

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK;
FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

VOLUME II

1968

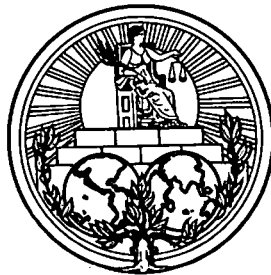
COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK;
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

VOLUME II



SECTION A

DOCUMENTS FILED BY THE PARTIES
ON THEIR OWN INITIATIVE

SECTION A

DOCUMENTS DÉPOSÉS PAR LES
PARTIES SUR LEUR PROPRE INITIATIVE

I. DOCUMENTS FILED BY THE AGENTS FOR THE GOVERNMENTS OF DENMARK AND THE NETHERLANDS¹

Note from the Danish Embassy at Canberra to the Australian Department of External Affairs, Dated 1 July 1968

The Royal Danish Embassy presents its compliments to the Department of External Affairs and with reference to previous correspondence, latest the Department's Note of 18 March 1968 (1558/1/39), has the honour to ask for the Department's assistance in connection with problems arising out of the proceedings in the International Court of Justice for the delimitation of the continental shelf between the Netherlands and the Federal Republic of Germany, on the one hand, and Denmark and the Federal Republic of Germany on the other.

As a consequence of the German "Reply" during the proceedings, the question of the Australian delimitation of the continental shelf has become of even greater importance. The German Reply considers the delimitation between the Australian States an example of a deviation from the principle of equidistance. In an "Annex" regarding the delimitation it is thus stated:

"22 November 1967

The Commonwealth of Australia

Note: This is an example of international law as applied between the individual States of a Federation. Whether the Australian continental shelf is subjected to the jurisdiction of the individual States or the Federation appears to be a controversial issue. The boundary lines in the following Act based on agreements between the States concerned differ largely from equidistance, particularly as the frontier between Victoria and South Australia is concerned. Petroleum (Submerged Lands) Act, 1968 (entered into force on 1 April 1968)."

Based on the valuable material already received through this Embassy from the Department of External Affairs, the Danish Ministry of Foreign Affairs has advised the Government's Legal Adviser, Sir Humphrey Waldock, Palais des Nations, Place des Nations, Geneva, as per attached copy of letter with enclosure. However, the Embassy has been instructed to approach the Department of External Affairs in order to obtain the adequate replies to the following questions:

1. On which principles has the remaining Australian delimitation of the continental shelf in relation to foreign States, i.e., Indonesia, including the Island of Timor, and probably also New Zealand been based? Has this or these delimitations been made unilaterally or according to an agreement with the country or countries concerned?

2. What principles of delimitation between the individual Australian States and between Australia and her "Territories" have been fundamental for the negotiations referred to in the "Hansard" (18 October 1967, House of Representatives) page 1945 (copy of which is enclosed) as having in some cases "presented delicate political problems"?

¹ See Nos. 39 and 40, pp. 385 and 386, *infra*.

If the principle of equidistance has been taken as a starting point during the negotiations for settling the delimitation, it is furthermore of great interest to be advised about the reasons why this principle has in some individual cases been subject to deviation, e.g., in the delimitation between Western Australia and South Australia where the continental shelf boundary seems to run as an extension of the State boundary, parallel to the 130th longitude.

If an Australian map showing the lines of equidistance as such, as well as the actual boundaries of the continental shelf is at hand, such map would be of great interest.

Unfortunately, it has to be pointed out that a reply to the questions raised above is considered very urgent as the Danish "Rejoinder" is already under preparation.

While expressing in advance its appreciation of the assistance in this matter, the Royal Danish Embassy avails itself of this opportunity to renew to the Department of External Affairs the assurances of its highest consideration.

Canberra, 1 July 1968.

Note from the Australian Department of External Affairs to the Royal Danish Embassy in Australia, Dated 3 September 1968

The Department of External Affairs presents its compliments to the Royal Danish Embassy and has the honour to refer to the Embassy's Note No. 23 of 1 July 1968, concerning the Australian practice in relation to the delimitation of the continental shelf.

Australia does not have a common continental shelf with New Zealand or with the Island of Timor. A common shelf exists between West Irian and Australia and West Irian and the Territories of Papua and New Guinea and boundaries for petroleum purposes in these localities have been defined unilaterally on the principle of equidistance and by median lines as mentioned in the Convention on the Continental Shelf. There is also a common shelf between the Island of Bougainville and the British Solomons. In this locality the boundary has been defined in a similar manner.

