A LATENT ENCOUNTER WITH THE COURT: HOW AUSTRALIA AND JAPAN SETTLED A PEARL FISHERIES DISPUTE

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National encounters with the International Court of Justice ('ICJ') are not limited to actual proceedings and judgments. Instead, the prospect of bringing a case to the Court is apparent in a wide range of international disputes and situations. Although the influence of the Court is difficult to substantiate without actual cases, this study seeks to uncover evidence of the Court's role in a historic dispute. It examines a dispute between Japan and Australia over pearl fishing during the 1950s. Using archival records, it traces the positions of the parties at different stages and the circumstances that led to the final resolution of the dispute. While proposed proceedings were delayed and finally abandoned, and there is no court record, it is still possible to discern from the parties' positions a dependence upon — and latent encounter with — the Court. This study's findings provide a greater understanding about the role and influence of the ICJ in a broader range of international disputes than is generally available, while also demonstrating the value of historical approaches to public international law.

CONTENTS

> But in the song there was a secret little inner song, hardly perceptible, but always there, sweet and secret and clinging, almost hiding in the counter-melody, and this was the Song of the Pearl That Might Be …
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> — John Steinbeck, *The Pearl*[1]

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1 John Steinbeck, *The Pearl* (William Heinemann, 1948) 18–19.

I INTRODUCTION

Interstate dispute settlement, according to the literature, entails a faith in the effectiveness of, compliance with and commitment to international courts and tribunals.[2] Effectiveness is typically evaluated by looking at compliance with court decisions, which has given rise to a particular type of empirical project.[3] Yet how parties think about the International Court of Justice ('ICJ') and what the Court does at the time of dispute resolution is an open question. This study does not examine the effect of the Court by tracking changed positions of parties, in the sense that they are shown to agree when they otherwise would not have agreed. Rather, it considers how a belief in the Court and variations to the parties' positions may have led to a settlement. Japan and Australia's first encounter with the Court, which concerned a dispute over whether Japan had the right to resume pearl fishing in waters off the coast of Australia after World War II, provides the material for this analysis.

National encounters with the ICJ are assumed to be cases, and studies of national encounters typically involve an assessment of cases.[4] While judgments by the Court provide a useful way of analysing state encounters, they are, of course, not exhaustive. Instead, it is important to understand the role of the Court in the broader context of international disputes and situations, even if a concrete case is not apparent.[5] It is worth noting that the ICJ, set up under the *Charter of the United Nations* ('*UN Charter*'),[6] and its predecessor, the Permanent Court of International Justice ('PCIJ'), established under the *Covenant of the League of Nations*,[7] are regarded as the paradigm of international courts and justice.[8] The founding of the ICJ represents a commitment to dispute resolution through the method of judicial settlement. Yet the model of the Court remains very much a reflection of the court in domestic law, where the threat of judicial

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2 See, eg, Andreas Follesdal, 'Survey Article: The Legitimacy of International Courts' (2020) 28(4) *Journal of Political Philosophy* 476.

3 See, eg, Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004); Eric A Posner and Miguel FP de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34(2) *Journal of Legal Studies* 599.

4 See Margaret A Young, Emma Nyhan and Hilary Charlesworth, 'Study Country-Specific Engagements with the International Court of Justice' (2019) 10(4) *Journal of International Dispute Settlement* 582.

5 In many ways, the pearling dispute conforms to the definition of an 'international incident', which is an 'international dispute that shapes or reinforces elite expectations about lawfulness, in which the appraisal of lawfulness by relevant international actors occurs in a nonformal setting': W Michael Reisman and Andrew R Willard, 'Preface and Acknowledgments' in W Michael Reisman and Andrew R Willard (eds), *International Incidents: The Law That Counts in World Politics* (Princeton University Press, 1988) vii, vii. W Michael Reisman and Andrew Willard advocated this epistemic unit to understand the interplay between processes of international law and politics: see generally W Michael Reisman and Andrew R Willard (eds), *International Incidents: The Law That Counts in World Politics* (Princeton University Press, 1988). For comments, see Richard Falk, 'The Validity of the Incidents Genre' (1987) 12(2) *Yale Journal of International Law* 376; Derek W Bowett, 'International Incidents: New Genre or New Delusion?' (1987) 12(2) *Yale Journal of International Law* 386.

6 *Charter of the United Nations* art 7(1).

7 *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt I ('*Covenant of the League of Nations*') art 14.

8 'History', *International Court of Justice* (Web Page) <https://www.icj-cij.org/en/history>, archived at <https://perma.cc/6CE8-6ZNB>.

interpretation or coercion leads parties to reassess their equilibrium position. Because the ICJ does not share that coercive capacity and its jurisdiction is voluntary, it is necessary to think differently about what the ICJ does, or does not do, when states seek to resolve an international dispute.

The objective of this study of a national encounter with the ICJ is to present an alternative picture to the unitary account of international adjudication by piecing together what happened in the pearl fisheries dispute between Japan and Australia. This requires a reconstruction of a conversation between two parties, facilitated by the prospect of the Court's involvement. This study draws from primary and secondary sources. The first of the two categories consists of archival material located in the National Archives of Australia in Canberra, Australia. The absence of Japanese archives is a potential source of selection bias, although correspondence and notes of exchange between Japan and Australia form part of the record.

The ways in which Japan and Australia participated and changed their positions at different stages of the dispute was, I argue, underpinned by their belief in the ICJ. This set of beliefs in what the Court meant to them and what it would do for them existed irrespective of expectations of who would win or lose. In this sense, the Court not only presented itself to be a constraint but also provided prospects for strategy and tactics. Participation in international judicial settlement meant something different to each party. This study seeks to understand whether Japan's previous position as part of the losing side of WWII and Australia's self-identification as a state committed to the rule of law influenced each party's attitude to the Court. It also seeks to understand the countries' motivations in settling the dispute, drawing on wider socio-economic changes in the pearl market as well as contemporaneous changes in the law of the sea.

This study thus combines a historical focus on pearl fishing in Australia with a legal-historical analysis of the pearl fisheries dispute between Japan and Australia in the context of the ICJ. Part II outlines the story of the dispute, weaving together Indigenous, Asian and settler-Australian histories. Part III charts how the dispute became judicialised, focusing on the ICJ's jurisdiction and international lawmaking regarding the continental shelf. The conclusion reflects on how one can think about interstate dispute settlement when national encounters with the Court do not lead to the institution of proceedings or judicial deliberation. With no available court record, the analysis instead depends on archival research and scholarly analysis — methods that are central to a full understanding of the role of the ICJ in the maintenance of peaceful interstate relations.

II BACKGROUND TO THE DISPUTE BETWEEN JAPAN AND AUSTRALIA

This Part begins with a short overview of pearl fishing, also known as pearling,[9] in waters off the coast of Australia. As I describe, pearl fishing involved matters of significance, including postwar relations between Australia and Japan. In the next Section, I outline efforts to negotiate a bilateral pearl fisheries agreement. The last Section describes how the issue transformed into an emerging international dispute.

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[9] 'Pearling' is defined as the 'work of searching for or obtaining pearl shell, trochus, bêche-de-mer or green snail': *Pearl Fisheries Act 1952* (Cth) s 5 (definition of 'pearling').

A *Pearl Fishing off the Coast of Australia*

Aboriginal peoples harvested pearl shells from shallow water for food, trade and decoration long before Australia was discovered by Europeans between the 16th and 18th centuries.[10] The British explorer William Dampier (1651–1715) visited 'New Holland' — a European name given to Australia after it emerged as a geographical and political entity — late in the 17th century. He observed the rich pearl shell beds in Shark Bay, the most westerly point off the coast of Western Australia. Yet his report aroused little interest at the time.[11] The discovery of pearl shell at Shark Bay in 1850 marked the birth of the Australian pearling industry.[12]

Pearling quickly established itself as a pillar of economic activity and commercial interests in Australia.[13] The pearl shell — namely the species *pinctada margaritifera* (commonly known as 'black lip') and *pinctada maxima* (commonly known as 'gold-lip', 'silver-lip' or 'white-shell') — was harvested so that its internal lining could be exported overseas and processed mainly as mother-of-pearl buttons.[14] Pearling centres were established along the coasts of Western Australia, Queensland and the Northern Territory. Settlements were also set up along the Australian-administered territories of Papua and New Guinea.[15] New technology in the form of boats and vessels were the first major advances that Europeans applied to pearling.[16] The subsequent introduction of new deep diving equipment would further change the dynamics of the industry.[17]

The Australian pearling industry quickly reached a high stage of development. Yet it was typified by colonial attitudes towards labour, in particular the exploitation of Aboriginal men and women in the emerging commercial industry. The Aboriginal workforce was typically procured through blackbirding — the use of force or deception to obtain workers.[18] The employment of Aboriginal peoples was subsequently discouraged and then outlawed. The government of Western Australia, for example, enacted *An Act to Regulate the Hiring and Services of Aboriginal Natives Engaged in the Pearl Shell Fishery; and to Prohibit the Employment of Women Therein 1871* (WA), which regulated the hiring and service of Aborigines engaged in the pearl shell industry and prohibited the use of

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10 Mike McCarthy, 'Naked Diving for Mother-of-Pearl' (2008) 13(2) *Early Days* 243, 243–4; Peter Saeger and BJ Stubbs, 'The Australian Pearl-Shell and Pearl Industries: From Resource Raiding to Sustainable Farming' in Fatima Suhail Al-Muhairii (ed), *Abu Dhabi & Pearls … A Story with a History* (Al Hosn Research & Studies Centre, 2012) 503, 503.

