LEGISLATION

THE FISHERIES ACT AND THE PEARL FISHERIES ACT

[Nos. 7 and 8 of 1952 (Commonwealth)]

The Fisheries Act and the Pearl Fisheries Act, passed by the Commonwealth Parliament in March 1952, represent Australia's most recent contribution to the growing stream of Acts and proclamations by which the maritime nations of the world are attempting to achieve the regulation and conservation of oceanic fishery resources. These Acts owe their existence to a realisation on the part of the Australian Government that, whilst the Australian fishing grounds are sufficiently rich in potential to offer considerable opportunity for increased development, it is imperative that greater exploitation should not proceed unrestricted but must, in the interests of conservation, be subject to regulation.

The Acts are in their general structure substantially identical, the only major dissimilarity, but one which may prove to be of crucial importance, being in the type of fishery which each is intended to regulate.[1] They provide the framework for a scheme of conservation, to be implemented by means of ministerial regulation, which is designed to operate in the interests of commercial development by guarding against the economic exhaustion which would be the inevitable result of uncontrolled and excessive exploitation.[2]

Both Acts are expressed to extend "to all the Territories and to all Australian waters." "Australian waters" are defined as:

> "(a) Australian waters beyond territorial limits; and
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> (b) the waters adjacent to a territory and within territorial limits",[3]

the natural consequence of which is that these Acts will have an extra-territorial operation.[4]

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[1] By s. 4 of the Fisheries Act "fish" includes "turtles, dugong, crustacea, oysters and other shellfish", but does not include any species of whales, pearl shell, trochus, beche-de-mer or green snail. The Pearl Fisheries Act in s. 5 defines "pearling" as including "the work of searching for or obtaining pearl shell, trochus, beche-de-mer or green snails." Thus the Fisheries Act is applicable to free swimming fish, whilst the Pearl Fisheries Act is confined to sedentary fisheries.

[2] They provide that "the Governor-General may, by proclamation, declare any Australian waters to be proclaimed waters for the purposes of this Act." The Minister is authorised to prohibit fishing operations in waters so proclaimed, either absolutely or for fish of specified species. He may also prohibit the taking from such waters of fish of a specified size or by a specified method, or, in the case of pearl fishing, the taking by any one pearling ship of pearl shell, etc., in excess of a specified quantity. Provision is made for the granting of licences authorising pearling and fishing operations in proclaimed waters, and for the registration of nets, traps and other fishing equipment. Officers under the Acts have authority to board boats in proclaimed waters and are invested with powers of examination, arrest and seizure. Penalties are created for offences against the Acts and any fish or pearl shell obtained in contravention of the regulations may be sold by such officers. Provision is also made for the institution of exploratory operations and investigations in the interests of research and development.

These Acts will almost certainly prove to be successful in so far as they apply to Australian fishermen,[5] but unfortunately past experience has shown that they are doomed to failure if their operation is to be confined to the Australian fishing fleet. This is graphically illustrated by the Bristol Bay salmon fisheries incident, which showed the almost complete futility of any attempt at conservation by the littoral State if it is unable to bind the fishermen of foreign nations.[6] Therefore it becomes pertinent whether Australia would be justified in asserting sovereign rights over her fishing grounds, or, failing this, in claiming rights of jurisdiction and as a consequence extending the operation of the conservation regulations to all fishermen in those areas irrespective of their nationality.

Insofar as these fishing grounds are located within Australian territorial waters there is no problem. Although the question of territorial waters is one of the more unsettled doctrines of international law[7] it would seem to be universally accepted that the territorial waters of a State, whatever their width, are at least three miles wide and that within this area, subject to a right of innocent passage, the littoral State has rights both of sovereignty and of exclusive jurisdiction.[8] Therefore it follows, as a necessary consequence, that within this area, subject to treaty or convention to the contrary, the littoral State is entitled to enforce its conservation laws against the fishermen of other nations as well as against its own nationals. But it is a matter of some considerable doubt whether such jurisdiction could lawfully be exercised over nationals of other countries when operating on fishing grounds situated outside the limits of territorial waters.[9] The validity of any such claim is dependent upon what is finally accepted as the correct interpretation of the highly controversial doctrine of the freedom of the high seas.[10]

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[3] The form of this definition is dictated by the division of power under the Constitution between Commonwealth and States—the States having exclusive power to legislate as to their territorial waters, while the Commonwealth, under s. 51, placitum (x), has power to legislate as to "Fisheries in Australian waters beyond territorial limits" and by virtue of s. 122 over territories, which of necessity includes the territorial waters of such territories.