The principles of the Convention on the Continental Shelf were not regarded as being applicable to the fixing of continental shelf boundaries for petroleum purposes between one Australian State and another or between an Australian State and an Australian Territory. The Convention principles were merely taken as a guide for these purposes.

The median and equidistance principles were used in the following cases:

- (a) between the State of Western Australia and the Northern Territory of Australia;
- (b) between the State of Western Australia and the Territory of Ashmore and Cartier Islands, and
- (c) between the State of Queensland and the Northern Territory of Australia.

(In the case of (c), part of the boundary was agreed at lines of five minutes of arc of latitude and longitude approximating the line of equidistance.)

In cases other than those mentioned in the immediately preceding paragraph the continental shelf boundaries for petroleum purposes between the Australian States and between a State and a Territory were fixed having regard to convenience and a variety of other purely local and domestic considerations that do not appear to provide any useful guide for the purposes of the proceedings in the International Court of Justice. For the Embassy's information, deviations from the median and equidistance principles have been agreed upon as follows:

- (a) between the State of Queensland and the State of New South Wales—an agreed line that is a compromise between the prolongation of the land boundary and the line of equidistance;
- (b) between the State of New South Wales and the State of Victoria—an agreed line that approximates to the line of equidistance;
- (c) between the State of Victoria and the State of Tasmania—in part an agreed line that is identical with the "Letters Patent Line" (see note below) for those States, with extensions to the south-west and the south-east which approximate to a median line between the States;
- (d) between the State of Victoria and the State of South Australia—an agreed line that is a compromise between the prolongation of the land boundary and the line of equidistance;

- (e) between the State of South Australia and the State of Western Australia—an agreed line that is a prolongation of the land boundary; and
- (f) between the State of Queensland and the Territory of Papua—an agreed line that commences in the west as a median line, then in the Torres Strait is the "Letters Patent Line" (see note below) for the State (a median line would cross and recross this line) and then further east, in the Gulf of Papua, is the southern boundary of petroleum exploration titles granted under Territory legislation that were current at the time of agreement.

The "Letters Patent Line" referred to under (c) and (f) above is the line fixed by executive action many years ago for the sole purpose of determining the State of Territory to which certain islands off Australia belong.

The Department regrets that maps showing the median lines and lines of equidistance in relation to the boundaries referred to above are not available.

In order to avoid confusion with regard to the scope of the Australian offshore petroleum legislation, the Department believes that it might be useful to bring to the Embassy's attention certain observations with respect to the Second Schedule of the Act that were made by the Minister for National Development and the Attorney-General in the House of Representatives on 18 and 26 October 1967 respectively. These appear in the Hansards for those days at pages 1946 (first column) and 2379 (second column) and make it clear that the Act applies only to so much of the submerged lands within the areas described in the Second Schedule as have the character either of territorial seabed or of continental shelf within the meaning of the Geneva Convention.

The Department of External Affairs avails itself of this opportunity to renew to the Royal Danish Embassy the assurance of its highest consideration.

CANBERRA A.C.T.
31 September 1968.

*Extract from the Australian House of Representatives Hansard,
18 October 1967, Page 1946*

This is the effect of the Petroleum (Ashmore and Cartier Islands) Bill.

I should make the point here that the areas outlined by the dotted lines on the illustrative maps are not all continental shelf. The approach which we have adopted has been to enclose comparatively large areas which are described in detail in the Second Schedule to the Bill. However, the Bill specifically applies only in relation to exploration for, and exploitation of, the petroleum resources of such submerged lands included in the areas described as have the character, either of seabed and subsoil beneath territorial waters or of continental shelf within the meaning of the International Convention. This scheme which we have adopted has a dual purpose. Firstly, it permits Australia to take advantage of the provisions of the Convention regarding exploitability. As technology advances, and exploitation in greater depths becomes possible the outer limits of the shelf for the purpose of this Bill are automatically adjusted.

Secondly, it is essential in these adjacent areas where petroleum operations are undertaken, to have applying a general body of law such as an appropriate criminal code, provision for workmen's compensation, for navigational safety, and the like. It will be noted that Part II of the Bill deals specifically with this question of application of laws. In brief, it provides that the provision of the laws in force in a State or Territory and as in force from time to time, apply in the adjacent area. This will cover, as appropriate, not only State laws and Territory Ordinances but also Commonwealth laws.

