission had been successful. Via "an informal intimation" from Lauter-

38. *Ibid.*

39. Public opinion was an important factor on both sides. In Australia bitter wartime memories led to strong opposition to the terms of the Peace Treaty and to the US handling of the issue. Feelings were further inflamed by continued press coverage of alleged Japanese infringements of territorial waters. See e.g. "Pearlers plan war on Japs", *Daily Telegraph*, 26 Nov. 1954 in AA:CRS A1838/T184 3103/10/8/3 Pt.3. In Japan the government was engaged in several fishing disputes during this period: see M. Ichimata, "A Map Analysis of Japan's Fishery Problems" (1959) 3 Japanese Annual of Int.L. 103–108 and Shigeo Sugiyama, "Postwar Japan and High Seas Fishery", in *The Japan Annual of International Affairs* (1961), pp.59–90.

40. "Negotiations with Japan for a Fisheries Convention", Cabinet Submission, 26 Feb. 1953: AA:CRS A4905/XM1 Vol.16, 14.

41. "Fisheries Negotiations with Japan", Attachment A to Cabinet Submission No.531, 11 Aug. 1953: AA:CRS A4905/XM1 Vol.20.

42. Submission to Cabinet No.531 by Minister for Commerce & Agriculture, 12 Aug. 1953, Attachment A: AA:CRS A4905/XM1, Vol.20. For Japanese justification of position adopted in talks see "Views of Japanese Delegation on Reasons for Area Approach set out by Australian Delegation": AA:CRS A1838/T184 3103/10/1/1 Pt.6.

43. For a useful summary of the negotiations see "Brief for the Prime Minister" prepared for his visit to Japan in 1952. Vol.II deals with the pearling dispute: AA:CRS A1838/T184 3103/10/1/1 Pt.24.

pacht Bailey was informed that "all would be well" with the continental shelf.[44] In a secret memorandum despatched from London to the Attorney-General, Bailey wrote that:[45]

> the stage has now been reached at which I can usefully report progress on the question of sedentary fisheries and the continental shelf. I am glad to be able to say, in general terms, that as a direct result of my visit, the International Law Commission's proposals on this subject have taken a decided turn in the direction of Australian views and interests.

Article 2 of the Commission's final draft articles was now to read that the "coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources". The coastal State was to retain the power of regulation even where foreigners had historically established, prescriptive rights in sponge, coral, or pearl fishery, although its powers were not to be exercised in a manner inconsistent with those rights.

Members of the Commission had engaged in considerable discussion over François's substitution of "mineral resources" for "natural resources". During discussion Professor Lauterpacht had proposed the consolidated treatment of sedentary living resources and the continental shelf, asserting that it could be made quite clear that the term "natural resources" was not being used to encompass either swimming or bottom fish. Lauterpacht's proposal was accepted, by six to four with three abstentions.[46] An accompanying comment explained that the Commission had reached the conclusion that:[47]

> the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the regime adopted and that this aim could be achieved by using the term "natural resources." It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there.

At its 234th meeting, the Commission recommended to the General Assembly the adoption by resolution of the draft articles on the continental shelf.[48]

The timing of the Commission's decision was opportune. With talks at an impasse, Australia had been unable to object to the sailing of the Japanese fleet upon the expiration of an agreed one-month delay,

44. Secret Memorandum, *op. cit. supra* n.34.
45. *Ibid.*
46. (1953) 1 Y.B.I.L.C. 135. UN Doc.A/CN.4/SER.A/1953 (1953).
47. *Official Records of the General Assembly, Eighth Session*, Supp. No.9, Doc.A/2456, Chap.III, Pt.II "The Continental Shelf": UN Doc.A/2456, 14.
48. *Ibid.*

although in notifying this position to Japan, officials had added a proviso regarding the areas within which Japanese pearling would be acceptable.[49] Matters had come to a head when, no agreement having been reached, Australia received a note on 10 August 1953 stating that the fleet would move, the very next day, to areas outside those that had been specified by Australia.[50]