[4] It is still too early to appreciate the full significance of these Acts, for they have not yet come into operation and consequently no "Australian waters" have been declared to be "proclaimed waters", nor have any regulations been made by the Minister or the Secretary. But note the perhaps over-wide area of operation proposed by Dr. H. V. Evatt in 1952 *Hansard* (Australia) 874.

[5] The extra-territorial character of these Acts, so far as their applicability to Australian fishermen is concerned, creates no constitutional problem since the Statute of Westminster Adoption Act (C'wealth, No. 56 of 1942), adopting, *inter alia*, s. 3 of the Statute of Westminster, 1931 (Imp., 22 & 23 Geo. V., c. 4).

[6] For a discussion of this incident, see L. L. Leonard, *International Regulation of Fisheries* (1944) 121-136.

[7] And the recent decision in the Anglo-Norwegian Fisheries Case (reported in I.C.J. Reports, 1951, 116-206) would not seem to have clarified this part of the law to any great extent.

[8] There is no definition of "territorial waters" in the Australian Constitution, but Australia has shown a consistent policy of limiting its territorial waters to a three-mile belt—see *Chapman v Rose* (1914) Q.S.R. 302 and the Australian reply to the questions of the Hague Codification Conference 1930 (*Publications of the League of Nations* 1929, V. 2, C. 74, M. 39, 1929, V., 162.).

[9] Two earlier Acts of the Federal Council of Australasia, The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act (No. 1 of 1888) and The Western Australia Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act (No. 1 of 1889), were both expressly stated to apply only to British ships (ss. 19 and 2 respectively). Similarly, the Whaling Act (C'wealth, No. 62 of 1935) applies only to ships registered in Australia. For a discussion of other Australian Acts having an extra-territorial operation, see C. B. V.

Despite the tendency to regard the doctrine of the freedom of the high seas as an axiomatic and inflexible principle, it is submitted that it is a rule which, throughout its history, has followed rather than dictated the changing practice of the maritime nations. This is supported by the manner in which the doctrine came to be established as a rule of international law. At the time when international law was first becoming a recognised body of rules it was accepted without dispute that a State might claim sovereignty over areas of the ocean, and such claims were in fact advanced by the majority of the maritime nations. It was only when these claims became excessive, Portugal claiming the Indian Ocean and most of the Atlantic and Spain the Pacific and the Gulf of Mexico, that there appeared the first signs of the coming reaction, later to be given a legal base in the "Mare Liberum" of Grotius. The first concrete expression of this reaction was the recognition, brought about by the increasing volume of maritime trade, that there should be a universal right of free navigation. The States thereafter gradually dropped their claims of sovereignty, although probably as much for the reason that they were finding them increasingly difficult to enforce as because they recognised that international law postulated that the high seas should be free.[11] The idea that they retain the right to claim sovereignty if it can be effectively exercised is demonstrated by the concept of the territorial belt, with its origin, or rationalisation, in the cannon-shot rule.[12]

What does the expression "the freedom of the seas" mean today? When this expression is used it is usually understood to imply that there should be freedom of navigation, freedom of fisheries, freedom to lay submarine cables, and freedom of aerial circulation on the high seas.[13] This correctly enunciates the positive side of the doctrine but it neglects to record the existence of several important derogations, some of which are of disputed legality, but probably all of which have formed the legal justification for State practice to such an extent as to warrant their being regarded as customary rules of international law. It is upon these derogations, which are but a reflection of changing State practice, that any legal justification for claims by Australia to exercise sovereignty or jurisdiction over high sea fisheries must be based.

Among these derogations from the basic principle are the right possessed by belligerents in time of war to board and search neutral ships on the high seas,[14] the doctrine of "hot pursuit", and the various hovering laws passed by almost all the maritime nations at some stage in their history.[15] Another deroga-

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Meyer, *The Extent of Jurisdiction in Coastal Waters* (1937) 431-434; and S. A. Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942) 169-171, and the Comment by L. F. E. Goldie *supra* pp. 84 ff.

