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FOURTH REPORT

on

THE REGIME OF THE HIGH SEAS

The continental shelf and related subjects

by

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Rapporteur

53-04498

(137 p.)

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Chapter I

INTRODUCTION

At its third session the International Law Commission decided to give its draft on the continental shelf and related subjects the publicity referred to in article 16, paragraph (g), of its Statute (Report of the Commission covering the work of its third session, Official records of the General Assembly: sixth session, supplement No. 9, A/1858, paragraph 78 and annex; also A/CN.4/49).

In pursuance of this decision, the Secretary-General communicated the Commission's request to the governments of all Members of the United Nations by a circular letter dated 28 November 1951.

By 4 August 1952, the Secretary-General had received comments on the above-mentioned draft articles from the governments of fourteen States Members of the United Nations. These observations were reproduced in documents A/CN.4/55 and Addenda 1 to 4.

At its fourth session, the International Law Commission deferred consideration of these replies to its fifth session and invited those governments which had not yet submitted their comments to do so within a reasonable time.

By 1 January 1952 the Secretary-General had received comments from the governments of sixteen Member States in reply to this invitation (Addenda 5...). In accordance with article 16 of its Statute the Secretary-General gave the Commission's draft all necessary publicity.

The International Bar Association discussed the International Law Commission's draft at its conference held in Madrid from 16 to 25 July 1952. Reports were submitted by Messrs. de Azcarraga, Enomoto, Gidel, Menzel and Vallat.

The International Law Association discussed this draft at its conference held at Lucerne from 31 August to 6 September. At the request of the Executive Council of the Association, the special rapporteur had transmitted to the conference a progress report, dated 6 June 1952, on the work on the problem of the continental shelf, and he supplemented this report orally during the session at Lucerne. As a result of the discussion, the Executive Council decided to set up a commission under the chairmanship of Professor C.H.M. Waldock to examine the subject, particularly in its technical and legal aspects, taking into careful consideration the most valuable work of the International Law Commission of the United Nations.

The first Hispano-Luso-American Congress, which met in Madrid from 2 to 12 October 1951, also dealt with the question of the continental shelf, though this problem was not on its agenda. At this Congress, which was presided over by Professor Barbosa de Magalhaes, of Portugal, Mr. Lucio M. Moreno Quintana, of Argentina, submitted the following draft resolution on the territorial sea and the continental shelf:

> "When the territory of a State extends beneath the sea as the continental shelf, the territorial sea shall extend from low-water mark for the entire extent of the aforesaid shelf. Where there is an 'epicontinental sea', the contiguous zone shall be measured from its outer limit."

After this proposal had been discussed in the competent commission and at one of the plenary meetings of the congress, it was decided to defer the question until the following meeting, which will be held at Sao Paulo (Brazil) in October 1953.

The matter was also taken up by the Inter-American Bar Association at its seventh session, reports being submitted by Mr. Joseph Walter Bingham, by Mr. Henry F. Holland and by Mr. Alvaro Alvarez Gilardoni, Mr. Pedro Fernandez y Fernandez and Mr. Osvaldo Soriano Mesia, of Uruguay. These three reports merely deal with part of the governmental material and propose resolutions similar to those drafted by the International Law Commission of the United Nations. The Congress took no decision and deferred the question to the next session.1/

The International Law Commission's draft was analysed very thoroughly in "The Continental Shelf", by Captain M.W. Mouton, a book awarded the Grotius Prize of the Institute of International Law on the unanimous recommendation of a jury composed of Messrs. Gidel and Lauterpacht and the author of this report. A book by Mr. de Azcarraga, La plataforma submarina y el derecho internacional, was awarded an honourable mention, and has been published in Spanish (1952).

A bibliography covering the period from the Commission's third to its fifth session is appended to this report; however, very few authors have examined the Commission's draft in detail.

1/ Azcarraga. La plataforma submarina, p. 154.

Lastly, the rapporteur would draw attention to an arbitral decision in which the International Law Commission's draft articles were examined. This was an arbitration case between Petroleum Development (Trucial Coast) Ltd. and His Excellency Sheikh Shakhbut bin Sultan La'id, Sovereign of Abu Dhabi and its Dependencies. The sole arbitrator was the Right Hon. Lord Asquith of Bishopstone; the proceedings were held from 21 to 28 August 1951.