However, with the news that the Commission's articles were now to support Australia's position, the tide had begun to turn. While recognising that the articles had not yet been accepted by an international convention, Bailey considered the support they provided for Australia's position warranted the adoption by the government of a "bolder stance".[51]

IV. AUSTRALIA'S CONTINENTAL SHELF PROCLAMATION

ACCORDINGLY, Australia suspended negotiations with Japan on 28 August 1953 and issued a continental shelf proclamation on 10 September 1953,[52] the wording of which closely followed that of the Commission's final draft articles and the Truman Proclamation. After reciting that international law recognised that there appertain to a coastal State or territory sovereign rights over the seabed and subsoil of the continental shelf contiguous to its coasts for the purpose of exploring and exploiting the natural resources of that seabed and subsoil, the Proclamation claimed such sovereign rights for Australia. The character as high seas of waters outside the limits of territorial waters was not to be affected, nor was the status of the seabed and subsoil beneath territorial waters to change.

The Proclamation, issued under prerogative powers, could have meaning only in the international sphere. In order to relate this to the municipal law of the Commonwealth, the Pearl Fisheries Bill (No.2) 1953 was introduced into Parliament on 9 September 1953.[53] The Act was to be effective in areas above the continental shelf outside territorial waters as proclaimed by the Governor-General to be subject to the provisions of the Act and was to be expressly applicable to foreigners and foreign ships. Thanks to Bailey's efforts, Mr McEwen could explain this important move to Parliament as being justified by "very recent developments, even during the present year" in international law.[54]

49. "Record of Conversation with Japanese Ambassador", 11 May 1953: AA:CRS A1838/T184 3103/10/1/1 Pt.6.

50. Minutes of meeting of Cabinet Committee on Fisheries Negotiations with Japan, 12 Aug. 1953: AA:CRS A4905/XM1, Vol.20.

51. Cable 861 from Washington, 13 Aug. 1953: AA:CRS A3103/10/1/1/T184, Pt.7.

52. *Commonwealth of Australia Gazette* (1953), No.56, 11 Sept., p.2563.

53. The Pearl Fisheries Act (No.2) passed on 17 Sept. 1953 was an Act to amend the Pearl Fisheries Act 1952, as amended by the Pearl Fisheries Act 1953.

54. "Second Reading of the Pearl Fisheries Bill", 9 Sept. 1953, Australia House of Representatives, *Debates* 1 (1953), 19.

On 25 September 1953 a special *Commonwealth Gazette* was issued, containing three proclamations under the Pearl Fisheries Act 1952–1953 and notification of the promulgation of regulations under the Act, which was to come into operation on 12 October 1953. Waters to be "proclaimed" were all those north of 27°S latitude, other than a small defined area north-east of the Northern Territory. Regulations provided for the implementation of a system of licensing to operate within these areas as well as for the prohibition of pearling in specified sections of proclaimed waters at certain times. Limitations on maximum catch sizes and restrictions on minimum shell sizes could also be enforced.[55]

Australia's move to tie the continental shelf proclamation to a system of pearl fisheries' licensing enforceable through domestic legislation amended so as to be applicable to foreign nationals provoked strong reaction from Japan. Official protests were lodged with the Australian government on 10 and 15 September 1953, the second of which claimed that, because of Japan's past association in pearling in seas adjacent to Australia, the Japanese had a right to a status no less advantageous than that accorded other nationals, including Australians. Should the Australian government take any forcible steps of interception of Japanese pearling vessels, the Japanese would be compelled to reserve the right to adopt at its discretion such measures as might be open to it.[56] A further note of 8 October 1953 claimed that the unilateral proclamation of sovereignty over a particular area was not accepted as altering its status as high seas for the nationals of other countries engaged in fisheries in that area. It was therefore proposed that the case be taken to the International Court of Justice and that both nations agree to abide by its decision. Interim measures could be arranged so as to avoid incidents pending the Court's decision.[57]