11 Saeger and Stubbs (n 10).

12 JPS Bach, *The Pearling Industry of Australia: An Account of Its Social and Economic Development* (Report, 1955) 4 ('*The Pearling Industry of Australia*').

13 Regina Ganter, 'Cultural Legacies of a Globalised Past' in Suvendrini Perera, Graham Seal and Sue Summers (eds), *Enter at Own Risk? Australia's Population Questions for the 21st Century* (Black Swan Press, 2010) 187, 188–90.

14 Regina Ganter, 'Images of Japanese Pearl-Shellers in Queensland: An Oral History Chapter in Australia–Japan Relations' (1991) 14(7) *Royal Historical Society of Queensland Journal* 265, 265 ('Images of Japanese Pearl-Shellers in Queensland').

15 The territory of New Guinea was a trusteeship territory of Australia and was a subject of a special agreement. The territory of Papua was an Australian possession. The two territories were administered together as the Territory of Papua and New Guinea from 1949 to 1971.

16 McCarthy (n 10) 244–6.

17 See generally McCarthy (n 10).

18 Sumi Kwaymullina, 'For Marbles: Aboriginal People in the Early Pearling Industry of the North-West' (2001) 22 *Studies in Western Australian History* 53, 54–5.

Aboriginal women as divers. Imported Asian labour would take the place of the Aboriginal workforce.[19]

Australian history is bound up with the Asia Pacific region. There have been many interactions between the culture of Asia and the Pacific and between the Indigenous and white inhabitants of Australia. Connections between Australia and the Asia Pacific revolved around pearl fishing, collecting trepang (sea cucumber), missionising and mining.[20] One response to the proximity and connectedness to the Asia Pacific region was the White Australia policy, which restricted immigration to mostly White Europeans and was formally enacted under the federal government's *Immigration Restriction Act 1901* (Cth).[21] This Act contained the first dictation test,[22] which was applied selectively to Asians and other individuals identified as undesirable.[23] This Act roughly coincided with Japan's victories over China (1894–95) and Russia (1904–05), which set Japan off on a course of assertive foreign policy and made it appear in the Australian worldview as a growing geopolitical threat in the region.[24]

Asian indentured labour continued after federation as an uncomfortable exemption to the White Australia policy, with Japanese and Malay labourers[25] remaining under a permit system.[26] Attempts to phase out indentured, non-white labour and to re-establish the industry by employing white labourers failed — sometimes with deadly consequences for the white diver, who was at a disadvantage because of his inexperience and poor diving techniques.[27] White labourers were considered 'temperamentally unsuited' to undertake this type of work.[28] The living conditions and lack of amenities in pearling settlements were not attractive to them.[29]

The population of Asian immigrants in pearl centres, notably in Broome on the north-west of Australia and on Thursday Island in the Torres Strait, significantly increased by the turn of the 20th century despite the national interest for a

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19 McCarthy (n 10) 251–7.

20 Ganter, 'Cultural Legacies of a Globalised Past' (n 13) 187.

21 Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press, 2008) ch 6, providing a detailed overview of the White Australia policy; JPS Bach, 'The Pearlshelling Industry and the "White Australia" Policy' (1962) 10(38) *Historical Studies: Australia and New Zealand* 203, looking at the White Australia policy in the context of pearling.

22 *Immigration Restriction Act 1901* (Cth) s 3(a).

23 EL Piesse, 'Japan and Australia' (1926) 4(3) *Foreign Affairs* 475, 477–8.

24 Henry Frei, 'Japan Discovers Australia: The Emergence of Australia in the Japanese World-View, 1540s–1900' (1984) 39(1) *Monumenta Nipponica* 55, 80.

25 Non-Japanese labour of Asian origins, apart from Chinese, were typically referred to as 'Malay': McCarthy (n 10) 252–3.

26 Julia Martínez, 'The End of Indenture? Asian Workers in the Australian Pearling Industry, 1901–1972' (2005) 67 *International Labor and Working-Class History* 125; John Bailey, *The White Divers of Broome: The True Story of a Fatal Experiment* (Macmillan, 2001) 53–4; Bach, *The Pearling Industry of Australia* (n 12) 127–30; Ganter, 'Images of Japanese Pearl-Shellers in Queensland' (n 14) 272–4.

27 Stefanie Affeldt, '"The White Experiment": Racism and the Broome Pearl-Shelling Industry' (2019) 28(3) *Anglica* 43, 50–3; Martínez (n 26) 127–8; Bach, *The Pearling Industry of Australia* (n 12) 130–2.

28 Joyce Allan, 'Diving for Pearls', *The Times* (London, 28 July 1953) 7 (National Archives of Australia, A1838, 3103/10/1/1 PART 8) 2.

29 Ganter, 'Images of Japanese Pearl-Shellers in Queensland' (n 14) 274.

White Australian society.[30] Japanese divers became the principal operators and maintained their stranglehold on the Australian industry, dominating because of their diving and technical expertise.[31] Japanese divers' 'fatalistic outlook on life seem[ed] to enable them to take risks that other divers would not attempt'.[32] The risk of death from shipwreck and 'diver's disease' — decompression sickness — did not deter Japanese divers and Japanese master pearlers, who were engaged in pearling operations and sent their own pearling fleets.[33] Furthermore, the Japanese divers, according to one newspaper report, were 'ever on the hunt for new fields, and undoubtedly [have] helped in the past to find some of the well-stocked beds in waters north of Australia'.[34]

In the period before WWII, Japanese involvement in the Australian pearl industry became a source of friction, resentment and misunderstanding.[35] Overseas vessels allegedly exchanged cigarettes and liquor with Australian vessels.[36] Missionary societies complained about overseas divers endeavouring to obtain Aboriginal women.[37] According to a 1936 report by Missionary Goldsmith of Goulburn Island, '[i]n spite of a police base established at King river, mission and bush women continue to go to the pearling boats. The natives seem unable to resist the temptation when induced with tobacco, flour, and calico.'[38] There were suspicions that Japanese vessels were spying and seeking information about Australia.[39] *The Herald* (Melbourne) reported that some older residents believed that 'it was in the guise of pearlers that Japanese naval officers got all the information they needed about Darwin's defences'.[40]

As soon as WWII broke out in 1939, the pearl fishing industry came to a standstill. Most of the Japanese divers returned home or were interned in prisoner-of-war camps and later repatriated.[41] Japanese immigration to Australia was restricted, which was made possible through Australia's strict immigration

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30 Melissa Miles and Kate Warren, 'The Japanese Photographers of Broome: Photography and Cross-Cultural Encounter' (2017) 41(1) *History of Photography* 3, 6.

31 Ganter, 'Images of Japanese Pearl-Shellers in Queensland' (n 14) 272–4.

32 Allan (n 28) 2.

33 'Views of the Japanese Delegation on the General Principles Contained in the Australian Proposals' (15 April 1953) (National Archives of Australia, F423, S11 PART 1) 1 ('Views of the Japanese Delegation').

34 Allan (n 28) 2.

35 On legislative efforts to curb Japanese pearling in the Northern Territory, see Shirley V Scott, 'The Japanese Lugger Case Episode: The Triumph of the Rule of Law?' (1997) 3(1) *Australian Journal of Legal History* 97 ('The Japanese Lugger Case Episode').

36 FE Wells, Chief Pearling Inspector, 'Control of Pearling Vessels Northern Territory Waters' (Memorandum, 30 April 1953) (National Archives of Australia, F423, S11 PART 1) 1.

37 John Morris, 'The Japanese and the Aborigines: An Overview of the Efforts to Stop the Prostitution of Coastal and Island Women' (2010) 21 *Journal of Northern Territory History* 15, 15–16; Ruth Balint, 'Aboriginal Women and Asian Men: A Maritime History of Color in White Australia' (2012) 37(3) *Signs: Journal of Women in Culture and Society* 544.

38 'Will Return of Jap Luggers Lead to Abuses Again?', *Northern Territory News* (Darwin, 26 February 1953) 3 (National Archives of Australia, A1838, 3103/10/1/1 PART 4).

39 Letter from Alan Watt, Australian Ambassador in Tokyo, to Secretary, Department of External Affairs, 26 November 1959 (National Archives of Australia, A1838, 3103/10/1/1 PART 32) 2. See also Regina Ganter, 'Images of Japanese Pearl-Shellers in Queensland' (n 14) 277–8.

40 'Bid to Delay Jap Divers', *The Herald* (Melbourne, 20 March 1953) 3.