In its report on the work of its fourth session the International Law Commission invited the rapporteur to study all replies from governments as well as comments brought about by the publication of the draft articles, and to submit to the Commission, at its sixth session, a final report on the continental shelf and related subjects, so that the Commission might, after considering and modifying it so far as might be deemed necessary, adopt it with a view to submission to the General Assembly.

In response to that invitation, the rapporteur has the honour to submit this report to the Commission. His observations are prefaced by a conspectus of the comments elicited by the paragraphs of the Commission's report. He has been obliged to confine himself to relatively brief citations; for complete information on the content of the suggestive observations made by the various governments and commentators, their replies and comments should be read in extenso.

The rapporteur possesses only a provisional record, drawn up by the conference secretariat, of the discussions during the International Law Association's meeting at Lucerne. In presenting the summaries of the various statements, therefore, he does not vouch for their accuracy.

The page-numbers after the author's names refer to works cited in the bibliography.

CHAPTER II

SUMMARY OF COMMENTS ON THE DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS

A. Appraisal of the Commission's report as a whole

BRAZIL

The Brazilian Government wishes to praise the Commission for the thoroughness and quality of the research it undertook on such a new and controversial matter, where customary law and international practice are still lacking. The Brazilian Government accepts, in principle, the conclusions reached by the International Law Commission, embodied in the draft articles, and regards them as a very valuable contribution for the future definition of the international regime of the continental shelf.

CHILE

The Government of Chile congratulates the Commission on having prepared draft articles on the highly-specialized subject of the continental shelf.

This Government, however, feels bound to object to some of the provisions of these draft articles, particularly in regard to:

(1) the legal concept of the continental shelf;

(2) the nature of the rights which may be exercised by a State over the submarine shelf adjacent to its territory;

(3) the legal status of the waters overlying the sea-bed and subsoil; and

(4) subjects related to the continental shelf.

DENMARK

The draft is considered a proper basis for negotiations on this subject. It is considered particularly valuable that it has succeeded in obviating the difficulties involved by the controversial question of the extent of territorial waters. By refraining from fixing any definite geographical limit to the extent of the shelf into the sea, differences of opinion have been precluded on that point. The avoidance of any reference to sovereignty in the established sense of the word is another useful aspect of the draft which refers only to an exclusive right to exploration and exploitation without involving, for instance, the question of the status of such areas during conditions of war and neutrality..

The media through which the draft thus reaches a practicable arrangement cannot, however, be considered a final solution to the problems as far as Denmark is concerned.

ECUADOR

The concept of the continental shelf or continental platform, as contained in this article, is qualified by two conditions: that the shelf be outside the area of territorial waters, and that it admit of the exploitation of the sea-bed and subsoil.

This concept is not entirely in accord with articles 1 and 2 of the Legislative Decree of 6 November 1950 approved by the National Congress of Ecuador, which does not subject the continental shelf to these two conditions.

ISRAEL

The Government of Israel is constrained to note with surprise that it is now asked to submit its comments from the point of view of progressive development, and not from that of codification. This absence of clarity is the more to be regretted having regard for the valuable preliminary work which has been performed in this sphere by the International Law Commission and its special rapporteur, Professor Francois, as well as by the Secretariat.

NETHERLANDS

The Netherlands Government endorses the principles underlying the rules proposed by the International Law Commission.

NORWAY

The draft articles make a sharp distinction between the rights of the coastal State over the resources of the sea-bed and subsoil on the one hand and of its rights over the fishery resources of the superjacent waters on the other. But are there any reasons for making such a sharp distinction? The commentaries of the draft articles do not explain in a convincing way why this should be necessary...it is not at all certain that it will be appropriate to establish a particular set of rules for the continental shelf.

PHILIPPINES

In general, the text of the draft articles and commentaries thereon are well-drawn and well elucidated.

YUGOSLAVIA

As a principle, the Government of the FPRY accepts the idea of establishing the "continental shelf" under which the coastal States would have certain specified rights and duties. It also expresses its recognition to the International Law Commission for its endeavours in this regard. As to the details, however, the Government of the Federal People's Republic of Yugoslavia does not agree with some provisions of the said draft...

