



NOTE BY THE SECRETARY-GENERAL

1. At its first session in 1949, the International Law Commission selected the topic of the regime of the high seas for codification and gave it priority. It also appointed Mr. J. P. A. François as special rapporteur on this topic.
2. The special rapporteur presented a first report (A/CN.4/17) at the second session of the Commission in 1950. The Commission had also before it replies from some Governments (A/CN.4/19, Part I, C) to a questionnaire circulated to them. After consideration of the first report together with these replies, the Commission selected a number of subjects pertaining to the regime of the high seas and requesting the special rapporteur to formulate concrete proposals with respect to them.
3. At the third session of the Commission in 1951, the special rapporteur submitted a second report (A/CN.4/42). On the basis of the proposals submitted in this report, the Commission prepared draft articles on the subject of the continental shelf and on certain related subjects, namely, conservation of the resources of the sea, sedentary fisheries and contiguous zones. The Commission further decided to give to its draft the publicity referred to in Article 16, paragraph (g), of its Statute and to communicate the draft to Governments so that they could submit their comments as envisaged in paragraph (h) of the same article. The text of the draft articles and commentaries thereon are contained in the present document.

DRAFT ARTICLES

ON THE CONTINENTAL SHELF AND RELATED SUBJECTS PREPARED BY THE INTERNATIONAL LAW COMMISSION

Part I. Continental shelf

Article 1

As here used, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil.

1. This article explains the sense in which the term "continental shelf" is used for present purposes. It departs from the geological concept of that term. The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of the problem.

2. There was yet another reason why the Commission decided not to adopt the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in respect of submarine areas where the depth of the sea would nevertheless permit exploitation of the subsoil in the same way as if there were a

continental shelf, could not justify the application of a discriminatory legal system to these "shallow waters".

3. The Commission considered whether it ought to use the term "continental shelf" or whether it would not be preferable, in accordance with an opinion expressed in some scientific works, to refer to such areas merely as "submarine areas". It was decided to retain the term "continental shelf" because it is in current use and because the term "submarine areas" used alone would give no indication of the nature of the submarine areas in question.

4. The word "continental" in the term "continental shelf" as here used does not refer exclusively to continents. It may apply also to islands to which such submarine areas are contiguous.

5. With regard to the delimitation of the continental shelf the Commission emphasizes the limit expressed in the following words in article 1: "... where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil". It follows that areas in which exploitation is not technically possible by reason of the depth of the waters are excluded from the continental shelf here referred to.

6. The Commission considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seems likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 metres would at present be sufficient for all practical needs. This depth also coincides with that at which the continental shelf, in the geological sense, generally comes to an end and the continental slope begins, falling steeply to a great depth. The Commission felt, however, that such a limit would have the disadvantage of instability. Technical developments in the near future might make it possible to exploit resources of the sea-bed at a depth of over 200 metres. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 metres but capable of being exploited by means of installations erected in neighbouring areas where the depth does not exceed this limit. Hence the Commission decided not to specify a depth-limit of 200 metres in article 1. The Commission points out that it is not intended in any way to restrict exploitation of the subsoil of the sea by means of tunnels driven from the main land.

7. The Commission considered the possibility of fixing both minimum and maximum limits for the continental shelf in terms of distance from the coast. It could find no practical need for either, and it preferred to confine itself to the limit laid down in article 1.

8. It was noted that claims have been made up to as much as 200 miles; but as a general rule the depth of the waters at that distance from the coast does not admit of the exploitation of the natural resources of the subsoil. In the opinion of the Commission, fishing activities and the conservation of the resources of the sea should be dealt with separately from the continental shelf (see part II below).

9. The continental shelf referred to in this article is limited to submarine areas outside territorial waters. Submarine areas beneath territorial waters are, like the waters above them, subject to the sovereignty of the coastal State.

10. The text of the article emphasizes that the continental shelf includes only the sea-bed and subsoil of submarine areas, and not the waters covering them (see article 3).

Article 2

The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.

1. In this article the Commission accepts the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose stated. The article excludes control and jurisdiction independently of the exploration and exploitation of the natural resources of the sea-bed and subsoil.

2. In some circles it is thought that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal States, but to agencies of the international community generally. In present circumstances, however, such internationalization would meet with insurmountable practical difficulties, and it would not ensure the effective exploitation of the natural resources which is necessary to meet the needs of mankind. Continental shelves exist in many parts of the world; exploitation will have to be undertaken in very diverse conditions, and it seems impracticable at present to rely upon international agencies to conduct the exploitation.