41 Yuriko Nagata, 'The Japanese in Torres Strait' in Anna Shnukal, Guy Ramsay and Yuriko Nagata (eds), *Navigating Boundaries: The Asian Diaspora in Torres Strait* (Pandanus Books, 2004) 139, 149–51.

policy.[42] Australian racial attitudes towards Asian immigrants, especially from Japan, were hardened by the war, and the immigration policy adopted by the first postwar Labor government was straightforward: 'No Japs!'[43]

After occupation controls were lifted in 1952, one of the first bilateral issues to arise was whether Japan had the right to resume pearling operations off the coast of Australia.[44] With war memories and anti-Japanese sentiment strong, the resumption of Japanese pearling was considered a sensitive issue. The Australian government was not willing to tolerate a repetition of

> pre-war incidents arising (peculiarly local in character) from lack of effective control of Japanese vessels on the seas immediately contiguous to its territorial waters and which prejudicated gravely the enforcement of the laws and the wellbeing of its native community.[45]

Western Australia and Queensland State governments expressed concern about any 'intrusion' of Japanese divers and vessels.[46] The Australian Administrator of Papua and New Guinea remarked that '[t]he natives would not appreciate the reasons for allowing Japanese to operate in proximity to the Territory, and would regard it as a weakness on our part'.[47] The postwar situation therefore necessitated conservation measures, measures to combat illegal entry and trade, and the protection of Aboriginal women from Japanese divers.[48]

The resumption of Japanese pearling operations also raised an economic issue. When Australian authorities took steps to rehabilitate the pearl fisheries after the war, they found that the pearl beds had recovered from earlier depletion due to overfishing.[49] Australia became the main supplier for world demand.[50] In July 1953, *The Times* (London) reported that '[p]rices now soared beyond the pearler's wildest dreams, and the fishery became a great dollar earner for Australia since the United States became the principal purchaser'.[51] Many Australians interested in the pearling industry resented the re-entry of the Japanese into this lucrative industry, owing to fear of competition.[52] In a letter to the Prime Minister, the Torres Strait Pearlshellers' Association expressed 'its grave concern at the threat to the Australian Pearling Industry, of Japanese owned pearling fleets', which they felt necessitated action 'if the dollar-earning Australian Pearling

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42 Alan Rix, *The Australia–Japan Political Alignment: 1952 to the Present* (Routledge, 1999) 44.

43 Ibid 18. See also 'No Japs Wanted in Australia', *The Canberra Times* (Canberra, 16 November 1949) 1.

44 See generally Rix (n 42) 44–53.

45 'Statement by the Australian Delegation: Reasons for the Area Approach' (21 April 1953) (National Archives of Australia, F423, S11 PART 1) 3 ('Reasons for the Area Approach').

46 'Pearling Dispute with Japan' (Draft Paper) (National Archives of Australia, A4311, 770/2) 2.

47 Memorandum from Administrator of Papua and New Guinea, 31 March 1953, reproduced in Memorandum from JA Willoughby to Secretary of Department of External Affairs, 8 April 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 4) 1.

48 See Balint (n 37).

49 Allan (n 28) 1–2.

50 John Bach, 'The Political Economy of Pearlshelling' (1961) 14(1) *Economic History Review* 105, 105.

51 Allan (n 28) 2.

52 'Many Australians Resentful of Japanese Pearlers', *Dominion* (Wellington, 24 March 1953) (National Archives of Australia, A1838, 3103/10/1/1 PART 4).

Industry, the lifeblood of Thursday Island and Broome, is to be saved from extinction'.[53]

During the negotiations for a peace treaty between Japan and the Allied Powers, it became politically and economically important for Australia to seek control of the Japanese post-treaty fishing operations. Early negotiations of the *Treaty of Peace with Japan* ('*Peace Treaty*') with the US and other former Allied Powers revealed 'that the treaty could be expected to afford little or no protection to Australia's fisheries interests'. Australia therefore sought to obtain an interim undertaking by Japan under which Japanese nationals and Japanese-registered vessels would be prohibited from conducting fishing operations off Australia's coast or in certain defined waters adjacent to Papua and New Guinea.[54] These efforts were not successful. The leader of the federal Opposition, Dr Herbert Vere Evatt, accused the Menzies–Fadden government of a 'shocking blunder in failing to secure safeguards in the Japanese Treaty against the exploitation of fishing rights in Australia territorial waters', and he added that 'there would be no compromise by the Australia Labor Party on the vital question of White Australia or the rights of the Australian fishing industry'.[55]

The Japanese government, by contrast, recalled 'hardly any friction in the pre-war days between Japanese and Australian fishermen, in spite of their intermingling'.[56] For an overcrowded Japan that had been stripped of 45 per cent of its prewar territories, the fishing industry was of vital importance for its economy and rehabilitation.[57] The Japanese desired to exploit the natural resources of the sea but acknowledged that such exploitation should be subject to long-term maintenance and development of the fisheries industry.[58] For this reason, under the 1951 *Peace Treaty*, Japan undertook to enter into negotiations with the Allied Powers for the conclusion of agreements to regulate or limit fishing and to conserve and develop fisheries.[59] Japan concluded a fisheries convention with the US and Canada in 1952,[60] and was eager to conclude a similar fisheries agreement with Australia.[61]

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53 Letter from RM Hockings, Secretary of the Torres Strait Pearlshellers' Association, to the Prime Minister, 11 February 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 4) 1.

54 'Negotiations between Australia and Japan for an Agreement on Pearl Fisheries' (Draft, 16 July 1956) (National Archives of Australia, A1838, 3103/10/1/1 PART 20) 1 [2] ('Negotiations between Australia and Japan').

55 'White Australia "Vital" Says Evatt', *Truth* (Sydney, 26 April 1953) (National Archives of Australia, A1838, 3103/10/1/1 PART 6).

56 'Comments of the Japanese Delegation on the Proposals of the Australian Delegation' (11 May 1953) (National Archives of Australia, F423, S11 PART 1) 2 ('Comments of the Japanese Delegation').

57 'Views of the Japanese Delegation' (n 33) 2.

58 'Comments of the Japanese Delegation' (n 56) 5.

59 'Negotiations between Australia and Japan' (n 54) 2 [5].

60 RJ Percival, 'Record of Meeting on Arrangements for Japanese Pearling during 1957 Season Held at the Department of External Affairs on 23 January, 1957' (National Archives of Australia, A4311, 770/1); *International Convention between the United States of America, Canada and Japan for the High Seas Fisheries of the North Pacific Ocean*, signed 9 May 1952, 205 UNTS 65 (entered into force 12 June 1953). See also Shigeru Oda, 'Japan and International Conventions Relating to North Pacific Fisheries' (1967) 43(1) *Washington Law Review* 63, 64–7, examining the Convention and the abstention formula contained in it.

61 See generally 'Comments of the Japanese Delegation' (n 56).

B *Negotiating a Bilateral Pearl Fisheries Agreement*

In October 1952, the Australian Cabinet agreed that formal negotiations should be entered into with Japan, with a view to concluding an agreement that would provide a legal basis for regulating and controlling Japanese pearling.[62] The general objective of the negotiations was to preserve the sedentary fisheries for development and exploitation by Australian nationals and to avoid the depletion of the pearl fisheries. It was anticipated that by the time the negotiations began, all steps would be taken to institute a system of control over the activities of Australian citizens with respect to the high seas and sedentary fisheries under the *Fisheries Act 1952* (Cth) and the *Pearl Fisheries Act 1952* (Cth).[63] This legislation applied to Australian nationals only and did not authorise the Australian government to exclude foreign nationals from fisheries outside of territorial limits or to control their activities in such fisheries.[64] International law did not, at the time, allow Australia to sustain an assertion of jurisdiction over foreign nationals in any waters outside its territorial limits.[65]

Representatives of the Australian and Japanese governments first met in Canberra on 13 April 1953 to negotiate an agreement on fisheries in waters adjacent to Australia. The conference was convened at the request of the Australian government under art 9 of the *Peace Treaty*,[66] which was signed by the Allied Powers and Japan at San Francisco on 8 September 1951 and which came into effect on 28 April 1952.[67] Article 9 reads:

> 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.[68]

To facilitate the negotiations, the Japanese government agreed to delay the sailing of the Japanese pearling fleet until one month after the negotiations began.[69]

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62 J McEwen, RG Casey and P Hasluck, 'Negotiations with Japan for a Fisheries Convention' (Copy No 69, 25 February 1953) (National Archives of Australia, F423, S11 PART 1) 1 [1].

63 Memorandum from Mr Eckersley (National Archives of Australia, A1838, A140/1/1 PART 4) [2].

64 *Pearl Fisheries Act 1952* (Cth) s 6.

65 The Attorney-General's Department prepared a number of legal memorandums in February 1953: see, eg, KH Bailey, 'Prescriptive Rights over Sedentary Fisheries outside Territorial Limits' (Memorandum, 12 February 1953) (National Archives of Australia, F423, S11 PART 1); Memorandum from KH Bailey to Secretary, Department of Commerce and Agriculture, 19 February 1953 (National Archives of Australia, F423, S11 PART 1) 1.

66 'Negotiations between Australia and Japan' (n 54) 3 [7].

67 *Treaty of Peace with Japan*, signed 8 September 1951, [1952] ATS 1 (entered into force 28 April 1952).

68 Ibid art 9.

69 'Pearl Fisheries Dispute between Australia and Japan: Negotiations between Australia and Japan for an Agreement on Pearl Fisheries' (National Archives of Australia, A4311, 770/1) 1 ('Pearl Fisheries Dispute').

The Australian delegation proposed subdividing areas between the two countries that were outside Australia's territorial limits into specific fisheries, which would prevent intermingling of pearling boats and divers.[70] This proposal led to disagreement. The Japanese delegation viewed the proposal as aimed

> not only at establishing an exclusive jurisdiction over the high seas within the proposed proclaimed waters under the *Pearls Fisheries Act 1952*, but also at monopolizing the fisheries by excluding Japanese nationals from almost the entire said waters in utter disregard of their past performances in the fisheries.[71]

The Japanese counterproposal included a draft agreement relating to conservation with a provision for the establishment of a Joint Standing Committee to conduct investigations and arrange supply of technical information, a voluntary notification system where Japan would voluntarily notify Australia of their operational areas, and a common fishing area.[72] Australia did not accept the Japanese counterproposal.[73]

While the negotiations continued, the first pearling fleet since the war left Japan on 14 May 1953 because further delay in the expedition would cause considerable losses to Japanese pearlers.[74] Australia did not object to the departure of the fleet on the condition that they would only fish in areas that Australia had proposed during the negotiations — at least until the negotiations had ended.[75] On 2 July 1953, the Japanese government submitted a proposal to permit Japanese operations in the areas to the west and east of Darwin, excluding the two major fishing grounds off Broome and Thursday Island.[76] As there was no formal response to their proposal because Cabinet members were on holidays, on 10 August 1953, the Japanese delegation notified their intention to move outside the 'agreed areas', which the Japanese pearlers had fished to capacity.[77] The Australian government took a serious view of the Japanese action and regarded it as tantamount to breaking off negotiations.[78]

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70 'Negotiations between Australia and Japan' (n 54) 3–4; 'Reasons for the Area Approach' (n 45) 3–4.