I come now to Part III of the Bill dealing with mining for petroleum. This is the Common Mining Code referred to in the Commonwealth-State Agreement. It has been worked out by the States and the Commonwealth in conjunction. As I said earlier in the devising of the code we sought to be both realistic and forward-looking. We have been assisted by comments, criticisms and suggestions made by the offshore petroleum industry following the initial statement to all seven Parliaments in November 1965. One of the purposes of that initial statement was to make known to the companies concerned in offshore work what ground rules the Governments had in mind. Thus not only would there be no misunderstanding when the actual legislation was introduced, but also the industry had the opportunity of expressing its views. I say at once that the legislation has been improved as a result of the co-operation which we have received from the industry.

I now seek leave to incorporate in Hansard, as part of my second reading speech, a statement outlining the more important provisions of the Common Mining Code as set out in the seven Bills. The statement also makes appropriate cross references to relevant clauses in the Commonwealth-State Agreement.

Mr. DEPUTY SPEAKER (Mr. LUCOCK)—There being no objection, leave is granted.

Mr. FAIRBARN—The administration of the Mining Code in respect of each adjacent area will, as provided by clause 9 of the Agreement, be in the hands of a designated authority. Provision is made in Division 1, clause 15, of the Mining Code for the appointment of designated authorities by arrangement between the Governor-General and the Governor of a State. In the case of States it is intended that the designated authority will be the Minister for

Mines and indeed this Minister is so nominated in each of the State Bills. In the case of Territories of the Commonwealth, the designated authority will be my colleague, the Minister for Territories. I understand that it is my colleague's intention to execute an instrument of delegation so that the administration of the legislation in the Northern Territory and in Papua and New Guinea will be through the Territory Administrations.

The crux of the inter-relationship between the States and the Commonwealth is contained in clause 11 of the Agreement. In brief this clause provides that in the administration of the Common Mining Code the States will consult the Commonwealth on all aspects which may affect the Commonwealth's own special responsibilities under the Constitution. The arrangement covers matters such as defence, external affairs, trade and commerce with other countries, and among the States, immigration, customs, navigation and so on.

*Extract from the Australian House of Representatives Hansard,
26 October 1967, Page 2379*

national fuel policy and a national fuel board. We are only getting to the stage where we have national fuel. If the necessity arises for the institution of a national fuel board then the Commonwealth has reserved powers under which it can step in and adopt this mode of dealing with the situation.

Other provisions of Part III of the Agreement are for the most part concerned with administrative matters of a day to day character and I refer to them only for the purpose of observing that a proper balance of all interests—the interests of smooth administration on the one hand and the interests of a Commonwealth and national character on the other—have been maintained. The provisions relating to sharing of royalties, under which the Commonwealth receives a substantial part of the standard royalty, have already been referred to by my colleague. But perhaps I should point out, in view of the attack about selling out that was made by the honourable member for Cunningham, that the Commonwealth Parliament still retains its taxation powers; it will be a partner to the extent of 42½ per cent. of profits; it will take its excise; and it will take its royalties. To describe the scheme as being unbalanced in some fashion shows that the matter has not been fully considered from the financial aspect.

I invite the attention of honourable members to Part II of the principal Bill and I say that it is not enough simply to set up a mining code. The continental shelf is not actually part of Australian territory. We have to provide a full system of law. It cannot be assumed that any part of the law of the adjoining State will apply. For instance, in relation to crime, workers' compensation or civil claims there is no applicable law unless we make a law applicable. Part II covers these matters.

This will not be the first occasion on which the Commonwealth and State parliaments have co-operated in producing a joint legislative scheme but there are features in the present scheme which are not matched exactly by anything we have achieved before. This has called for some drafting ingenuity. I mentioned that the two sets of laws, Commonwealth and State, will each confer powers on designated authorities. By the same token, it has been necessary in a scheme such as this, to devise provisions that will avoid the incurring of double liabilities and obligations, for example, in respect of the payment of royalties. Special provision has had to be made in relation to the exercise of rights, privileges and powers under both the general law and the Common Code, and also in relation to the extinguishing of causes of action. These various matters are provided for by clause 128 and by a group of short, but legally important provisions in the last part of the Petroleum (Submerged Lands) Bill.