ICELAND

The Icelandic Government is unable to agree with these views... The Commission has not yet circulated its report on the question of territorial waters. Nevertheless, in its report on the regime of the high seas it seems to have prejudiced the issue. For in Part I, Article 1, of its draft, the Commission seems to have taken for granted that the "continental shelf", as defined by it, is situated outside territorial waters. And how far do territorial waters extend? The Commission does not say...

The Icelandic Government considers itself entitled and indeed bound to take all necessary steps on a unilateral basis to preserve these resources and is doing so as shown by the attached documents. It considers that it is unrealistic that foreigners can be prevented from pumping oil from the continental shelf but that they cannot in the same manner be prevented from destroying other resources which are based on the same sea-bed.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

In the opinion of Her Majesty's Government the draft articles on the continental shelf and related subjects contained as an Annex to Chapter VII (Régime of the High Seas) of the report of the ILC covering its third session, are a credit to the Commission and a valuable contribution towards the codification of the law of the sea...

Her Majesty's Government also note that at its second session the Commission thought it could, for the time being, leave aside all those subjects falling for study by other United Nations organs or by the specialized agencies. Her Majesty's Government consider this was a wise decision as enabling the Commission generally to concentrate on the task of codifying the existing law, whilst leaving to other United Nations organs or the specialized agencies the task of initiating studies in matters not yet regulated by international law, such as fishery conservation outside territorial waters and pollution.

UNITED STATES OF AMERICA

...the Government of the United States is in general agreement with the principles which appear to inspire the draft articles of Part I, Continental Shelf...

SWEDEN

...the Swedish Government is of opinion that the provisions concerning the continental shelf proposed by the International Law Commission, as contained in Part I of the draft, are fairly satisfactory in several respects.

SYRIA

...these articles have been approved, in principle, by the competent authorities of Syria.

FRANCE

The French Government would like first of all to pay a tribute to the International Law Commission for its efforts in studying a new and controversial topic which is not as yet covered by international rules. It feels that the draft articles constitute a really useful working paper and a notable step towards the reconciliation of the divergent views which still prevail in this area of international maritime law. To their credit, the draft articles neither challenge the principle of the freedom of the seas, which must continue to be the basic rule, nor do they question the regime of territorial waters.

The French Government wishes to offer one final comment which relates both to the provisions dealing with the continental shelf and to those concerning the related subjects. It is to be noted that while provision is made for a system of general regulatory and policing measures, no mention is made of the conditions which are to govern the supervision of these measures. Yet the question of supervision raises a good many difficulties of a national and international character (practical methods for exercising it, financial costs, apportionment of financial responsibility, etc.) and it is difficult to take a position on any of the articles in question until some further particulars, with explanations, concerning this general problem are obtained.

INTERNATIONAL BAR ASSOCIATION

Madrid, 1952

Resolution:

The fourth Conference of the I.B.A.

Takes pleasure in commending the International Law Commission's work on the subject of the continental shelf;

Concurs in the essential principles formulated by the International Law Commission in its draft of July 1951 (articles 2 et seq.); but

Reserves its position with regard to the definition of the continental shelf (article 1); and

Expresses the hope that governments will communicate their views on the International Law Commission's draft articles at the earliest possible date, in order that positive rules of international law may be established as soon as possible in a matter which is of great importance for international progress.

INTERNATIONAL LAW ASSOCIATION

Lucerne Conference
September 1952

Resolution:

"that the whole question dealt with in Prof. Francois' report and the various views expressed during the discussion should be referred by the Executive Council to a new committee for consideration and report".

Executive Council
November 1952

A new Commission is formed under the Chairmanship of Prof. C. H. M. Waldock. The Commission is directed to examine the question particularly in its technical and legal aspects taking into careful consideration the most valuable work of the International Law Commission of the United Nations.

B. CONNEXIONS WITH THE PROBLEM OF THE TERRITORIAL SEA

DENMARK

It is considered particularly valuable that it has succeeded in obviating the difficulties involved by the controversial question of the extent of territorial waters.

ISRAEL

It seems evident that in due course the articles now being considered will have to be integrated into a more comprehensive text, which will be largely codificatory. For example, all the matters discussed in document A/CN.4/49 in point of fact will stand in direct relationship with the manner, yet to be indicated by the Commission, for the determination of what it calls "Territorial Waters", and it is difficult to assess the full import of the draft articles now under discussion in isolation...