71 'Views of the Japanese Delegation on the Australian Proposal Made in the First Session of the Area Committee' (National Archives of Australia, F423, S11 PART 1) 1 ('Views of the Japanese Delegation on the Australian Proposal').

72 Ibid 3–4.

73 'Pearl Fisheries Dispute' (n 69) [14].

74 Cablegram from the Australian Embassy, Tokyo, to the Department of External Affairs, 12 May 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 6); Cablegram from the Department of External Affairs to the Australian Embassy, Tokyo, 10 May 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 6) 1.

75 Cablegram from the Department of External Affairs to the Australian Embassy, Tokyo, 10 May 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 6) 1.

76 Cablegram from the Department of External Affairs to the Australian Embassy, Tokyo, 28 August 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 8) 1. See also 'Proposal of the Japanese Delegation' (Memorandum, 1 July 1953) (National Archives of Australia, A1838, 3103/10/1/1 PART 8).

77 'Pearl Fisheries Dispute' (n 69) 2–3.

78 Ibid.

C *An Emerging International Dispute*

Bilateral negotiations over Japanese access to the pearl fisheries proved unavailing since both sides were uncompromising in their positions: Australia offered 'reasonable opportunities of pearling',[79] whereas Japan insisted on a '"substantial and continuing" catch'.[80] The Australian government decided to take an alternative course of action by asserting its sovereignty over the resources of the subsoil and seabed of the continental shelf.[81] This action was informed by a suggestion to extend the application of the licensing system to the Japanese operating in Australian waters outside territorial limits either under the existing *Pearl Fisheries Act 1952* (Cth) or under the Act as amended to apply expressly to foreign nationals.[82] John McEwen, the Minister for Commerce and Agriculture, suggested that

> if the Act were amended to apply to foreigners Australian courts would uphold action against Japanese vessels for a breach of the Act occurring in Australian waters and that this would be so whatever the position might be in international law.[83]

By adopting this course of action, the Australian government was acutely aware of the potential international repercussions, including a deterioration in overall relations with Japan and the possibility of litigation. Australian officials thought it 'most unlikely that the Japanese would attempt to resist our licensing, but they would almost certainly challenge the issue in the courts'.[84] Ultimately, the view was that Australia 'would have to expect at the best that the policy of licensing might be challenged not only in our own courts but also in international courts'.[85] Yet from the Australian government perspective, 'it was better to have attempted to exercise control and to have failed because of the legal decision of an international tribunal than not to have tried at all'.[86]

On 10 September 1953, Australia proclaimed its sovereign rights over the seabed and subsoil of the continental shelf contiguous to Australia and the coasts of its territories other than the United Nations trusteeships.[87] An act to amend the *Pearl Fisheries Act 1952* (Cth) was passed on 17 September 1953.[88] On 25 September 1953, the Minister for Commerce and Agriculture issued a special gazette containing the proclamations under the *Pearl Fisheries Act 1953* (Cth) and

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79 Note from the Australian Department of Foreign Affairs, February 1954 (National Archives of Australia, A518, A140/1/1 PART 7) 2.

80 'Record of Conversation with Mr Takase and Mr Tachibana of the Japanese Embassy' (21 October 1957) (National Archives of Australia, A1838, 3103/10/1/1 PART 26) 2.

81 'Pearl Fisheries Dispute' (n 69) 3.

82 Cablegram from the Department of External Affairs to the Australian Embassy, Washington, 13 August 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 8) 1 [2].

83 Ibid 1 [3].

84 'Note on the Submission on Fisheries Negotiations with Japan' (12 August 1953) (National Archives of Australia, A1838, 3103/10/1/1 PART 8) 1.

85 Ibid 2.

86 Cabinet Committee (Fisheries Negotiations with Japan), 'Minutes of Meeting of the Committee Held in Cabinet Room, Parliament House, on Wednesday, 12th August, 1953, at 7:30 pm' (National Archives of Australia, A432, 1953/1771) 3.

87 'Pearl Fisheries Dispute' (n 69) 3 [6]. A separate proclamation made a similar claim for the Trust Territory of New Guinea.

88 *Pearl Fisheries Act 1953 (No 2)* (Cth), amending *Pearl Fisheries Act 1952* (Cth), as previously amended by *Pearl Fisheries Act 1953* (Cth).

notification of the issue of regulations under the Act.[89] As amended, the legislation provided for the management of pearl shell resources in accordance with Australia's proclaimed sovereign rights over the natural resources of the seabed and subsoil to the 100-fathom line, which was considered the outer edge of the continental shelf. Pearlers and vessels, irrespective of their nationality, were legally required to obtain a fishing license.[90] The law came into force on 12 October 1953.[91]

Australia's move to tie pearl fishing to a system of licensing provoked a strong reaction from Japan. On 15 September 1953, the Japanese government protested that the new Australian legislation, and any action taken by Australia, was contradictory to established principles of international law and usage.[92] Since the issue involved the interpretation of fundamental international law principles, Japan considered that the 'equitable solution' was 'to entrust the final decision of this dispute to [the] most fair and authoritative organization, the International Court of Justice'.[93] On 8 October 1953, the Japanese government proposed testing the issue in the Court to determine whether, under the established rules of international law, Australia had the right to subject Japanese nationals engaging in pearling outside Australia's territorial waters to domestic legislation. Japan also proposed that, pending a court decision, the two parties reach a provisional understanding concerning pearling operations within waters subject to licences under the *Pearl Fisheries Act (No 2) 1953* (Cth).[94]

Although Japan was neither a party to the *Statute of the International Court of Justice* ('*ICJ Statute*') nor had accepted the compulsory jurisdiction of the ICJ, Edward Walker, the Ambassador of Australia in Tokyo (1952–56), viewed Japan's decision to refer the matter to the ICJ as a willingness on its part to accept the rule of law in international affairs and to belong to the international community.[95] In a cablegram sent to the Department of External Affairs on 10 October 1953, Walker commented:

> The Japanese clearly have in mind the prominent role which Australia has played in the United Nations under successive governments and our world reputation in

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89 One proclamation concerned the date, the second proclamation defined 'proclaimed waters' and the third proclamation clarified the extent to which Australia asserts jurisdiction over the continental shelf adjacent to its shores in these parts where the shelf adjoins other countries: Commonwealth, *Commonwealth of Australia Gazette*, No 59, 25 September 1953, 2683–4. See also 'Proclamations and Regulations under Pearl Fisheries Act' (Press Release, 27 September 1953) (National Archives of Australia, A4311/770/1). Australia did not break new ground. The US was the first country in the world to issue a declaration of the continental shelf in Harry S Truman's proclamation of 1945, in which the US President declared sovereignty over the natural resources of oil and coal on the continental shelf: *Proclamation 2667: Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, 3 CFR 39 (1945). See also Michael P Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press, 2013) ch 5.

90 *Pearl Fisheries (No 2) 1953* (Cth) s 6.

91 'Proclamations and Regulations under Pearl Fisheries Act' (n 89) 1.

92 Cablegram from the Australian Embassy, Tokyo, to the Department of External Affairs, 8 October 1953 (National Archives of Australia, A518, A140/1/1 PART 6) 1 [2] ('Cablegram 8 October 1953'); 'Pearl Fisheries Dispute' (n 69) 4 [7].

93 Cablegram 8 October 1953 (n 92) 1 [3]

94 'Pearl Fisheries Dispute' (n 69) 4–5 [9].

95 Cablegram from Edward Walker, Australian Embassy, Tokyo, to the Department of External Affairs, 8 October 1953 (National Archives of Australia, A518, A140/1/1 PART 6) 2 [6].

> this connection. Whatever happens they intend taking this case to The Hague where it will be followed closely by many countries.[96]

He concluded that if Australia made no positive response to their proposal, Japan would be seen as being prepared to abide by international law by seeking to avoid provocation while the case was sub judice, and Australia would be seen to be 'behaving like an outlaw'.[97]

The Australian government did not accept the contentions of the Japanese government, but it agreed that the matter involved the interpretation of international law. On 30 October 1953, the Australian Department of External Affairs notified the Japanese government that it was prepared to consent to bringing the matter before the ICJ by mutual agreement, provided a satisfactory arrangement was made, in accordance with Australian legislation, for a provisional regime to apply to Japanese divers and vessels pending the Court's decision.[98] The Australian government proposed that the Japanese government prepare and submit to the Australian government for comment a draft mutual agreement for initiating proceedings at the Court, since Japan was not yet a party to the *ICJ Statute*. The special agreement was to define the issues on which the Court's jurisdiction was to be involved and accepted; contain the assurances that each government might require of the other, concerning acceptance of the Court's decision; and deal with any related procedural matters.[99] The necessity for mutual agreement, rather than a unilateral action by Japan, was considered to give Australia some opportunity to define the legal issues to be brought before the Court.[100]

The *Provisional Regime Agreement* for pearl fishing operations was signed at Canberra on 24 May 1954 and registered with the UN.[101] The Agreement placed a restriction on the areas in which the Japanese could operate and set a catch limit no greater than that of Japanese pearling operations in 1953.[102] Article V of the Agreement provided that the Australian government would determine the conditions to be placed on Japanese divers and vessels in subsequent seasons, 'with such variations as may be appropriate having regard to conservation requirements and in the light of results of operations in the preceding season'.[103]

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96 Cablegram from Edward Walker to Alan Watt, 10 October 1953 (National Archives of Australia, A518, A140/1/1 PART 6) 1 [1].