[10] The question of territorial waters is not discussed in this note, for it is not felt that these Acts can be regarded as an attempt to extend the width of these waters beyond the three-mile limit hitherto adopted by Australia—they are merely concerned with the assertion of one particular type of claim within definite and probably not over-large areas. For the same reason it is not considered that the doctrine of contiguous zones is relevant, even apart from any doubts which may be entertained as to the legality of extending such doctrine to cover the regulation of fisheries.

[11] See T. W. Fulton, *Sovereignty of the Sea* (1911) and A. P. Higgins and C. J. Colombos, *International Law of the Sea* (2 ed.) cc. I and II particularly in relation to the development of the conception in Great Britain.

[12] On the history of the territorial belt see W. L. Walker, "Territorial Waters: The Cannon Shot Rule" (1945) 22 *B.Y.B. Int. L.* 210.

[13] For a formulation of the doctrine of "the freedom of the seas" see 34 *Annuaire* of the Institute of International Law, pt. iii (1927) 339.

[14] See P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) 76.

[15] As to the Hovering Laws, particularly in relation to the United States Tariff

tion from the principle of the freedom of the seas which is accorded recognition, and one which is directly pertinent to the present question, is the right to exercise control over sedentary fisheries outside territorial waters. Of the two Australian Acts, only the Pearl Fisheries Act is intended to regulate sedentary fisheries; therefore this derogation is of importance only to relation to that Act and has no application to the Fisheries Act, the operation of which is confined to free swimming fish.

As to this derogation, the majority of modern publicists espouse the view[16] that international law permits the exercise of at least some degree of control over the sea-bed beyond territorial limits for the purpose of regulating sedentary fisheries[17]—a view which accords with the practice of the maritime nations, many of whom claim either sovereignty or jurisdiction over areas of the sea-bed outside territorial waters. Among the longest standing claims are those over the chank and pearl fisheries in the Gulf of Manaar and Palk's Bay, the sponge beds off the coast of Tunis, beds of pearl oysters off the Mexican coast, oyster beds in St. George's Channel, and over pearl beds off the coast of Western Australia.

The strength with which such claims are asserted is indicated by the reply of Great Britain to the questions submitted by the Preparatory Committee of the Hague Codification Conference of 1930.[18] In this reply, which was substantially identical with that of Australia, Great Britain, whilst declaring that no claim was made by the U.K. Government to exercise rights over the high seas outside territorial waters, expressly excepted the case of sedentary fisheries "off the coasts of various British dependencies" outside territorial waters.

Such national claims of control over sedentary fisheries seem very modest when viewed in the light of a number of recent treaties and proclamations under which the nations concerned have claimed to exercise various degrees of control over the soil and subsoil of their respective continental shelves.[19]

The first of such claims was embodied in the treaty promulgated on 26th February, 1942, by which the United Kingdom and Venezuela divided between them the soil and subsoil of the sea-bed of that part of the Gulf of Paria which lies outside territorial waters.[20] The next of such claims was the proclamation of the President of the United States on 28th September, 1945. This proclamation not only affected a much larger area of the sea-bed than did the Gulf of Paria treaty, but it was expressed in far more forthright language, claiming to exercise "jurisdiction and control" over the soil and subsoil of the continental shelf. In the succeeding years there has been a spate of similar claims,[21] most

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Act of 1922, see W. Masterson, *Jurisdiction in Marginal Seas* (1929). Mr. Masterson concludes that such laws were consistent with international law; but see 2 H. A. Smith, *Great Britain and the Law of Nations* (1935) 109.

[16] See particularly C. Hurst, "Whose is the Bed of the Sea?" (1923-24) *B.Y.B. Int. L.* 34-43. In a later paper entitled "The Continental Shelf" (1948) 34 *Transactions of the Grotius Society* 153, Sir Cecil reaffirmed the position there taken.

[17] It would seem that the conception of the sea-bed outside territorial waters as a *res nullius* is no longer regarded with favour.

[18] For text see 2 H. A. Smith, *op cit. supra* n. 15 at 129.