The formation of Australia's response to Japan's proposal was complicated by the possibility of Japan becoming a party to the Statutes of the Court following its formal application of 26 October 1953. Until then, Japan could state a case or bring a case to the Court by special agreement, but could not unilaterally invoke the Court's jurisdiction without Australia's explicit consent both to the terms of the case and to the provisions of any interim arrangement. However, should Japan's application be accepted, it would then be free to accept the Optional Clause allowing for compulsory jurisdiction by the Court and proceed with a unilateral application, rejecting Australia's provisional regime in favour of a possibly

55. "For the Prime Minister", Notes on Pearl Fishing: AA:CRS A1838/T184 I3103/10/1/1 Pt.9.
56. *Ibid.*
57. Cable 492, Tokyo to External Affairs, 8 Oct. 1953: AA:CRS A1838/T184 I3103/10/1/1 Pt.8.

preferable one determined by the Court. Since both steps would be likely to work against Australia in the final judgment it was deemed important that any Australian offer appear reasonable to Japan, as well as to the United Kingdom and the United States, on which Australia relied for legal advice and political support.[58]

On 30 October 1953 the Australian government notified Japan that it was prepared to consent to bringing the matter before the Court by mutual agreement between the two countries subject to agreement on a provisional regime. It was proposed that the Japanese government prepare and submit for comment to the Australian government a draft bilateral agreement in suitable form for initiating proceedings. This document would define the issues on which the Court's jurisdiction was to be invoked and accepted, contain the assurances which each government might require of the other concerning acceptance of the Court's decision, and deal as necessary with any related procedural matters. In turn, the Australian government was to advise the Japanese government, for comment, of the arrangements which it proposed to make to cover pearling operations within Australian waters during the provisional regime.[59]

Battle-lines in the struggle for superiority in the pearling industry had now been drawn: "traditional" principles of high seas fisheries versus the evolving principle of the continental shelf as inclusive of sedentary fisheries. Time was on Australia's side: while Japan's best hope lay with a favourable verdict from the International Court of Justice, Australian officials sought to delay progress towards this end while ensuring that the favourable terms of the Commission's revised draft articles were preserved, passed by the General Assembly with little apparent dissent, and accepted by an international convention. This was going to involve much tactical planning and judicious behind-the-scenes political manoeuvring as each side attempted to anticipate the other's likely course of action.

V. THE UNITED NATIONS GENERAL ASSEMBLY

IN November 1953 the International Law Commission's report came up for discussion in the Sixth (Legal) Committee of the General Assembly. It was imperative for Australia's case that the General Assembly accept the articles and Bailey was afraid that even discussion revealing divergent points of view might weaken Australia's position in any impending litiga-

58. This support was crucial to Australian success and was therefore a major consideration right up to 1958. While the UK and US supported Australia's claim to exercise jurisdiction over sedentary fisheries on the basis of the continental shelf doctrine, they strongly opposed the very much wider claims of some South American States. Throughout the period it was considered important for Australia to avoid creating the impression that its stand was to be the thin end of the wedge for claims to high seas fisheries.

59. Cabinet Submission GEN 16/2, 18 Jan. 1954, p.2: AA: A4933/XM1 Vol.12.

tion.[60] Iceland had already tabled a draft resolution seeking to postpone all discussion, on the basis that the problems of the high seas, territorial waters, contiguous zones, and continental shelf and superjacent waters were closely linked juridically and physically, and that any examination of the regime of the high seas should therefore be postponed until all the problems involved had been studied by the Commission.[61] Although this resolution offered a possible means of delay, Australia could not accept that the continental shelf issue was inseparably linked with other aspects of high seas and territorial waters, and did not like the implication that the continental shelf articles were not final. At Australia's request, the Icelandic representative agreed that in his remarks to the Committee he would state that his government did not disagree with the principles expressed in the articles.[62]

Having achieved this assurance, and indicators pointing to the likely rejection of Iceland's resolution, the Australian delegation then moved to have "some more or less innocuous resolution introduced by some other delegations", and so initiated but did not sponsor a joint "five-power" resolution by Canada, Egypt, France, Syria and the United Kingdom.[63] Investigations having revealed that most governments had only recently received the Commission's report, the Resolution proposed that, so as to give governments "sufficient time to study the draft articles ... and their implications", consideration of the subjects (fisheries and the continental shelf) be postponed and included in the provisional agenda of the tenth session of the General Assembly.[64] The Sixth Committee had before it a third draft resolution, by Panama, which was similar in content to that of Iceland, and proposed that the General Assembly request the Commission "to continue its study of all the drafts relating to the territorial sea and the regime of the high seas, with a view to ... their inclusion in the agenda of the Ninth Session of the General Assembly".