For this reason it is suggested that the International Law Commission consider deferring further consideration of the draft articles contained in document A/CN.4/49 and the comments of Governments thereon for the time being, and concentrate on completing its work of codification on the law of the high seas and territorial waters. In this connexion it can be noted that the Commission itself regards it necessary to perform its work in phases (Official documents of the General Assembly: Fifth session, Supplement No. 12, A/1316, paragraph 183). The Government of Israel finds itself in agreement with this approach, but believes that ultimately the whole work of the Commission on these two topics will have to be discussed as a single phase, either in the General Assembly itself or in a specially convened diplomatic conference.

ICELAND

At the General Assembly of the United Nations in 1949 the Icelandic delegation pointed out that it would not be sufficient for the ILC to study the regime of the high seas as proposed by the Commission itself and that it would be necessary for it to study also the other side of the problem, i.e. the question where the high seas started, or, in other words, the regime of territorial waters. In that way the entire problem, including the problem of contiguous zones would be covered.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government note that at its second session the Commission decided to proceed to the codification of the law of the sea by stages and that at its third session it decided to initiate work on the regime of territorial waters. In the opinion of Her Majesty's Government the questions of the regime of the high seas and of the regime of territorial waters have now tended to become so inter-connected that, at this stage of the Commission's work, it is not possible for governments to express more than tentative comments. Her Majesty's Government will await, however, with very great interest the Commission's report on the regime of territorial waters and hope to be able to offer more extended comments thereafter.

SWEDEN

...it is difficult to form a final opinion on them before knowing how the question of the extent of territorial waters is to be settled internationally. In this connexion, the Swedish Government wishes to stress its view that none of the interests which the draft is designed to safeguard, be it the exploitation of the resources of the continental shelf, the conservation of the resources of the sea or any other interest, should serve as a pretext for extending territorial waters beyond the traditionally accepted limits.

C. COMMENTS ON THE ARTICLES

Part I. Continental Shelf

Article 1

Comments Nos. 1 and 2.

CHILE

The International Law Commission's conclusions on this point appear to the Chilean Government to be correct and acceptable, for geology, while it may influence law to some extent, cannot impose principles upon it.

ISRAEL

The Government of Israel is inclined to agree with the suggestion advanced by the International Law Commission in draft article 1 of Part I of document A/CN.4/49, that the legal definition of the concept of the continental shelf should be divorced from the geological and scientific definition.

SWEDEN

It seems true to say that for purposes of regulation, the essential point is that the superjacent waters should be shallow enough to admit of exploitation of the natural resources of the sea-bed and subsoil, and not that the sea-bed should form a "plateau" or "shelf".

GIDEL (p. 5)

The International Law Commission therefore very properly decided that for the purposes of the legal study on which it was engaged, the geological concept of the continental shelf should be put aside.

VALLAT (I.B.A.)

Lawyers cannot accept the geographers' concept and the expression "continental shelf", though convenient, is a misnomer...

The idea of a continental shelf is, at least in origin, a geographic geological conception. There are, nevertheless, serious objections to accepting this form of definition for legal purposes... Moreover, the claim to rights over the continental shelf is based just as much on economic and even security grounds as on the dictates of geography or geology.

GIDEL (p. 7)

The advantage of retaining the expresson "continental shelf" is that this calls to mind clearly a number of concepts which are already well established...

With all due respect to those writers who favour or use it and despite the fact that it appears in the Anglo-Venezuelan Treaty of 1942, the term "submarine areas", or the even more dubious "submarine regions", is not to be recommended...

The expression "epicontinental belt" (proposed by J. Andrassy) is open to criticism.

BRASKOVIC (I.L.A.)

Might not the French expression "zone epicontinentale" ("epicontinental belt" in English) be acceptable? This term would lend itself easily to translation into other languages.

VALLAT (I.B.A.)

It might be possible to find a more accurate expression than "continental shelf", but its use has become so general that it may be wiser not to try to coin a new phrase.

DE AZCARRAGA (I.B.A.)

We consider that the term "submarine shelf" should be employed and "continental shelf" abandoned, because in some cases what is meant is an insular shelf, and the expression we are proposing would obviate any difficulties that might arise in connexion with areas with shallow waters. And since the coastal State has the exclusive right to explore and exploit the part of the submarine shelf underlying the territorial waters, we refer only to the part of the shelf beyond the outer limits of the territorial waters, i.e. what we call the epijurisdictional (or ultrajurisdictional) shelf.