[19] On the doctrine of "the continental shelf" see F. A. Vallat, "The Continental Shelf" (1946) 23 *B.Y.B. Int. L.* 334; E. Borchard, "Resources of the Continental Shelf" (1946) 40 *Am. J. Int. L.* 53; H. Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 *B.Y.B. Int. L.* 376-433; Sir Cecil Hurst, "The Continental Shelf" *loc. cit. supra* n. 16; C. H. M. Waldock, "The Legal Basis of Claims to the Continental Shelf" (1950) 36 *Transactions of the Grotius Society* 115.

[20] For the argument that the treaty was not merely a bilateral agreement but was in fact intended to found rights of sovereignty exercisable against other nations see F. A. Vallat, article cited *supra* n. 19.

[21] Included in such claims are those by Mexico on 29th October 1945, Argentina in 1944 (repeated on 9th October 1946), by Chile in June 1947, Peru on 1st August 1947, Costa Rica on 28th September 1948, El Salvador, Honduras,

of which have been modelled on the United States proclamation, although some of them, notably those of Argentina, Chile, Peru and Costa Rica, claimed sovereignty over the waters above the continental shelf as well as over the shelf itself. The consensus of opinion of the publicists has been that these claims, insofar as they relate only to the sea-bed and make no claim to exercise control over the waters above such areas, must be regarded as consistent with international law.[22] But that this opinion is still in the realm of "the ought" and not "the is" is demonstrated by the arbitration between the Petroleum Development (Trucial Coast Ltd.) and the Sheikh of Abu Dhabi.[23] In this arbitration Lord Asquith stated that, although he considered that the doctrine of the continental shelf was one which had much to recommend it, it could not be said that it had yet become established as a doctrine of international law.[24] Therefore, although the continental shelf proclamations, at least when they have not asserted rights over the waters above the continental shelf, have not given rise to any protests, it would seem that it is still too early to say that they have the blessing of international law.[25] But although it may be that claims to the continental shelf are not yet sanctioned by international law there is no such uncertainty as to the legality of claims to exercise control over sedentary fisheries outside territorial limits and, in fact, in the above arbitration Lord Asquith referred to the "customary right" vested in certain nations to exercise control over sedentary fisheries situated in certain areas of the high seas. It is to be noted, however, that Lord Asquith, like Hurst, refers to this as a "customary right". Therefore it would seem that any claims by the Australian Government to exercise control over sedentary fisheries outside territorial waters will only fall within this exception to the doctrine of the freedom of the high seas, and therefore be sanctioned by international law, if it can be shown that such control has a customary basis. If in fact it can be shown that the sedentary fisheries in the waters surrounding Australia are the object of such a "customary right" it seems probable that the Australia Government would be justified in extending the operations of the Pearl Fisheries Act to these areas.[26]

Although it is generally admitted that, consistently with the freedom of the high seas, claims may be made to sedentary fisheries, a distinction is drawn in the case of free swimming fish—that part of the fishing industry which the Fisheries Act is intended to regulate. That control may be exercised over the resources of the sea when attached to the sea-bed, yet not when in the form of

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Saudi Arabia in May 1949, Trucial States in June 1949, Bahamas on 27th November 1949, Jamaica on 26th November 1948, Falkland Islands on 21st December 1950 and Ecuador in February 1951. For the texts of these and other similar proclamations see *Laws and Regulations on the Regime of the High Seas* (United Nations Legislative Series, vol. 1).

[22] See particularly H. Lauterpacht, article cited *supra* n. 19, who states that the practice of States has resulted in the formation of a customary rule of international law within the meaning of Article 38 of the Statute of the International Court.

[23] The award in this case is reported in 1 *International and Comparative Law Quarterly* 247-261.

[24] But note that Lord Asquith's opinion that the doctrine of the continental shelf is not yet established law is clearly *obiter*, for it was only *necessary* for him to find that the doctrine was not embodied in international law in 1939, and that the area of the sea-bed in question had not been included in the Sheikh's kingdom by "agreement with other States".

[25] It seems obvious, however, that the exercise of control over the continental shelf must be distinguished from control over sedentary fisheries, not so much because of the supposed distinction between control over soil and control over the subsoil of the high seas but because claims to the continental shelf, of their nature, affect far greater areas and involve a greater interference with the free navigation of the high seas.