This time the Australian initiative failed. The Sixth Committee adopted the Icelandic resolution and so no vote was taken on the Australian-initiated resolution or on that of Panama.[65] By General Assembly Resolution 798 of 7 December 1953 further action was deferred until all the problems relating to the regime of the high seas and the regime of

60. Memo, K. H. Bailey to External Affairs, 16 Aug. 1954: AA: A432 53/3122.
61. A/C.6/L.314.
62. Memo, Delegation to UN to the Secretary, Department of External Affairs, 24 Nov. 1953: AA: A432 53/3122.
63. A/C.6/L.318.
64. Cable 1268, Australian High Commission's Office, NY to External Affairs, 17 Nov. 1953: AA:CRS A432 I53/3122.
65. A2589 Report of the Sixth Committee, p.8.

territorial waters had been studied by the Commission and reported upon by it to the Assembly.

Two days later the General Assembly approved, by resolution, Japan's application to become a party to the Statute of the International Court.[66] This meant that after 1 April 1954 Japan would be able to sign the clause allowing for compulsory jurisdiction and simultaneously file an application for Court proceedings against Australia. The Australian government was hesitant to go so far as to terminate its own acceptance of the Court's compulsory jurisdiction, but was also afraid of adverse public reaction should the issue remain unresolved or be resolved in a manner unfavourable to Australia. However, acting on a solution suggested by Professor Waldock,[67] on 6 February 1954 Australia did terminate its acceptance of the Court's compulsory jurisdiction. A new declaration was immediately substituted by which compulsory jurisdiction would be accepted on any matter concerning the Australian continental shelf or "Australian waters" as defined by the Pearl Fisheries Act, conditional upon acceptance by the other party of Australia's provisional regime pending the final judgment of the Court on the matter.[68] This meant that Japan would be obliged to reach a *modus vivendi* with Australia before invoking the Court's jurisdiction against Australia, although it would then be free to proceed by unilateral application if it so chose.

Australia and Japan exchanged the agreed documents on 19 February 1954 and, following only slight adjustments, the provisional regime was signed in Canberra on 24 May 1954. The agreement for instituting proceedings was to prove much harder to finalise, the two nations even differing over the definition of the dispute on which the Court was to be asked to pass judgment.[69] Since no agreement had been reached over the application to initiate proceedings, the 1954 regime became the basis for a series of annual bilateral agreements in which the Commonwealth government felt compelled to make few concessions.[70]

Time was on Australia's side. Although lawyers still disagreed over the extent to which the continental shelf doctrine yet represented a rule of

66. Res.805, 9 Dec. 1953, "Application of Japan to become a party to the Statute of the International Court of Justice".

67. Cabinet Submission, *op. cit. supra* n.59, at p.3.

68. The declaration, signed and deposited on 6 Feb. 1954, is reproduced in (1954–55) Y.B.I.C.J. 189–190.

69. Another key question was as to which party was to accept the burden of proof. It was generally considered advisable for Australia to refuse to accept it. G. G. Fitzmaurice considered that Norway's success in the recent British–Norwegian dispute was due largely to the way in which Norway managed to get the case worded: Fitzmaurice to Moodie, 10 Mar. 1954: AA:CRS A1838 3103/10/1/1/T184 Pt.13.

70. The Japanese take actually decreased each year, from 940 tons in 1954 to 750 in 1955 and 650 in 1956. "Pearling", Notes for the Solicitor-General, 12 Dec. 1956: AA:CRS A1838/T184 3103/10/1/1 Pt.16. Details of the annual arrangements were published in the *Fisheries Newsletter*.

law,[71] each year witnessed additional, scarcely challenged, continental shelf claims, so strengthening the status of its position in customary law.