97 Ibid.

98 'Cabinet Submission re Japanese Pearling' (National Archives of Australia, A518, A140/1/1 PART 6) 1 [2].

99 Ibid 1–2 [3]–[4].

100 Cablegram from the Department of External Affairs to the Australian High Commissioner's Office, London, 18 November 1953 (National Archives of Australia, A518, A140/1/1 PART 6).

101 *Agreement on a Provisional Regime to Regulate Pearling by Japanese Nationals pending the Final Decision of the International Court of Justice in the Dispute concerning the Application to Japanese Nationals of the Australian Pearl Fisheries Act 1952–1953*, 191 UNTS 125 (signed and entered into force 24 May 1954) ('*Provisional Regime Agreement*'). See also Kenneth Bailey, 'Australia and the Law of the Sea' (1960) 1(1) *Adelaide Law Review* 1, 9.

102 *Provisional Regime Agreement* (n 101) art IV.

103 Ibid art V. See also RJ Percival, 'Japanese Pearling: 1956 Season' (National Archives of Australia, A1838, 3103/10/1/1 PART 21).

The correspondence between Australia and Japan shows the battlefront in the struggle for superiority in the pearl fisheries: freedom of the high seas (the Japanese case) versus sovereign rights over natural resources (the Australian case).[104] Both countries favoured the international rule of law. Japan moved towards the international judicialisation of the dispute and was likely to plead the case before the ICJ.[105] While Australia agreed to taking the case to the ICJ, it favoured an out-of-court settlement, mainly because officials in Canberra and London believed that Japan had a strong case and that any claim made to exclude foreign nationals from outside the limit of Australian territorial waters was open to challenge.[106] Against a backdrop of the likely consequences of litigation, Japan and Australia sought to settle the matter through judicial means. How did Japan and Australia regard the Court, and to what extent did the Court shape the dynamics between the parties during different stages of the dispute? The next Part will consider these questions within the context of the judicialisation of the dispute at the ICJ, focusing on the parties' consent to the Court's jurisdiction and the applicable international legal norms.

III JUDICIALISING THE DISPUTE: THE STORY AND OUTCOME

The judicialisation of the dispute not only integrated it into the UN system but also brought it under the remit of international law, specifically the law of the sea. In the first Section, I outline Japan's eagerness to access the ICJ, as illustrated by its decision to become a party to the *ICJ Statute,* and Australia's efforts to limit the jurisdiction of the Court through its optional clause declaration. In the next Section, I describe Australia's role in the development of the law on the continental shelf that strengthened Australia's position and prompted a settlement.

A *Consenting to the Court's Jurisdiction*

The basis of the ICJ's jurisdiction to adjudicate the pearl fisheries dispute depended on the consent of the parties.[107] When Japan decided to take action against Australia, like any state, it could access the Court by procuring a special agreement from Australia; however, Japan could not invoke the jurisdiction of the Court without Australia's explicit consent.[108] Although Japan was not yet a member of the UN, it decided to become party to the *ICJ Statute* and submitted

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104 SV Scott, 'The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine' (1992) 41(4) *International and Comparative Law Quarterly* 788, 800 ('The Inclusion of Sedentary Fisheries').

105 Kisaburo Yokota, 'International Adjudication and Japan' (1973) 17 *Japanese Annual of International Law* 1, 18.

106 See generally the NAA documents in *Pearl Fisheries Negotiations with Japan: Provisional Regimes and Draft Agreement* (The National Archives, A518, A140/1/1 PART 7) and *Pearl Fisheries Negotiations with Japan: Provisional Regimes and Draft Agreement* (The National Archives, A518, A140/1/1 PART 8).

107 *Monetary Gold Removed from Rome in 1943 (Italy v France) (Preliminary Question)* [1954] ICJ Rep 19, 32.

108 *Statute of the International Court of Justice* arts 36(1), 40(1).

its formal application on 26 October 1953.[109] By cooperating with the UN, Japan accepted stipulated conditions pursuant to art 93(2) of the *UN Charter*,[110] which provides:

> A state which is not a Member of the United Nations may become a party to the *Statute of the International Court of Justice* on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.[111]

According to the Japanese Ambassador to Australia, Haruhiko Nishi, the Japanese action was

> motivated by her intention to strive for a peaceful solution of all international disputes, as well as by her intention to 'apply for membership in the United Nations and in all circumstances to conform to the principles of the *Charter of the United Nations*' as declared by her in the Preamble of the *Treaty of Peace with Japan*.[112]

It was in Australia's interests to postpone Japan's application so that it could influence the conditions for reference of the dispute to the ICJ. However, it became clear, following the consideration and recommendation of the UN Security Council, that the General Assembly would approve Japan's application.[113] In December 1953, Professor Kenneth Bailey, the Australian Solicitor-General, discussed the matter with legal advisers at the British Foreign Office and experienced academic practitioners who held chairs of international law at the University of Cambridge and the University of Oxford. According to the British Foreign Office advice, delay in the treatment of Japan's application to become a party would have no effect on how quickly the dispute reached the ICJ.[114] Australia therefore decided to vote in favour of Japan's application on two grounds. First, Australia approached the question on a wider basis than on the narrow consideration attached to the dispute. It was in Australia's interests that

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109 *Letter Dated 26 October 1953 to the Secretary-General from the Permanent Observer of Japan to the United Nations, Transmitting a Cablegram Dated 24 October 1953 from the Minister for Foreign Affairs of Japan, concerning Japan's Application to Become a Party to the Statute of the International Court of Justice*, UN Doc S/3126 (27 October 1953). See also *Report of the Security Council to the General Assembly Covering the Period from 16 July 1953 to 15 July 1954*, UN GAOR, 9th sess, Supp No 2, UN Doc A/2712 (1954) 54 [401]–[404]; Letter from Casey to Menzies, 24 May 1956 (National Archives of Australia, A1838, 3103/10/1 PART 4) <https://www.dfat.gov.au/about-us/publications/historical-documents/Pages/volume-19/137-letter-from-casey-to-menzies-1>, archived at <https://perma.cc/43QW-SQ43>.

110 See Note Verbale No 23/EA3 from the Ministry of Foreign Affairs, Japan, to the Australian Embassy in Japan, 19 February 1954 (National Archives of Australia, A518, A140/1/1 PART 7) 1.

111 *Charter of the United Nations* art 93(2).

112 Letter from H Nishi, Ambassador of Japan to RG Casey, Minister for External Affairs, 15 December 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 11).

113 Cablegram from the Department of External Affairs to the Australian Mission to the United Nations, New York, 7 December 1953 (National Archives of Australia A518, A140/1/1 PART 6) ('Cablegram 7 December 1953').

114 Cablegram from the Australian High Commissioner's Office, London, to the Department of External Affairs, 3 December 1953 (National Archives of Australia, A518, A140/1/1 PART 6) [4]; 'Notes by Mr GG Fitzmaurice, Foreign Office Legal Adviser, on the Japanese Application to Become a Party to the Statute of the International Court of Justice, in Relation to the Australia–Japanese Pearl Fisheries Dispute' (National Archives of Australia, A1838, 3103/10/1/1 PART 11) 1–2 [5].

Japan should be encouraged to settle its interstate disputes through the Court.[115] Secondly, there was the further consideration of Australia's own bilateral relations with Japan. A cable from Richard Casey, the Minister for External Affairs, to Percy Spender, the Vice-President of the Australian delegation at the UN and Australia's Ambassador to the United States, stated: 'We have to live with these people in the Pacific and our failure to vote in favour of their admission would not contribute to reasonable relations between the two countries.'[116]

The UN General Assembly at its 471st plenary meeting approved Japan's application on 8 December 1953 by a vote of 51 in favour and five abstentions (corresponding to the Soviet Bloc).[117] As mentioned above, Japan could state a case or bring a case to the ICJ by special agreement, but it could not unilaterally invoke the Court's jurisdiction without Australia's explicit consent. Now that Japan's application to become a party to the *ICJ Statute* had been accepted, Japan was free to accept the optional clause allowing for the compulsory jurisdiction of the Court and proceed with a unilateral application, rejecting Australia's provisional regime in favour of a potentially preferable one determined by the Court.

Strategically, Australia supported Japan's move to become a party to the *ICJ Statute*, but it was not disposed to permit Japan to put itself in a better position than it occupied at the time that Australia consented to submitting the dispute to the ICJ.[118] Australian officials were wary that Japan's signing of the optional clause in New York and filing of the application in The Hague would be simultaneous. The Australian government sought to avoid being outmanoeuvred.[119] It seemed 'dangerous to delay our action pending information on Japanese intentions which may of necessity be speculative. They might easily beat us to it.'[120] There was also a suggestion that Japan might take the dispute to the UN Security Council, which, for Australia, demonstrated that Japan was 'working to have another string in their bow'.[121] Based on perceived 'intense activity' by the Japanese, Professor Bailey took immediate action.[122] (It is worth noting that while Japan was able to make a declaration accepting the Court's

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115 Cablegram 7 December 1953 (n 113).