[26] But note that in the "Draft Articles on the Continental Shelf and Related

free swimming fish, seems to be a distinction lacking in any logical foundation. This distinction would seem to provide further proof that the doctrine of the high seas has followed rather than dictated the practice of States, for the great maritime nations, particularly Great Britain, in their desire to keep the greatest possible area of high seas open for the exploitation of their fishing fleets have, in the past, strongly opposed any attempts to create national monopolies over high sea fisheries, although acquiescing in the few instances in which such rights have been asserted over the commercially less important high sea sedentary fisheries.[27] But whatever the reason for such distinction, that such a distinction does exist is demonstrated by the fact that the legality of any attempts to exercise control over free swimming fish on the high seas has invariably been immediately and emphatically denied.

Probably two of the most far-reaching attempts to exert control over high sea fisheries were the claims which gave rise to the famous Fur Seal Controversies.[28] The first of these was the Bering Sea Fur Seal Arbitration. This arbitration resulted from the seizure of Canadian sealing vessels whilst on the high seas for the alleged contravention of the prohibition imposed by the United States Government on pelagic sealing in Alaskan waters. In the arbitration proceedings the United States attempted to justify these seizures on two grounds. The first was that the fur seals were subject of property and accordingly that rights of ownership could be, and in fact were, vested in the United States.

The second was that owing to the great importance of the industry to the United States and the fact that it had been developed and conserved by United States nationals the United States Government was entitled to exercise a protective jurisdiction over the seals even when on the high seas. The tribunal rejected both these arguments and held that the United States had no right to exercise control over these fisheries when situated outside the limits of United States territorial waters.

The second of the Fur Seal Controversies was that of the Russian-American Fur Seal Claims. This arbitration does not bear directly upon the question of attempts to exercise control over fishing in the high seas, for although the seizures were made upon the high seas it was alleged by the Russian Government that the United States ships were seized because they had previously engaged in unlawful sealing within Russian territorial waters. But the arbitration is interesting in that Russia, in the course of the argument, claimed, in the interests of conservation, to be entitled to exercise a protective jurisdiction over the fur seals—a claim almost identical with that unsuccessfully advanced by the United States in the Bering Sea Arbitration and now advanced by Russia with as little success.

The Fur Seal Arbitrations are the only occasions—the North Atlantic Coast Fisheries Arbitration of 1910 being merely concerned with the interpretation of an existing treaty—where the right to exercise control over high sea fisheries has been the subject of arbitral decision,[29] and in both these arbitrations the exist-

Subjects" (A.CM. 4/8))which, however, cannot be regarded as a statement of the existing international law) the International Law Commission makes a proviso that non-nationals should be "permitted to participate in the fishing activities on an equal footing with nationals."

[27] Mr. Masterson says that this desire to protect the freedom of high seas fisheries was one of the more important factors behind Great Britain's opposition to the United States Hovering Laws of 1922 (see *op. cit. supra* n. 15 at 351).

[28] For an exhaustive treatment of these Arbitrations see L. L. Leonard, *op. cit. supra* n. 6 at 55 ff.

[29] Other cases of conflicts of national interest in relation to high seas fisheries (although in these cases the disputes were resolved by diplomatic correspondence) are the Moray Firth Controversy, the Anglo-French Channel Fishery Dispute (terminating in the Convention of 1839) and the case of the North Sea Fisheries (terminating in the Convention of 1882).

ence of such a right was most emphatically rejected. These arbitrations would seem to establish that a State is not entitled, in the absence of treaty, to extend its jurisdiction to foreign fishing fleets operating on the high seas even although, in the absence of such extension, these operations would render completely ineffectual any attempts which the littoral State might make to ensure conservation of fisheries within its territorial waters.