See also: La plataforma submarina, page 215.

MOUTON (p. 45)

The term "continental shelf" being of geographical, oceano-graphical or geological origin, should not be used in law with quite a different meaning.

If we could adopt the name "shelf" and leave the adjective "continental", it would be a conception which would mean the same in geography, oceanography and geology as it will mean in law.

It would comprise outer shelves, inner shelves and insular shelves. It seems to us, that using this term would make lengthy definitions quite unnecessary.

Comment No. 4

See de Azcarraga's observations, No. 3.

Comments Nos. 5 and 6

BRAZIL

In regard to article 1, the Brazilian Government feels that the Commission should further explore the possibility of establishing, at least on a provisional basis, a more precise limit for the continental shelf.

CHILE

The depth limit of 200 metres has been eliminated from the definition and replaced by the modern legal idea that the sea-bed and subsoil may be exploited.

As the commentary on article 1 so properly remarks, technical developments in the near future might make it possible to exploit intensively the natural resources of the sea-bed and subsoil, whatever the depth of the superjacent waters.

DENMARK

By refraining from fixing any definite geographical limit to the extent of the shelf into the sea, differences of opinion have been precluded on that point.

ECUADOR

This concept is not entirely in accord with articles 1 and 2 of the Legislative Decree of 6 November 1950 approved by the National Congress of Ecuador, which does not subject the continental shelf to these two conditions. Our continental shelf, which is limited to submerged land contiguous to continental territory where the depth of the superjacent waters does not exceed 200 metres, lies partly within and partly beyond the area of territorial waters. Nor does its existence depend simply upon whether the depth of the superjacent waters admits exploitation of the natural resources of the sea-bed and subsoil, as stipulated in the International Law Commission's formula. The Act says simply that the continental shelf or platform contiguous to Ecuadorean coasts, " and all or any part of the wealth it contains, belong to the State...". The Commission will only recognize the continental shelf if its natural resources can be exploited; in Ecuadorean law the right of exploitation is inherent in the recognition of the State's jurisdiction over the shelf.

NETHERLANDS

Although the Netherlands Government has no serious objection to this article, it wonders whether a limit of 200 metres in depth would not place the law on a surer foundation and prevent unlimited expansion in the future.

NORWAY

This definition may be adequate as long as one is dealing with the continental shelves of countries bordering on the great oceans. But when several countries are contiguous to one shallow sea, the definition seems inadequate.

YUGOSLAVIA

Therefore, the Yugoslav Government insists that the boundary of the continental shelf should be changed in the manner to determine as continental shelves all areas of sea-bed and subsoil covered by water not deeper than 200 metres.

ICELAND

At present, the limit of the continental shelf may be considered as being established precisely at a depth of 100 fathoms. It will, however, be necessary to carry out the most careful investigations in order to establish whether this limit should be determined at a different depth.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Suggested amendment: Delete "where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil" and substitute "as far as the 100 fathom line".

Comment: Her Majesty's Government agree that, whatever the precise geological meaning of the term "continental shelf", this term should continue to be used in international law to cover those submarine areas over which the

coastal State (which may be an island as well as a State forming part of a "continent") is entitled to exercise sovereignty.

Her Majesty's Government consider, however, that the definition adopted by the Commission of "continental shelf" in the legal sense is too vague and is susceptible of abuse.

The formula "Where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil" might easily provoke international disputes. Just as in the case of the superjacent waters it became necessary to establish a fixed limit of distance for the extent of the territorial sea, so in the case of the sea-bed and subsoil it is essential from the practical point of view to establish a fixed limit of depth for the extent of the continental shelf under the sovereignty of the coastal State.

Her Majesty's Government consider that State practice is sufficiently uniform to justify fixing this limit at the 100 fathom line. Consequently, in the view of Her Majesty's Government, every State is entitled to exercise sovereignty over the sea-bed and subsoil off its coasts as far as the first point at which the depth of the water becomes 100 fathoms, regardless of the fact whether this sea-bed and subsoil constitute a continental shelf in the geological sense or not.