In August 1954 the United Kingdom advised Australia that UK and American authorities had agreed that an attempt should be made to secure a reversal of the resolution adopted by the General Assembly on 7 December 1953 by which the articles on the continental shelf were not to be dealt with until the International Law Commission had finished considering all matters related to the regime of the high seas and territorial waters and reported upon it to the General Assembly. The United Kingdom's aim was to have the Assembly "note with approval" the Commission's draft articles on the continental shelf so as to help maintain the present legal situation and provide a basis for protest against the "extravagant" shelf claims which were inclusive of the waters above the shelf.[72] Bailey considered that the United Kingdom's proposal did not entail too great a risk, since that part of the Commission's report relating to fisheries which did contain some controversial provisions would be dealt with separately. Since it might not prove possible to avoid all comment on the matter before the Australia–Japan case reached the International Court, Australia was prepared to support the proposal. However, Bailey thought that Australia's position as a litigant in pending proceedings in the Court made it undesirable for Australia actually to co-sponsor the move to have discussion on the articles reopened in the Assembly or to enter into any detailed discussion of them.[73]

The United Kingdom was ultimately successful. By Resolution 899(IX) adopted on 14 December 1954 the General Assembly was scheduled to consider the questions of the high seas, territorial waters, contiguous zones, and continental shelf at its eleventh session, by which time the Commission was to have submitted its final report on all four matters.

In 1956 the Commission completed its full report covering all the articles for the proposed comprehensive maritime code.[74] Bailey had once again consulted with Fitzmaurice over the articles on the continental shelf, this time with a view to preventing any unfavourable changes to the text.[75] The outcome was favourable. Although the Commission had engaged in considerable debate over the proposed inclusion in the articles of a definition of sedentary fisheries as those permanently attached to the

71. Lauterpacht, *loc. cit. supra* n.2, argued that it was, from as early as 1950. But other writers, including Mouton, *loc. cit supra* n.2, remained opposed throughout this period.

72. G. S. Whitehead, Office of the High Commissioner for the UK, to J. Plimsoll, Dept. of External Affairs, 4 Aug. 1954: AA:CRS A432 53/3122.

73. Memo, *op. cit. supra* n.60.

74. "Report of the ILC to the General Assembly"—Report covering 8th session, *Official Records of the G.A., 11th Session*, Supp. No.9, A/3159.

75. "Japanese–Australia Pearling Dispute: Special Agreement", Notes for the Attorney-General by K. H. Bailey, 4 July 1956: AA:CRS A1838/T184 I1303/10/1/1 Pt.20.

bottom of the sea, this had resulted only in a general agreement that the question was one for biologists and that a committee of experts should consider the matter further at the forthcoming international conference.[76] The Commission affirmed its articles on the continental shelf as presented to the General Assembly in 1953.

By Resolution 1105(XI) adopted by the General Assembly on 21 February 1957, the Secretary General convoked the UN Conference on the Law of the Sea, which was to commence in Geneva on 24 February 1958. It was there that the legal validity or otherwise of Australia's position in the dispute was to be determined.

VI. THE 1958 GENEVA CONFERENCE ON THE LAW OF THE SEA AND THE QUESTION OF SEDENTARY FISHERIES[77]

ARTICLE 2 of the Commission's final draft articles on the continental shelf, as presented to the Conference in 1958, declared that: "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."[78] This wording was basically in Australia's favour, but no boundary had yet been delineated between those resources that were to be subject to the continental shelf regime and those of the high seas. It therefore remained uncertain as to whether Japan could be regarded as having acquired rights to the pearl fisheries through the prior activities of its nationals, a point which could obviously assume importance during litigation.

Other nations were also interested in securing a tight definition of the natural resources to which the Convention would apply. While some such as Burma and Korea proposed that the definition be wide enough to cover even "bottom-fish" which "occasionally have their habitat at the bottom of the sea or are bred there", others including Sweden, Norway, Greece, Spain, Denmark and Italy were adamant that it should be applicable only to mineral resources. The United States, involved in a controversy with Mexico over the right of US nationals to take shrimp from the waters above Mexico's continental shelf, was concerned that, if

76. (1956) I Y.B.I.L.C. 141–148, 276–277.