116 Ibid.

117 *Application of Japan to Become a Party to the Statute of the International Court of Justice*, GA Res 805 (VII), UN GAOR, 8th sess, 471st plen mtg, Agenda Item 75, UN Doc A/RES/805(VII) (9 December 1953); *Application of Japan to Become a Party to the Statute of the International Court of Justice*, UN GAOR, 8th sess, 471st plen mtg, Agenda Item 75, Supp No 17, UN Doc A/PV.471 (9 December 1953); Cablegram from the Department of External Affairs to the Australian Embassy, Tokyo, 11 December 1953 (National Archives of Australia, 1518, A140/1/1 PART 6).

118 Savingram from the Department of External Affairs to All Posts, 9 February 1954 (National Archives of Australia, A18, A140/1/1 PART 7) 2 [6] ('Savingram 9 February 1954').

119 Cablegram from the Department of External Affairs to the Australian High Commissioner's Office, London, 26 January 1954 (National Archives of Australia, A518, A140/1/1 PART 7) 1–2 [5] ('Cablegram 26 January 1954'); Cablegram from the Australian Mission to the United Nations, New York, to the Department of External Affairs, 21 January 1954 (National Archives of Australia, A518, A140/1/1 PART 7).

120 Cablegram from the Australian Embassy, Tokyo, to the Department of External Affairs, 25 January 1954 (National Archives of Australia, A518, A140/1/1 PART 7) 1 [3].

121 Cablegram from the Australian Mission to the United Nations, New York, to the Department of External Affairs, 16 November 1953 (National Archives of Australia, A518, A140/1/1 PART 6).

122 Cablegram 26 January 1954 (n 119).

compulsory jurisdiction in March 1954, it did not submit its declaration until 15 September 1958.)[123]

Australia ensured that its optional clause declaration, submitted under art 36(2) of the *ICJ Statute*, would prevent Japan from unilaterally instituting proceedings against Australia. Australia decided to withdraw its existing declaration and enter into a new and limited acceptance of jurisdiction.[124] CHM Waldock, Chichele Professor of Public International Law at All Souls College, Oxford, suggested and helped draft Australia's new declaration, which was more or less in the terms of the existing declaration but with a special reservation.[125] The object of the special reservation was to exempt from Australia's acceptance any disputes relating to the continental shelf or Australian waters as defined in domestic legislation unless a modus vivendi was first agreed.[126] It was desirable to make the new exclusion general in form so that, from the Japanese perspective, the only effect of the change would be to preserve the status quo.[127]

The form of the Australian instrument required special consideration, given that all Commonwealth countries — except Canada — had adopted the same method of adherence.[128] Hence, the draft text of the proposed termination and new acceptance was sent to the United Kingdom authorities for comment.[129] Hersch Lauterpacht, Whewell Professor of International Law at the University of Cambridge, saw termination of the proposed acceptance as having no adverse effect on Australia's position before the ICJ. Subject to minor amendments, Professor Lauterpacht maintained that this course of action was 'sound and safe'.[130] However, he considered that the new declaration contained what could be 'interpret[ed] as an attempt to avoid jurisdiction of Court in this particular case, with a drastic curtailment of its compulsory jurisdiction in the future'.[131] Lauterpacht concluded that there could be strong objection to the formulation, which impaired the value of the declaration and was derogatory to the Court's authority.[132]

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123 *Declaration by Japan Accepting the Conditions Determined by the General Assembly of the United Nations for Japan to Become a Party to the Statute of the International Court of Justice*, 188 UNTS 137 (registered 2 April 1954); *Japan: Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 312 UNTS 156 (registered 15 September 1958).

124 Cablegram 26 January 1954 (n 119) 1 [1].

125 Cablegram from the Australian High Commissioner's Office, London, to the Department of External Affairs, 29 January 1954 (National Archives of Australia, A518, A140/1/1 PART 7). See also KH Bailey, 'Pearl Fisheries Dispute with Japan: Provisional Regime: Effect of Japan Becoming a Party to the Statute of the International Court of Justice' (Memorandum, 14 January 1954) (National Archives of Australia, A518, A140/1/1 PART 7) 3–4 [11].

126 *Declaration by Australia Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 186 UNTS 77 (registered 6 February 1954) para (2)(v)(a) ('*Australian ICJ Jurisdiction Declaration*').

127 Savingram 9 February 1954 (n 118) 2 [7].

128 Cablegram 26 January 1954 (n 119) 1 [2].

129 Cablegram 26 January 1954 (n 119). In the time available, Australia did not have an opportunity to consult other members of the Commonwealth.

130 Cablegram from the Australian High Commissioner's Office, London, to the Department of External Affairs, 29 January 1954 (National Archives of Australia, A518, A140/1/1 PART 7).

131 Ibid.

132 Ibid.

On 6 February 1954, William Douglass Forsyth, the Head of the Permanent Mission of Australia to the United Nations, deposited the new declaration,[133] which supplanted Australia's earlier acceptance of the compulsory jurisdiction of the Permanent Court of International Justice to which Australia was still bound when the ICJ began work in April 1946.[134] The text of Australia's new declaration was divided into two parts. The first part terminated the existing acceptance of the compulsory jurisdiction of the Court. The second part contained a new declaration accepting the jurisdiction in terms substantially similar to those of the earlier declaration with the addition of a fresh exception. According to sub-para 2(5), the declaration did not apply to disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia:

> (a) in respect of the continental shelf of Australia and the Territories under the authority of Australia, as that continental shelf is described or delimited in the Australian Proclamations of 10 September 1953 or in or under the Australian *Pearl Fisheries Acts*;
>
> (b) in respect of the natural resources of the sea-bed and subsoil of that continental shelf, including the products of sedentary fisheries; or
>
> (c) in respect of Australian waters, within the meaning of the Australian Pearl Fisheries Acts, being jurisdiction or rights claimed or exercised in respect of those waters by or under those Acts,
>
> except a dispute in relation to which the parties have first agreed upon a *modus vivendi* pending the final decision of the Court in the dispute …[135]

No other change was made except to take account of the fact that the League of Nations and the Council had been replaced by the UN and the Security Council. The new declaration, like the previous one, did not apply to disputes in which parties agreed to some other means of settlement, disputes with other Commonwealth countries, disputes 'with regard to questions which by international law fall exclusively within the jurisdiction of Australia' and 'disputes arising out of events occurring at a time when the Government of Australia was or is involved in hostilities'.[136]

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133 *Australian ICJ Jurisdiction Declaration* (n 126).

134 Australia's first declaration was dated 20 September 1929: *Protocol of Signature of the Statute of the Permanent Court of International Justice*, opened for signature 16 December 1920, 200 LNTS 484 (entered into force 16 December 1920) 494–5. It substituted a fresh declaration on 21 August 1940, which was in identical terms plus an additional exception relating to events arising out of hostilities: at 496–7.

135 *Australian ICJ Jurisdiction Declaration* (n 126) para 2(v).

136 Ibid paras 2(i)–(iv). The first part of this reservation was designed to keep the White Australia policy from the ICJ's jurisdiction. For comments on Australia's White Australia policy from an international law perspective, see Hilary Charlesworth, 'Australia in the International Order' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 425, 427–31, 434.

B *Developing Australia's Continental Shelf*

Interstate dispute settlement does not necessarily involve international courts and tribunals, but it always involves international law.[137] The dispute between Japan and Australia over pearl fishing illustrates this observation. When the issue of Japanese pearling arose in February 1953, Australia turned to international law. One issue was the exercise of national jurisdiction over Japanese pearlers and vessels. The Australian Attorney-General's Department was of the opinion that the fundamental criterion of prescriptive jurisdiction was actual assertion of control over all persons and acquiescence by other countries in such assertion, and that this criterion was absent in this case.[138] Although Australia could exercise no control on the basis of prescriptive jurisdiction, there were nevertheless developments in international law upon which Australia could base a claim that it had control over foreigners in sedentary fisheries. For example, if Australia could exploit any advantage to be gained based on a liberal interpretation of the 1951 *Fisheries* case, then there could be some increase in the area of territorial waters from which foreigners could be excluded.[139] However, new developments in the international law of the sea, specifically emerging rights for exclusive use of the continental shelf, offered Australia legal arguments to build its case.[140]

National assertions to exclusive rights over the continental shelf had concentrated, at the early stages, on mineral resources of the subsoil (such as oil and gas) rather than sedentary fisheries on the seabed (such as pearl fisheries). The boundaries of Australia's proclaimed waters were in places outside of the 100-fathom line; however, all pearling beds of interest to Australia lay within it. If Australia was able to extend the continental shelf doctrine to include sedentary fisheries, it could exercise sovereign rights (including powers of exclusion) over its pearl fisheries.[141] The initiative for securing the proposed extension of the doctrine rested on Australia, since all other countries with sedentary fisheries adjacent to their coasts had acquired a prescriptive title over those fisheries and were satisfied with the doctrine as it stood. Australia was not in that fortunate position.[142]

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137 Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999) 215.

138 Bailey, 'Prescriptive Rights over Sedentary Fisheries outside Territorial Limits' (n 65) 1–2 [4]–[6].

139 Ibid 2–3 [9(a)]. In *Fisheries*, the ICJ's ruling had the effect of granting a coastal statewide powers, depending on the circumstances, to extend its exclusive waters seawards well beyond the four-mile limit: see generally *Fisheries (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116.