Her Majesty's Government sympathize with the desire of the Commission to establish a more flexible limit, so as not to preclude the possibility of exploitation, when that becomes technically feasible, beyond the 100 fathom line. In their view, however, the 100 fathom line is likely to be sufficient for all practical purposes for some time to come and, if practical considerations ever necessitated a greater depth, the matter could be reconsidered later. Although a flexible limit might have some advantage, it would seem preferable on balance to secure as soon as possible international agreement on a fixed depth. Her Majesty's Government might be prepared to consider 200 metres as an alternative to 100 fathoms* but they wish to place on record their opposition to any system which would allot the continental shelf to coastal States on the basis of distance rather than depth and which would allot to coastal States

submerged plateaux (themselves possibly less than 100 fathoms below the water) separated from the coast by a channel more than 100 fathoms deep. In the opinion of Her Majesty's Government, such submerged plateaux are either res communis capable of acquisition by prescription or res nullius capable of occupation and exploitation by any State according to the normal law of occupation. Her Majesty's Government regard as illegal certain claims that have been made over the continental shelf on the basis of distance rather than depth.

FRANCE

Although the definition admittedly avoids the drawback of instability, it appears to suffer from the defect of vagueness. It is arguable that it might be better to contemplate a specified depth-limit of, say, three hundred metres, to avoid having to change it too soon. A fixed limit would have the further advantage of ruling out any dispute concerning such vague concepts as the ability of the coastal State to exploit the natural resources or the period within which it should be in a position to do so.

UNION OF SOUTH AFRICA

The Union Government feel that the definition of the Continental Shelf as "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", is too elastic. If the test is to be the 'exploitability' of the sea-bed and subsoil then it seems clear that with the advance of technical proficiency in working at increasing depths, the boundaries of the continental shelf must be subject to continual revision. This would tend to import into the law an element of uncertainty which would be inimical to the orderly development and exploitation of the continental shelf.

On the other hand, the Union Government recognizes that a rigid definition of the Continental Shelf in terms of the depth of the superjacent waters may also be unsatisfactory in that whatever depth is decided upon must be arbitrary and may in the course of time, and through the advance of technical knowledge, cease to bear any relation to the needs and capacities of the littoral State. In the circumstances, the Union Government would prefer to see the Continental Shelf defined in terms of a maximum depth of 200 metres; but feel that provision should be made for reviewing this depth at some future date, should technical considerations render such a review necessary.

GIDEL (p. 5)

Consequently, the extent of the continental shelf would necessarily be uncertain and variable.

It would be uncertain, because at any given time and for any given purpose the possibilities of exploitation vary appreciably in accordance with the degree of technical advancement the country concerned has attained, and because it is debatable whether the development of technique in the coastal State or in some other country should be taken into account.

Variable: because the extent of the continental shelf will constantly change with the improvement of exploration and exploitation equipment and methods.

At present it is generally acknowledged that submarine natural resources can be exploited only at a depth of some thirty metres. It is somewhat surprising to find the International Law Commission stating that it did not adopt a <u>fixed</u> limit for the continental shelf in terms of the depth of the superjacent waters -

more specifically the depth of 200 metres, which, as the Commission states in paragraph 6, "coincides with that at which the continental shelf, in the geological sense, generally comes to an end" - only because "such a limit would have the disadvantage of instability". "Technical developments in the near future", it adds, "might make it possible to exploit resources of the sea-bed at a depth of over 200 metres".

Whatever may be thought of this view of the value of the 200-metre line as a geophysical criterion or of this somewhat optimistic technical prognosis, it is very difficult to accept the concept of the continental shelf and the method of its delimitation which the ILC has seen fit to approve - whether out of a desire to limit the extent of the continental shelf as far as possible for the present or with the object of allowing for the greatest possible expansion in the future, it is hard to say.

One thing is certain: the criterion proposed by the ILC does not offer the uniformity, stability and unambiguity essential to legal relations.

The most generally accepted solution seems to be that for legal purposes the continental shelf should be defined by a given depth of water wherever the geophysical formation exists and its width is such that the continental shelf extends beyond the outer limit of the territorial sea of the country in question.

The 200-metre line, or, if preferred, the similar but not identical 100-fathom line, has to recommend it the fact that the 200-metre (or 100-fathom) isobath is now shown on most charts.

There is no reason why a coastal State should be entitled to take advantage of the fact that along its coasts the fall-off characterizing the continental shelf happens to occur at a greater depth than that conventionally established. (The commission set up by the International Law Association took the opposite view in its report to the 1950 Copenhagen Conference).