77. Contemporary relevant literature includes, *inter alia*, K. Bailey, "Australia and the Law of the Sea" (1960) 1 Adelaide L.Rev. 1–22; A. H. Dean, "The Geneva Conference on the Law of the Sea: What was Accomplished" (1958) 52 A.J.I.L. 607–628; J. Gutteridge, "The 1958 Geneva Convention on the Continental Shelf" (1959) XXV B.Y.I.L. 102–123; P.C. Jessup, "Geneva Conference on the Law of the Sea: A Study in International Law Making" (1958) 52 A.J.I.L. 730–733; D. H. N. Johnson, "The Geneva Conference on the Law of the Sea" (1959) 65 Y.B.W.A. 68–74; S. Oda, "Japan and the United Nations Conference on the Law of the Sea" (1960) 4 Japanese Annual Int.L. 40–62; M. M. Whiteman, "Convention on the Continental Shelf" (1958) 52 A.J.I.L. 629–659; R. Young, "Sedentary Fisheries and the Convention on the Continental Shelf" (1961) 55 A.J.I.L. 359–373.

78. This was Art.68 in the ILC's final report on the law of the sea which was included as Chap.II of Report, *op. cit. supra* n.74.

the regime were not to apply solely to non-living resources, then the definition of inclusive species should at least be sufficiently narrow to exclude the shrimp.[79]

The Japanese delegation, realising that it would be practically useless to remain opposed to the whole doctrine, now joined with those European nations attempting to have the list of resources limited to minerals. Playing on the fears of the United States and others who wished the imposition of a narrow definition of the term "natural resources", the Japanese delegate warned the Fourth Committee that to permit the inclusion of sedentary fisheries would be to invite coastal States gradually to gain increasing monopoly over the resources of the high seas. There was no reason why a change in the law brought about by a technical revolution in the field of mineral exploitation of the sea bed should be made inclusive of sedentary fisheries, which already had their own regime.[80]

Faced with the prospect of the Committee choosing between no sedentary fish resources and a range of fisheries inclusive even of bottom-dwelling fish, the Australian delegation organised a Commonwealth working party of lawyers and marine biologists to work out a scientific and legally exact definition of sedentary fishes which would unequivocally exclude the shrimp and the sole while including the mother-of-pearl shell, pearl oyster, bêche-de-mer, trochus and green snail, as well as the sacred chank of India and Ceylon.[81] This resulted in a joint proposal being put forward by Australia, Ceylon, the Federation of Malaya, India, Norway and the United Kingdom, which defined the "natural resources" to be incorporated as those:[82]

> mineral and other non-living resources of the seabed and the subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil; but crustacea and swimming species are not included.

Professor Bailey, leader of the Australian delegation, explained that this represented a balanced compromise between the requirements of coastal States and the principle of freedom of the high seas. The words "and other non-living resources" had been added so that the article would not only apply to mineral resources, for:[83]

79. Bailey, *op. cit. supra* n.77, at pp.10–11.
80. UN Conference on the Law of the Sea, *Official Records*, Vol.VI (Continental Shelf), Summary records of meetings and Annexes A/CONF.13/42, pp.55–56.
81. Bailey, *op. cit. supra* n.77, at pp.10–11.
82. UN Doc.A/CONF.13/C.4/L.36.
83. UN Doc.A/CONF.13/42, 57 (21st meeting, 26 Mar. 1958).

> It would be senseless to give the coastal State sovereign rights over mineral resources such as the sands of the seabed, but not over the coral, sponges and the living organisms which never moved more than a few inches or a few feet on the floor of the sea.