140 See, eg, Philip C Jessup, 'The United Nations Conference on the Law of the Sea' (1959) 59(2) *Columbia Law Review* 234. Among modern commentators, see DP O'Connell, 'Sedentary Fisheries and the Australian Continental Shelf' (1955) 49(2) *Australian Journal of International Law* 185, 203–9; DHN Johnson, 'The Legal Status of the Sea-Bed and Subsoil' (1956) 16 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 469. Cf MW Mouton, *The Continental Shelf* (Springer-Science+Business Media, 1952) 144–51.

141 Bailey, 'Prescriptive Rights over Sedentary Fisheries outside Territorial Limits' (n 65) 4–5 [14]–[15].

142 Ibid 1–2 [4]–[7], 4–5 [14]–[15].

Kenneth Bailey was the Commonwealth Solicitor-General from 1946 to 1964, covering a critical period in the dispute, and a key contributor to the international negotiations on the continental shelf. In addition to his expertise in international law, Bailey's legal manoeuvring in international arenas, specifically in the International Law Commission ('ILC') and the UN General Assembly, helped to ensure that sedentary fisheries, including pearl fisheries, would become part of the continental shelf subject to regulation by the coastal state.[143] Yet Bailey sought to preserve the status quo at the ICJ. It is worth noting that Bailey was an adviser to the Australian delegation at the United Nations Conference on International Organization, which took place from 25 April to 26 June 1945 in San Francisco. He had a relatively free hand in the committees that prepared the final draft of the *UN Charter* and revised the preliminary *ICJ Statute*, and he was responsible for guaranteeing that Australia's voice was heard in the drafting of the Statute.[144]

From 1949 to 1956, the ILC, whose mandate is the progressive development and codification of international law in accordance with art 13(1)(a) of the *UN Charter*,[145] studied all aspects of the law of the sea, including the continental shelf. Recognising the special character of sedentary fisheries, the Commission studied the topic in its sessions in 1951, 1953 and 1956. In 1951, the Commission considered the continental shelf to be confined to mineral resources, and it tended to treat sedentary fisheries similarly to how it treated the high seas.[146] Two years later, the Commission adopted a position diametrically opposed to its earlier one, concluding that the rights of the coastal state over the shelf fully extended to sedentary fisheries, which therefore no longer required special treatment.[147] This development was more encouraging to Australia than to Japan. Even though the report was not binding per se, Bailey anticipated that it would have 'a law-making as distinct from a merely consolidating character'.[148]

In November 1953, the ILC's report came up for discussion in the Sixth Committee (Legal) of the UN General Assembly. The Australian delegation was advised not to 'give [the] appearance of anxiety' in light of the pending ICJ proceedings.[149] The Attorney-General's Department instructed the Australian delegation not to enter questions of substance that 'could easily lead to something

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143 Donald K Anton, 'Australia before the World Court: A Look Back and a Look Forward' (Research Paper No 14-21, ANU College of Law, Australian National University, 7 June 2013) 5. This paper was presented at the Whaling in the Antarctic Forum, held by the Australian National University Centre for International and Public Law.

144 James Crawford, 'Dreamers of the Day: Australia and the International Court of Justice' (2013) 14(2) *Melbourne Journal of International Law* 520, 521–6.

145 *Establishment of an International Law Commission*, GA Res 174 (II), UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/RES/174(II) (21 November 1947), discussing *Charter of the United Nations* art 13(1)(a).

146 International Law Commission, *Report of the International Law Commission Covering the Work of Its Third Session*, UN GAOR, 6th sess, Supp No 9, UN Doc A/1858(SUPP) (1951) annex ('Draft Articles on the Continental Shelf and Related Subjects') 20 (art 3 para 1).

147 International Law Commission, *Report of the International Law Commission Covering the Work of Its Fifth Session*, UN GAOR, 8th sess, Supp No 9, UN Doc A/2456(SUPP) (1953) 14 [71]. Pearl fishing negotiations began a few months before this session of the Commission began.

148 Cablegram from the Australian Embassy, Washington, to the Department of External Affairs, 13 August 1953 (National Archives of Australia, A1838, 3103/10/1/1 PART 8).

149 Cablegram from the Department of External Affairs to the Australian Mission to United Nations, New York, 28 November 1953 (National Archives of Australia, A518, A140/1/1 PART 6).

like preliminary airing of contentions Australia would eventually want to make to [the] Court'.[150] The Attorney-General noted that Japan had not commented on the report of the ILC, which could be interpreted as an 'unwillingness to disclose in advance their eventual case before [the] International Court'.[151] While Australia was keen for any debate on the substance to result in the adoption of the draft articles on the continental shelf,[152] the UN General Assembly, by *Resolution 798* of 7 December 1953, deferred action until all questions relating to the regime of the high seas and the regime of territorial waters had been studied by the Commission and then reported to the General Assembly.[153]

At its 1956 session, the ILC retained verbatim the 1953 language on the subject of sedentary fisheries, which became part of the commentary accompanying the final draft articles. In short, sedentary fisheries were now linked to the continental shelf and were no longer associated with the high seas.[154] The Commission submitted to the UN General Assembly a comprehensive report and articles.[155] It recommended to the General Assembly that an international conference be convened for the purpose of concluding an international convention on the law of the sea.[156] According to a secret legal paper on 'Legal Aspects of the Pearl Fisheries Dispute', the Australian government considered that

> a diplomatic conference of this kind would be likely to take a rather broader and even more liberal view of the interests of the coastal state than would a judicial body such as the International Court which had nevertheless already shown itself to be mindful of these interests.[157]

As noted already, the Australian mission, led by Bailey, made a notable contribution towards the codification of the continental shelf at the first United Nations Conference on the Law of the Sea that took place between 24 February and 27 April 1958. In the first place, Bailey led the initiative to secure a satisfactory definition of 'natural resources' of the continental shelf so as to not only include living organisms such as pearl oyster, bêche-demertrochus, green snail and chank but also to exclude crustaceans such as shrimp and bottom-fish such as sole, which the UK and the US were eager to prevent from falling under the exclusive rights of the shelf state.[158] The Australian-sponsored definition of 'natural resources' — 'organisms which, at the harvestable stage, either are

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150 Cablegram from the Department of External Affairs to the Australian Mission to United Nations, New York, 30 October 1953 (National Archives of Australia, A518, A140/1/1 PART 6) 1 [1]–[4].

151 Ibid 1 [6].

152 Ibid 1 [2].

153 *Régime of the High Seas*, GA Res 798 (VIII), UN GAOR, 8th sess, 468th plen mtg, Supp No 17, UN Doc A/RES/798(VIII) (7 December 1953).

154 *Report of the International Law Commission Covering the Work of Its Eighth Session*, UN GAOR, 11th sess, Supp No 9, UN Doc A/3159(SUPP) (1956) 42 (art 68 para 6) ('*ILC Eighth Session Report*').

155 *ILC Eighth Session Report*, UN Doc A/3159(SUPP) (n 154).

156 Ibid 3 [28].

157 'Legal Aspects of the Pearl Fisheries Dispute' (Paper) (National Archives of Australia, A1838, 3103/10/1/1 PART 20) 7 [22].

158 IA Shearer, 'Australia and the Law of the Sea' (1986) 24(1) *Archiv des Völkerrechts* 22, 23. On the role of the ILC and UN General Assembly, see Richard Young, 'Sedentary Fisheries and the Convention on the Continental Shelf' (1961) 55(2) *American Journal of International Law* 359.

immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil' — found its place in art 2(4) of the resulting *Convention on the Continental Shelf*.[159] Outlining his views on the definition of natural resources, Bailey wrote:

> In an attempt to work out a scientific and legally exact definition, the Australian delegation at Geneva was encouraged to organize a Commonwealth working party, in which marine biologists were associated with lawyers. There resulted the definition which is now to be found in the convention. I am myself too long in the tooth as a lawyer to wish to be dogmatic about the meaning that will be given hereafter to any form of words, however meticulously prepared. This definition, however, certainly resulted from a most heartening piece of Commonwealth co-operation. It is the earnest hope of its draftsmen that it will be found in practice to *exclude* the shrimp and the sole from the natural resources of the continental shelf just as unequivocally as it *includes* the mother-of-pearl shell, the pearl oyster, the beche-de-mer, the trochus and the green snail, as well as the sacred chank of India and Ceylon. If it turns out to do these things, Australia has good ground for being pleased with the result, and for being grateful for staunch support from her associates in the Commonwealth and also from the United States, France, Norway and others.[160]

The *Convention on the Continental Shelf* established the sovereign rights of the coastal state to the natural resources of the continental shelf in art 2(1).[161] Article 3 emphasised the clear distinction between the taking of natural resources from the continental shelf and the taking of resources from the high seas beyond territorial limits.[162] The Convention did not provide for the recognition of any pre-existing rights of foreign nationals.

On 26 April 1958, the first United Nations Conference on the Law of the Sea adopted the *Convention on the Continental Shelf* by a large majority (57 in favour, three against and eight abstentions) with the support of all major maritime states except Japan.[163] Australia ratified the Convention on 14 May 1963.[164] The Convention came into operation on 10 June 1964.

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159 Shearer (n 158) 23; *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) art 2(4). The UK, Ceylon, Malaya, India and Norway were the other sponsors of this proposal: *United Nations Conference on the Law of the Sea: Official Records: Volume VI: Fourth Committee (Continental Shelf)*, UN Doc A/CONF/13/42 (1958) annex ('*Australia, Ceylon, Federation of Malaya, India, Norway, United Kingdom of Great Britain and Northern Ireland: Proposal (Article 68)*').