That claims to exercise control over high seas fisheries are ill founded is demonstrated not so much by these decisions as by the fact that on almost all the occasions when there have been several nations carrying out fishing operations in the one area the nations concerned, although sensitive to the necessity for regulation, have protected their respective interests by entering into bilateral and multilateral treaties and not by the assertion of national claims.[30]

The culmination to date of the attempts at conservation by multilateral convention is seen in the Whaling Agreements.[31] But these agreements, although providing a comprehensive and practical scheme of regulation, demonstrated very forcefully a limitation which is inherent in all such multilateral agreements, for Japan, one of the major whaling nations, adamantly refused to co-operate with the conservation programme. This meant that of all the whaling fleets that of Japan was the only one which did not, in the future interests of the industry, voluntarily reduce the size of its catch, a refusal which not only placed the Japanese whalers in an advantageous position, but one which threatened the success of the whole scheme. This is the great weakness of all multilateral agreements for, of their nature, they are only binding upon the signatories and it only needs the non-participation of one important fishing nation to render the whole agreement abortive.[32]

In this weakness lies a possible justification for the assertion of unilateral conservation measures over high sea fisheries. For it is obvious that there is a pressing need for conservation and it is equally obvious, as was demonstrated by the Whaling Agreements and the dispute between Japan and the United States in 1937 as to the Bristol Bay salmon fisheries, that effective conservation, both of high sea fisheries and of national fisheries in territorial waters, is not possible unless the conservation regulations are to be binding on all the maritime nations. Therefore, unless some international body such as the International Fisheries Office, as suggested by Leonard,[33] is brought into being, or unless there is an increased consciousness on the part of States of their international responsibilities so that they become willing to enter into conservation agreements, the sanction by international law of unilateral conservation measures would seem to be

[30] Included among these agreements are the Anglo-French Channel Convention of 1839, the North Sea Convention of 1882, the Fisheries Convention of 1901 between Denmark and the United Kingdom, the Fur Seal Convention of 1911, the Spitzbergen Convention of 1920, the Halibut Fisheries Treaty of 1923 and the Convention of 1937, the Baltic Sea Convention of 1929 and the Whaling Agreements of 1931, 1937 and 1938. For texts of these treaties and supplementary legislation see *Laws and Regulations on the Regime of the High Seas* (United Nations Legislative Series, vol. 1). For a list of treaties to which Great Britain has been a party see 2 H. A. Smith, *op. cit. supra* n. 15 at 109.

Mr. Leonard points out that there has been a gradual change in the reasons impelling such conventions—the earlier ones being aimed solely at preventing friction between the fishermen of various nationalities, whilst the later were principally designed to ensure conservation.

[31] On these see L. L. Leonard, *op. cit.* 98 ff.

[32] That such schemes are inherently weak even apart from the case where one of the maritime nations refuses to participate is demonstrated by the problems encountered in instituting conservation measures in the Great Lakes, which showed that the whole scheme is only as effectual as the most ineffectual set of regulations of the individual States participating. See *id.* at 118.

[33] *Id.* at 175 ff.

possibly the only solution to the problem of conservation.

But would such measures, in fact, be sanctioned by international law? It is certain that claims to exercise control over high sea fisheries designed merely to create a monopoly for the claimant State would be contrary to international law. But would such claims, particularly when over areas of the high seas adjacent to national fisheries within territorial waters, be justified if their sole object were that of conservation? The Fur Seal Controversies would appear to show that such claims, even if their object is that of conservation, can never be justified, but it is submitted that despite these arbitrations there is some likelihood that such claims might today be recognised.

That the principle of protective jurisdiction was rejected in these arbitrations may perhaps be due not to any inherent deficiency in the principle itself but rather because, in both these cases, the principle was advanced in circumstances which strongly indicated that the real aim of the claims in question was not the conservation of the industry but the creation of a monopoly for the fishermen of the claimant State.[34] Also, it is over half a century since these arbitrations, and in that time not only has the need for conservation become greater but the nations of the world have become increasingly aware that such a need exists; and, as past events have proved other methods of conservation to be at least in some degree ineffective, it is conceivable that today States would be more readily prepared to accept without protest unilateral attempts to institute conservation measures. A strong argument for such acceptance is the fact that from the practical aspect of supervision and control, particularly as most of the high sea fisheries are comparatively close to land, the marginal nation is obviously the best fitted to impose a control which would be in any way effective.