One other difficulty has been with the convention and the reference to the seabed. This is the convention on the continental shelf and on subsoil adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres, or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said submarine areas. The outer limit is determined as the point where it is possible with your capacity to go to exploit resources. This capacity will increase with technical advancement and thus the limits advance outwards. The outer limit today may not be

the outer limit tomorrow. This presents the draftsmen of an Act such as this with a problem. The Bill was drafted on the basis of application to "areas". The device adopted was to draw the series of "picture frames" that honourable members will see in the maps contained in the booklet which has been distributed. The legislation makes it clear, and this is recognised by notations on the maps themselves, that the legislation will apply only to so much of the submerged lands within a particular frame as has the character either of territorial seabed or of continental shelf within the meaning of the convention with its varying limits.

In all cases where Australian territory is opposite or adjacent to the territory of another country, regard has been had, and will be had, to the relevant principles relating to delimitation of a country's continental shelf. This would apply as between Australia and Portuguese Timor and Australia and Indonesia. I think no comment is needed from me on the domestic boundaries between State and State, and between State and Territory. These have . . .

II. DOCUMENT FILED BY THE AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY¹

(Translation)

Complications of a Border Dispute

by S. E. Werners, *The Hague (From the Netherlands Juristenblad, 1968 No. 9, pages 224 and 225, 2 March 1968)*

"One of the questions over which the Surinamese and Guyanese Governments have been at variance for years is the delimitation of the continental shelf between the two countries. As the issue involves problems that lie in the international sphere, according to Article 3, paragraph 1b, of the Statute the Kingdom of the Netherlands is obliged to take action in this matter. An examination of this question from the legal aspect reveals one or two complications that are interesting enough for consideration here.

The Surinamese argument is that the border between the territorial sea and the continental shelf with Guyana is a line (Note: *interrupted line* in the attached map²; the *black line* is the equidistance line claimed by Guyana) running ten degrees coastwards of true north in extension of the western border of the Corantijn River. Guyana, however, has always invoked the principle of equidistance as laid down in the Geneva Convention on the Continental Shelf concluded in Geneva on 29 April 1958. It was determined at that conference that the delimitation of the continental shelf for adjacent or opposite coastal States should be laid down by means of an agreement between those States, but that if no agreement existed and there were no special circumstances justifying any other border the latter should be determined by applying the equidistance line drawn from the nearest points of the baselines from which the width of the territorial seas of the States concerned is measured.

It is well known that the Netherlands, in casu the Kingdom of the Netherlands, has for many years based its claims against neighbouring countries to the continental shelf of the North Sea on the same principle as Guyana. True, negotiation with the Federal Republic of Germany led in 1964 to the conclusion of the treaty between the two countries, but Article 2 of that treaty expressly lays down that its provisions do not influence the question of the course of national boundaries in the Ems estuary. Both contracting parties reserve their legal standpoints in this respect. Similarly, subsequent negotiations between the two countries did not lead to any settlement, and in the communiqué issued by the International Court of Justice No. 67/1 of 21 February 1967 it was stated that the Court had been asked to give a decision on this legal dispute.

There is no doubt that the Kingdom of the Netherlands will put forward strong arguments to try and convince the Court that it is in the right. In all probability it can be assumed that the Kingdom, in its Counter-Memorial of 20 February 1968³, will defend the equidistance principle in favour of the Netherlands with forceful arguments. The Federal Republic of Germany, if

¹ See p. 47, *supra*, and Nos. 41, 43 and 44, pp. 386, 387 and 388, *infra*.

² See p. 48, *supra*.

³ See I, pp. 307-388.

it has not already done so, will certainly not omit to invoke special circumstances which the convention recognizes as exceptional grounds. If, during the evaluation of these divergent legal standpoints by the International Court of Justice, Surinam or the Kingdom of the Netherlands, too, were to ask the Court for a decision—a step which would be welcome—then a collision of the interests of parts of the Kingdom would be almost unavoidable. This matter will call for closer study in its wider context at the appropriate time.

In conclusion, it is to be hoped that these complications will not be circumvented by the expulsion of Guyanese citizens by the Surinamese Government, which could cause considerable harm to international legal order as well as good neighbourly relations between these two South American countries.”