The ILC rightly disallowed the claims advanced by certain States to the enjoyment - whether or not they had a continental shelf - of any rights which might come to be attached to the existence of a continental shelf (indeed, of overriding rights) up to a mathematical line formed by the terminal points at sea of lines of a given length drawn horizontally from points on the coast.

The concept of the continental shelf must remain attached to a geophysical formation in which depth is an essential element.

Although the delimitation of the continental platform by the 200-metre or 100-fathom line would be generally suited to the end in view, it would still leave certain thorny, if secondary, problems.

VALLAT (I.B.A.)

The best conclusion seems to be that the exact delimitation of the outer boundary of the continental shelf must be left to the coastal State and that the coastal State may define the boundary as it sees fit so long as it conforms approximately to the one hundred fathom line. International law does not recognize the right of a coastal State to any part of the sea-bed or subsoil beyond that general limit.

DRIESSEN, C.F. (I.L.A.)

I think that the definition of the International Law Commission gives too little and too much: it could lead to impossibility of exploitation or to excessive claims. The delimitation should be made by a committee of lawyers and geologists. I personally am in favour of the 200 metres limit.

WALDOCK (I.L.A.)

The Commission defines the shelf simply as the areas where the depth of water admits the exploitation of the natural resources of the sea-bed and subsoil. This definition is extremely vague, being open to subjective interpretations by coastal States which might result in very large claims. Such a vague definition risks throwing away all the advantages gained by the Commission's attempt strictly to define and limit the new right which is being developed. I, therefore, prefer the view expressed in the report submitted to the Copenhagen conference that the shelf should be defined by reference to a fixed limit of depth - either 200 metres or 100 fathoms. There is not much difference between these two limits but there is a strong practical reason for adopting 100 fathoms as the limit. It is marked on all good nautical charts whereas the 200 metre line is not. Either of these limits covers all the areas likely to be open to exploitation for a considerable time to come. My main

point is that, at the beginning, when we do not yet know where this new doctrine will take us, we should go cautiously and adopt a fixed limit which will for the time being set a definite boundary to the claims of coastal States.

MOUTON

Therefore we feel that the Commission is sacrificing a perfectly clear and easily discernible limit, marked on all sea-charts (leaving for a moment the difference between markings in metres and fathoms) for a rather vague conception of "where the depth admits of the exploitation of the natural resources", for a reason which contains a low factor of probability.

We call a delimitation based on the possibility of exploitation vague, because it runs behind the facts. When does this possibility exist? When a new device comes off the drawing desk of a drilling engineer?

We should think that this possibility can only be proved in practice. Up till now, the depth admitting of the exploitation is 30 metres.

But the Commission is going to allow oil-geologists to explore outside the 30 metre-isobath and cause damage to fisheries with their seismic exploration methods. Let us imagine that these geologists predict good results at a spot where the depth is 40 metres. An oil-company has a new device in stock and starts building an installation on that spot.

Unfortunately, after some months of work it turns out to be a dry hole, or better still, the device is a failure.

Exploitation is proved to be impossible. In other words, the coastal State had no right to build the installation, which in the meanwhile has been an "illegal" obstacle in the high seas, hampering navigation.

We fear that adoption of the Commission's proposal has a greater disadvantage of instability than the very generously fixed depth limit of 200 metres would have.

In our opinion the words "where the depth admits of the exploitation" should be interpreted in an objective way. If the coastal State has not available the technical devices to drill at a certain depth, but other States have, that depth does admit of the exploitation. Even if the coastal State does not wish either to exploit or to explore the subsoil, it would nevertheless have control and jurisdiction over the resources of the adjacent shelf up to the depth, which would admit of the exploitation, if this was performed with the worlds' best devices.

DE AZCARRAGA (I.B.A.)

The maximum limit of the shelf is fixed by the 200-metre line.

See also: La plataforma submarina, p. 220

BRASKOVIC (I.L.A.)

In order to obviate the disadvantage of instability, I am prepared to support the view expressed by the Bar Association in Madrid that the depth line should be fixed at 200 metres.

Comments Nos. 7 and 8

CHILE

For these reasons the Government of Chile is obliged to scrutinize articles 1, 2 and 3 of part II of the draft prepared by the United Nations International Law Commission, and believes that there should be a reaffirmation of the right to establish an exclusive hunting and fishing zone 200 sea miles wide.