The proposals of Greece and Burma, by which resources would respectively be limited to minerals and inclusive of even bottom-fish having both been rejected,[84] the compromise offered by the joint proposal was adopted in its original form, by 24 to 11, with 17 abstentions.[85]

The efforts of Mexico and some other countries to have the concluding phrase deleted so as to be inclusive of crustacea was not accepted, the vote being evenly divided for and against.[86] However, the latter decision was reversed in the plenary sessions. At the suggestion of El Salvador, the words "crustacea and" were put to the vote, and eliminated.[87] Afraid that the retention of the remaining words "but swimming species are not included" would imply the inclusion of crustacea, the United States, with Australia's acquiescence,[88] moved that the rest of the phrase be deleted. This was passed.[89]

On 26 April 1958 the Conference voted on the continental shelf convention as a whole and this was passed by 57 (Australia) to 3 (Japan), with eight abstentions.[90] Australia ratified the Convention on 14 May 1963, and it came into force the following year, having by then received the requisite 22 ratifications.

While the 1958 Convention on the Continental Shelf did not in itself mean that the doctrine was indisputably established as a rule of customary law, this was retrospectively confirmed by the International Court's ruling in the *North Sea Continental Shelf* cases of 1969, which pointed to Articles 1, 2 and 3 of the Convention as being:[91]

> the ones which, it is clear, were then regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf, amongst them . . . the nature of the rights exercisable; the kind of natural resources to which these relate; . . .

84. On 28 Mar. 1958 in 24th Meeting of 4th Committee, Burma's proposal A/CONF.13/C.4/L.3 was rejected 42:1:1, and the Greek proposal was rejected 52:7:6. See A/CONF.13/42, 69.

85. *Idem*, p.70.

86. Mexican oral sub-amendment to the six-power amendment A/CONF.13/C.4/L.36 was not adopted after a vote of 27:27:13.

87. "crustacea and" was rejected 42:22:6, 8th plenary meeting 22 Apr. 1958, UN Doc.A/CONF.13/38, 15.

88. Notes on "International Conference on the Law of the Sea—Continental Shelf", p.4: AA: A1838/T184 3103/10/1/1 Pt.29.

89. "but swimming species are not included in this definition" was rejected 43:14:9, *loc. cit. supra* n.87.

90. 18th plenary meeting, 26 Apr. 1958, in A/CONF.13/38, 57.

91. *North Sea Continental Shelf*, judgment, I.C.J. Rep. 1969, 39.

VII. CONCLUSION

IT was no more than coincidence that the continental shelf doctrine was developing at a time when the Australian government was seeking a means of restricting Japanese pearl-shelling operations off Australia's northern coast. But the regime's inclusion of sedentary fisheries was, as has been demonstrated, in large part due to the Australian government's active involvement in promoting their inclusion among the resources to which the emergent rule of law would apply. Australia's involvement began with the Solicitor-General's trip to Geneva to ensure that the International Law Commission dealt with sedentary fisheries as part of the continental shelf doctrine. Australia reinforced the terms of the Commission's subsequent articles through its own continental shelf proclamation and national legislation and was able to ensure that the UN Convention on the Continental Shelf of 1958 served only to refine the legal treatment of sedentary fisheries proposed by the Commission.

The issue received little attention by UNCLOS III and the 1958 arrangement was retained,[92] now in express contrast to the treatment of all other living resources within the exclusive economic zone regime.[93] It is a formula that has understandably drawn some opposition.[94] For, while a State must proclaim an exclusive economic zone, coastal State rights in respect of the continental shelf (which may, of course, extend beyond the exclusive economic zone anyway) do not depend on occupation or require any express proclamation.[95] Furthermore, the continental shelf regime does not include an equivalent provision to that of the exclusive economic zone, by which the coastal State is obliged to give other States access to the surplus allowable catch.[96] The strong position of the coastal State in relation to its sedentary fish resources, so successfully promoted by Australia in the 1950s, has not been weakened by more recent developments in the law of the sea.

92. Art.77, para.4.
93. Art.68.
94. See e.g. B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), pp.74–78; D. J. Attard, *The Exclusive Economic Zone in International Law* (1987), pp.190–191. Shigeru Oda has not deviated from his view that the 1958 treatment of sedentary fisheries was "erroneous": see his *International Control of Sea Resources* (reprint with a new Introduction, 1989), pp.xxxii–xxxiv, 188–195.
95. Art.77, para.3.
96. Art.62.