160 Bailey, 'Australia and the Law of the Sea' (n 101) 11 (emphasis in original).

161 *Convention on the Continental Shelf* (n 159) art 2(1).

162 Ibid art 3.

163 *United Nations Conference on the Law of the Sea: Official Records: Volume II: Plenary Meetings*, UN Doc A/CONF.13/38 (1958) 57 [31]–[36]. There were three additional separate conventions dealing with the territorial sea and contiguous zone, the regime of the high seas and the conservation of the living resources of the high seas. The proceedings in the plenary sessions are reported in the same document.

164 *Convention on the Continental Shelf* (n 159) n 1. See also Anthony Samul Bergin, 'Australia and the Third United Nations Conference on the Law of the Sea' (PhD Thesis, Australian National University, August 1990) 17–18.

The adoption of the *Convention on the Continental Shelf* gave international support to the legal position of the *Pearl Fisheries Act 1953* (Cth), so Australia had 'little to worry about so far as the legal aspects of the dispute [were] concerned'.[165] In his legal assessment, Clarence Harders, acting principal legal officer at the Attorney-General's office, considered Australia's prospects in litigation to be somewhat better than 50–50, but its position had now become quite strong.[166] Harders acknowledged that the Convention did not resolve the dispute unless Japan became a party to the Convention, but he considered that the Convention did provide persuasive authority.[167] In his opinion, it was unlikely for Japan to want a judicial settlement 'because the Court's decision would in all probability be in Australia's favour'.[168] Harders recommended exploring the possibility of a settlement through diplomacy.[169] From the Department of External Affairs' perspective, the fact that the conference had strengthened Australia's legal position did not remove the need for a cooperative approach — if anything, it strengthened it so as to avoid the impression that Australia had been '"stringing the Japanese along" until such time as Australia's legal position was reinforced'.[170] The Department of External Affairs stressed the need for Australia to present proposals in a manner that saved 'face' as much as possible.[171]

In sum, the codification of sovereign rights to the continental shelf changed the course of the dispute, since the terms of the *Convention on the Continental Shelf* were entirely favourable to Australia's case. Now that the main grounds for Japanese objection to Australia's fisheries legislation had been removed, it made it easier for Japan to accept a continuance of the licensing arrangements in force under the *Pearl Fisheries Act 1953* (Cth).[172] It also made it less difficult to solve the matter by other means. The general feeling was that the newly-elected Menzies government wanted to have a plan for a diplomatic settlement placed before it, as part of a cautious approach to progressing Australia's relations with Japan. From the narrower perspective of the dispute itself, Australia's position in a practical sense was by no means as secure as hoped, since the Australian pearling industry continued to rely heavily on Japanese divers. Japan mentioned this fact from time to time without making any real issue of it, but the possibility existed that Japan would exploit it as 'a bargaining-weapon'.[173]

In addition to the judicialisation of the dispute, it should be emphasised that diplomatic exchanges had occurred throughout this entire period, leading to a trail of notes verbales, aide-mémoires, diplomatic conferences and press conferences. A turning point occurred when the Australian Prime Minister Robert Menzies and the Japanese Prime Minister Nobusuke Kishi met in April and December 1957 to

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165 Harders, 'Notes on Pearling Dispute' (Paper, 1 October 1958) (National Archives of Australia, A4311, 770/2) 1–2 [3]–[5], 3 [10].

166 Ibid 1 [3].

167 Ibid 1 [5].

168 Ibid 2 [6].

169 Ibid 3–6 [10]–[12].

170 H Marshall, 'Japanese Pearling' (Memorandum) (National Archives of Australia, A1838, 3103/10/1/1 PART 30) 9.

171 Ibid 13.

172 Department of External Affairs (Cth), '3103/10/1/1' (10 March 1959) (National Archives of Australia, A4311, 770/2) 4–5 [10]–[11].

173 Harders (n 165) 3 [10].

discuss a practical solution through 'free talks'.[174] In essence, what they were trying to do was to reach a long-term agreement that would satisfy their respective interests while not compromising their legal positions.[175] If the 'free talks' did not lead to a negotiated resolution, then the legal experts of both countries would meet for the purpose of drafting a special agreement for the submission of the dispute to the ICJ.[176] In October 1958, exploratory work began with the holding of expert talks to assess the resources of the Northern Territory, the traditional area for Japanese pearl fishing. Substantial agreement was reached with respect to the pearling areas, quotas and seasons.[177]

During the expert talks, Japan asked for an informal discussion on the market situation of the pearl shell industry, since the future of the industry was in doubt.[178] Ultimately, market considerations became the prime factor for resolving the pearl fisheries question. Owing to the improved quality of plastic buttons, the pearl shell industry experienced marketing difficulties, except for quality shell, and production had to be revised.[179] At the suggestion of the Australian government and on its own initiative, the Australian pearling industry significantly curtailed its activities.[180] There was a progressive decrease in the Japanese catch. By 1962, pearling operations undertaken by Japanese-owned vessels with the appropriate licences were suspended in Australian waters.[181]

IV CONCLUSION

The pearl fisheries dispute affords a good example of an encounter with the ICJ where both parties are willing to have the dispute adjudicated and agree to a friendly settlement. Australia was in favour of a special agreement to establish the Court's jurisdiction, in principle, but failed to accept the proposed terms, leading to years of delay until the dispute was effectively superseded by other developments. Japanese authorities wanted to speed up the proceedings and informally suggested that the Australian government was delaying the issue. Australia denied this but nevertheless did not take positive steps to resolve the dispute.[182] While Japan's best hope had been a favourable ICJ decision, Australian officials sought to delay progress to this end and instead ensured that the favourable terms of the draft articles on the continental shelf were adopted by the 1958 United Nations Conference on the Law of the Sea.[183]

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174 Ibid 4 [12]. See also Embassy of Japan, Australia, 'Aide-Memoire' (12 September 1957) (National Archives of Australia, A4311, 770/2).

175 J Plimsoll, 'Record of Conversation with Mr Tadakatsu Suzuki (Japanese Ambassador)' (31 December 1957) (National Archives of Australia, A1838, 3103/10/1/1 PART 27).

176 Embassy of Japan, Australia (n 174).

177 Marshall (n 170) 4–5.

178 Harders (n 165) 5 [13(d)].

179 Teletype Message from P Hill, External Affairs (Canberra), to Miss Hauser, Ministers Office (Melbourne), 23 June 1959 (National Archives of Australia, A1838, 3103/10/1/1 PART 32). See also Bailey, 'Australia and the Law of the Sea' (n 101) 9.

180 Department of External Affairs (Cth), '3103/10/1/1' (n 172) 3 [8].

181 Memorandum from DG Nutter, First Secretary at the Australian Embassy, Tokyo, to Secretary, Department of External Affairs, 4 April 1962 (National Archives of Australia, A1838, 3103/10/1/1 PART 33).

182 Department of External Affairs (Cth), *Pearling Developments* (Report, 11 November 1957) (National Archives of Australia, A4311, 770/2) 1. See also Yokota (n 105) 18.

183 Scott, 'The Inclusion of Sedentary Fisheries' (n 104) 800.

Pearl fishing, through Australian eyes, went to the heart of domestic interests — primarily the interests of state governments and pearlers — and the control and conservation of their pearl fisheries had great political significance. Paradoxically, Australia showed a commitment to the ICJ even though the adversarial model of international adjudication was seen as poorly suited, since the applicable international law was unsettled and Australia's legal position was not strong from the outset. Despite its weak legal position, Australian officials invoked international legal rules and procedures; behaviour typically associated with international adjudication. Yet, as a potential respondent, the Australian government took steps to avoid litigation, which involved tactical planning and strategic behaviour in an attempt to anticipate Japan's likely course of action.[184]

Japan preferred the adjudicative process, which would lead to a third-party decision. There were tangible legal and diplomatic gains that were possible from bringing or threatening to bring the dispute before the ICJ and to use litigation as a tool to resolve the dispute. As a potential applicant, Japan employed the Court as a positive weapon to advance particular legal and diplomatic objectives. Japan saw the Court as a useful forum to articulate its concerns over an action taken by Australia (a reversal of the later positions of Australia and Japan in *Whaling in the Antarctic*).[185] The ICJ represented a neutral third party that would hear Japan's concerns over a bilateral issue. The Court was accepted as legitimate and authoritative, even if the ICJ never pronounced on the merits of the case and the action became moot.

Japan and Australia's dispute over pearl fisheries has been and can be analysed from various perspectives.[186] One way to tell the story is to describe the possibilities and inadequacy of international adjudication where national interests are perceived to be in competition.[187] Highlights in this account might be jurisdictional issues, compliance or the rule of law. Another way to tell the story is to situate the actors and the ICJ in the context in which they arise.[188] In this latter way, and as this study has demonstrated, how we think about dispute settlement is historically contextual. My account stands in the place of broad-brush hypotheses and instead uncovers specific contemporaneous accounts to better understand how states encounter the Court. A latent encounter, and its aftermath, reveals much about the role and influence of the ICJ in a broad range of international disputes.

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184 Ibid.

185 See *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* (International Court of Justice, General List No 148, 31 March 2014).

186 See, eg, Scott, 'The Japanese Lugger Case Episode' (n 35); Scott, 'The Inclusion of Sedentary Fisheries' (n 104); Henry Burmester, 'Australia and the International Court of Justice' (1997) 17 *Australian Year Book of International Law* 19.

187 Anton (n 143) 4–5.

188 CM Chinkin and Romana Sadurska, 'Learning about International Law through Dispute Resolution' (1991) 40(3) *International and Comparative Law Quarterly* 529.