It must be emphasised that any such claims of control, if they are to be justified, must be dictated by a spirit of internationalism and not one of nationalism. The conservation regulations would have to be reasonable and the fishing fleets of other nations could rightfully be excluded only if they refused to submit to those regulations. Unilateral conservation measures, if in fact applied without discrimination on the basis of nationality, would be quite consistent with the principle of the freedom of the high seas, for there is no necessity that such measures should interfere with the freedom of high sea navigation and, if they were truly attempts at conservation and not merely attempts to create a national monopoly, any restrictions they placed upon rights of fishing would be in the best interests of the industry and of all the maritime nations.[35]

That a State is in fact entitled to extend its conservation laws to areas of the high seas would appear to be assumed by the U.S. proclamation of 1945 respecting "Claims to Fisheries in Contiguous Oceanic Zones."[36] This proclamation is to all appearances a genuine attempt at conservation, for it contains the important qualification that nationals of other countries are to be refused access to the conservation zones only if they fail to comply with the United States conservation laws. If it remains unchallenged, this proclamation may well be

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[34] *Id.* at 94.

[35] In the "Draft Articles on the Continental Shelf and Related Subjects", pt. ii, under the heading "Resources of the Sea", the International Law Commission advocates such regulation and control of high seas fisheries by the States whose nationals are engaged in the area. The Articles also state that if the area is within 100 miles of the territorial waters of a coastal State "that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area. In no circumstances, however, may an area be closed to nationals of other States wishing to engage in fishing activities." The Commission also suggested the establishment of a permanent international body. (A/CN.4/48) Note, however, that these Draft Articles cannot be considered as being a formulation of established rules of international law, but are merely in the nature of recommendations.

[36] For text see 40 *Am. J. Int. L.* Supp. 46.

the forerunner of similar claims by other States—claims which could serve to establish as a customary rule of international law that a State is justified or perhaps even bound, to take steps for the conservation of fisheries on the high seas adjacent to its coasts.

But, although there is some indication that in the United States proclamation the first step has been taken towards the recognition of another exception to the principle of the freedom of the high seas, the validity of such step remains at the present a matter of considerable uncertainty. Therefore it would seem expedient for the Australian Government to confine the operation of the Fisheries Act to Australian nationals until more positive proof is provided of the existence of such an exception, either by further unilateral claims or by the continued absence of protest against the United States proclamation. However, an extension of the operation of the Act to include foreign nationals is not at the moment necessary, for Japan, the only nation which has yet entered into any extensive competition with Australian fishermen, is obliged under s. 9 of the Peace Treaty[37] to enter into agreements for the conservation of high sea fisheries; accordingly it should be possible for Australia, by virtue of this provision, to conclude an agreement ensuring the successful conservation of the fisheries involved.*

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THE SUITORS' FUND ACT, 1951 (N.S.W.)

The Suitors' Fund Act, although it received a pacific passage through the Houses of Parliament and has not caused great excitement either among members of the legal profession or the community in general, is nevertheless a legislative innovation of major importance. The principle embodied in the Act is by no means new. It has been enunciated by a number of writers in legal periodicals. It would seem, however, that this Act is the first attempt to translate the principle into a legislative enactment and so give it practical effect.

The principal provisions of the Act are contained in s. 6 (1) and (2) which read as follows:—

> "(1) Where an appeal against the decision of any court on a question of law succeeds, the court determining the appeal may grant to the respondent thereto or to any one or more of several respondents a certificate (hereinafter in this section referred to as an "indemnity certificate").
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> (2) Where a respondent to an appeal has been granted an indemnity certificate, such certificate shall entitle the respondent to be paid from the Fund—
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> (a) the whole of the appellant's costs of the appeal ordered to be paid and actually paid by the respondent;
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> (b) the costs of the appeal incurred by the respondent:
>
> Provided that the amount payable from the Fund pursuant to paragraph (b) of this subsection shall not exceed the amount payable pursuant to paragraph (a) hereof."

Where, therefore, a party to a suit endeavours to support in an appellate court a decision given in a court below but is unsuccessful in that attempt, the superior court holding that the decision in the court below is wrong in law, the unsuccessful respondent may be indemnified for the costs of the appeal out of the fund provided for that purpose.

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[37] Article 9 of the Treaty of Peace provides: "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".

* See Note, *infra* p. 107 on the new Bills introduced Feb. 18, 1953.