3. The Commission is aware that exploration and exploitation of the sea-bed and subsoil, which involve the exercise of control and jurisdiction by the coastal State, may to a limited extent affect the freedom of the seas, particularly in respect of navigation. Exploration and exploitation are permitted because they meet the needs of the international community. Nevertheless, it is evident that the interests of shipping must be safeguarded, and it is to that end that the Commission has formulated article 6.

4. It would seem to serve no purpose to refer to the sea-bed and subsoil of the submarine areas in question as *res nullius*, capable of being acquired by the first occupier. That conception might lead to chaos, and it would disregard the fact that in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which the submarine areas are contiguous.

5. The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine areas in question would be practically impossible; nor should recourse be had to a fictional occupation. The right of the coastal State under article 2 is also independent of any formal assertion of that right by the State.

6. The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2. Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community.

7. Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters.

Article 3

The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas.

Article 4

The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the airspace above the superjacent waters.

The object of articles 3 and 4 is to make it perfectly clear that the control and jurisdiction which may be exercised over the continental shelf for the limited purposes stated in article 2 may not be extended to the superjacent waters and the airspace above them. While some States have connected the control of fisheries and the conservation of the resources of the waters with their claims to the continental shelf, it is thought that these matters should be dealt with independently (see part II below).

Article 5

Subject to the right of a coastal State to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the exercise by such coastal State of control and jurisdiction over the continental shelf may not exclude the establishment or maintenance of submarine cables.

1. It must be recognized that in exercising control and jurisdiction under article 2, a coastal State may adopt measures reasonably connected with the exploration and exploitation of the subsoil, but it may not exclude the laying of submarine cables by non-nationals.

2. The Commission considered whether this provision should be extended to pipelines. If it were decided to lay pipelines on the continental shelf of another country, the question would be complicated by the fact that pumping stations would have to be installed at certain points, and these might hamper the exploitation of the subsoil more than cables. Since the question does not appear to have any practical importance at the present time, and there is no certainty that it will ever arise, it was not thought necessary to insert a special provision to this effect.

Article 6

(1) The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing. Due notice must be given of any installations constructed, and due means of warning of the presence of such installations must be maintained.

(2) Such installations shall not have the status of islands for the purpose of delimiting territorial waters, but to reasonable distances safety zones may be established around such installations, where the measures necessary for their protection may be taken.

1. It is evident that navigation and fishing on the high seas may be hampered to some extent by the presence of installations required for the exploration and exploitation of the subsoil. The possibility of interference with navigation and fishing on the high seas could only be entirely avoided if the subsoil could be exploited by means of installations situated on the coast or in territorial waters; in most cases, however, such exploitation would not be practicable. Navigation and fishing must be considered as primary interests, so that the exploitation of the subsoil could not be permitted if it resulted in substantial interference with them. For example, in narrow channels essential for navigation, the claims of navigation should have priority over those of exploitation.

2. Interested parties, i.e., not only governments but also groups interested in navigation and fishing, should be duly notified of the construction of installations, so that these may be marked on charts. Wherever possible, notification should be given in advance. In any case, the installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.).

3. The responsibility for giving notification and warning, referred to in the last sentence of paragraph (1) of this article, is not restricted to installations set up on regular sea lanes. It is a general duty devolving on States regardless of the place where such installations are situated.

4. While an installation could not be regarded as an island or elevation of the sea-bed with territorial waters of its own, the coastal State might establish narrow safety zones encircling

it. The Commission felt that a radius of 500 metres would generally be sufficient, though it was not considered advisable to specify any definite figure.

Article 7

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.

1. Where the same continental shelf is contiguous to the territories of two or more adjacent States, the drawing of boundaries may be necessary in the area of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States, and no general rule exists for such boundaries. It is proposed therefore that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*. The term "arbitration" is used in the widest sense, and includes possible recourse to the International Court of Justice.

2. Where the territories of two States are separated by an arm of the sea, the boundary between their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration.

Part II. Related subjects

RESOURCES OF THE SEA

Article 1

States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert; if the nationals of only one State are thus engaged in a given area, that State may take such measures in the area. If any part of an area is situated 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.

Article 2

Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves.

1. The question of conservation of the resources of the sea has been coupled with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to

be quite distinct, and for this reason they have been separately dealt with.

2. Protection of marine fauna against extermination is called for in the interests of safeguarding the world's food supply. The States whose nationals carry on fishing in a particular area have therefore a special responsibility, and they should agree among them as to the regulations to be applied in that area. Where nationals of only one State are thus engaged in an area, the responsibility rests with that State. However, the exercise of the right to prescribe conservatory measures should not exclude newcomers from participation in fishing in any area. Where a fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even though its nationals do not fish in the area.

3. This system might prove ineffective if the interested States were unable to reach agreement. The best way of overcoming the difficulty would be to set up a permanent body which, in the event of disagreement, would be competent to submit rules which the States would be required to observe in respect of fishing activities by their nationals in the waters in question. This matter would seem to lie within the general competence of the United Nations Food and Agriculture Organization.

4. The pollution of waters of the high seas presents special problems, not only with regard to the conservation of the resources of the sea but also with regard to the protection of other interests. The Commission noted that the Economic and Social Council has taken an initiative in this matter (resolution 298 C (XI), of 12 July 1950).

5. The Commission discussed a proposal that a coastal State should be empowered to lay down conservatory regulations to be applied in a zone contiguous to its territorial waters, pending the establishment of the body referred to in paragraph 3. Such regulations would as far as possible have to be drawn up in agreement with the other States interested in the fishing grounds in question. They would make no distinction between the nationals of the various States, including the coastal State. Any disputes arising out of the application of the rules would have to be submitted to arbitration. The figure of 200 sea miles was

suggested as the breadth of the zone. In view of the fact that there was an equality of votes concerning the desirability of this proposal, the Commission decided to mention it in its report without sponsoring it.

SEDENTARY FISHERIES

Article 3

The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas.

1. The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas, in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g., stakes embedded in the sea-floor. This distinction justifies a division of the two problems.

2. Sedentary fisheries can give rise to legal difficulties only where such fisheries are situated beyond the outer limit of territorial waters.

3. Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, have been regarded by some coastal States as under their occupation and as forming part of their territory. Yet this has rarely given rise to complications. The Commission has avoided referring to such areas as "occupied" or "constituting property". It considers, however, that the special position of such areas justifies special rights being recognized as pertaining to coastal States whose nationals have been carrying on fishing there over a long period.

4. The special rights which the coastal State may exercise in such areas must be strictly limited to such rights as are essential to achieve the ends in respect of which they are recognized. Except for the regulation of sedentary fisheries, the waters covering the sea-bed where the fishing grounds are located remain subject to the régime of the high seas. The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal State, should continue to apply.

CONTIGUOUS ZONES

Article 4

On the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to

prevent the infringement, within its territory or territorial waters, of its customs, fiscal or sanitary regulations. Such control may not be exercised more than twelve miles from the coast.

1. International law does not prohibit States from exercising a measure of protective or preventive jurisdiction for certain purposes over a belt of the high seas contiguous to its territorial waters, without extending the seaward limits of those waters.

2. Many States have adopted the principle of a high sea zone contiguous to territorial waters, where the coastal State exercises control for customs and fiscal purposes, to prevent the infringement of the relevant laws within its territory or territorial waters. In the Commission's view it would be impossible to challenge the right of States to establish such a zone. However, there may be doubt as to the extent of the zone. To ensure as far as possible the necessary uniformity, the Commission is in favour of fixing the breadth of the zone at twelve nautical miles measured from the coast, as proposed by the Preparatory Committee of The Hague Codification Conference (1930). It may be, however, that in view of the technical developments which have increased the speed of vessels, this figure is insufficient. A further point is that until such time as there is unanimity in regard to the breadth of territorial waters, the zone should invariably be measured from the coast and not from the outer limit of territorial waters. The States which have claimed extensive territorial waters have in fact less need of a contiguous zone than those which have been more modest in their delimitation.

3. Although the number of States which claim a contiguous zone for the purpose of sanitary regulations is fairly small, the Commission believes that, in view of the connexion between customs and sanitary regulations, the contiguous zone of twelve miles should be recognized for the purposes of sanitary control as well.

4. The proposed contiguous zones are not intended for purposes of security or of exclusive fishing rights. In 1930, the Preparatory Committee of the Codification Conference found that the replies from governments offered no prospect of reaching agreement to extend beyond territorial waters the exclusive rights of coastal States in the matter of fishing. The Commission considers that in that respect the position has not changed.

5. The recognition of special rights to the coastal State in a zone contiguous to its territorial waters for customs, fiscal and sanitary purposes would not affect the legal status of the airspace above such a zone. Air traffic control may necessitate the establishment of an air zone over which a coastal State may exercise control. This problem does not, however, come within the régime of the high seas.