NORWAY

If it is necessary to give coastal States a right of control and jurisdiction for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil, the best thing would probably be to limit that right to a contiguous zone of a fixed breadth. It would be necessary to have provisions stating how the boundaries between the contiguous zones of several States should be drawn when the zones overlap.

YUGOSLAVIA

Hence, the Yugoslav Government considers as far more acceptable the proposition of Mr. El Khouri (who proposed a minimum boundary "X" miles from the coast regardless of the depth, and a maximum boundary "X" metres of depth regardless of the distance from the coast), than article 1 of the draft. Therefore, the Yugoslav Government insists that the boundary of the continental shelf should be changed in the manner to determine as continental shelves all areas of sea-bed and subsoil covered by water not deeper than 200 metres.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government...wish to place on record their opposition to any system which would allot the continental shelf to coastal States on the basis of distance rather than depth... Her Majesty's Government regard as illegal certain claims that have been made over the continental shelf on the basis of distance rather than depth.

GIDEL (pp. 6, 8)

The ILC rightly disallowed the claims advanced by certain States to the enjoyment -- whether or not they had a continental shelf - of any rights which might come to be attached to the existence of a continental shelf (indeed, of overriding rights) up to a mathematical line formed by the terminal points at sea of lines of a given length drawn horizontally from points on the coast.

After examining the problem as a whole, the ILC concluded - and rightly so - that it would be undesirable to approve a system in which in order to correct inequalities all States were awarded a stated uniform jurisdiction, within a specified zone identical for all, by fixing maximum and minimum limits for the legal continental shelf defined on the basis of a distance measured from the coast. Although some thought might be given to the value of such a criterion for determining the width of the territorial sea, it would seem to be wholly irrelevant to the quite different question of the continental shelf; in fact, it would amount to establishing a new contiguous zone for the exploitation of the subsoil, while deliberately leaving out the essential prerequisites for such exploitation.

DE AZCARRAGA (I.B.A.)

We believe that the territorial sea should be fixed at a uniform distance of twenty miles for all States.

RYGH (I.L.A.)

I think it will be much more just and practical to follow the example, given by some States, namely, a line of 200 km. from the coast and where the distance between two countries is less than 400 km., the middle line between them. Such a line will be easy to fix.

BRASKOVIC (I.L.A.)

Might it not be useful to try to solve the problem as a whole, and to examine rather more closely a proposal made by the French Branch at Copenhagen to broaden the special rights of coastal States where there is no shelf?

MOUTON (p. 55)

The continental shelf can be very productive if the conditions influencing abundance of fish are fulfilled, which is particularly so in regions of upwelling and convection. The last two factors, however, do take place also in regions where no, or only a narrow, shelf exists, along coasts as well as far off shore. In other words, it is true that the continental shelf is very often a place where an abundance of fish is found, but it is not the only place and hence it should not be made into a criterion for delimitation of rights concerning fisheries.

This conclusion finds further confirmation in the Report on a Survey of the Fishery Resources of the United States and its Possessions, (p. 1): "Unlike conditions on the North Atlantic coast, food-rich water in the Pacific is not confined to the continental shelf, extends many miles to sea over deep water, supports large populations of many kinds of pelagic fishes.

Comment No. 9

There were no observations on this paragraph.

Comment No. 10

(Natural resources)

NETHERLANDS

It might perhaps be useful to emphasize that this article deals only with the "mineral resources" of the continental shelf. The same comment applies to the first sentence of the first paragraph of article 6. See also note 1 under article 3 of part II.

SWEDEN

It should be expressly stated that "natural resources" are understood to mean mineral resources, in order to show that fishing is not included.

MOUTON (p. 41)

It does not expressis verbis say what sort of natural resources, but obviously the adjective "mineral" should be thought of in view of the explanation given in point 8: "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".

NEHRU (I.L.A.)

I refer to the monazite sands, rich in thorium, the most valuable element for atomic energy production, which are found for thousands of kilometres along the foreshore of eastern India, in some cases in deposits extending into the marine subsoil. If a State or a ship, whether friendly, neutral or hostile, stood off the three-mile territorial limit and began large-scale dredging operations to extract these highly valuable sands, on the pretext of scientific research, how could India safeguard these essential defence materials?

MOUTON (p. 281)

The resources of the sea-bed and the subsoil belong to the coastal State or are under the control and jurisdiction of that State. What are the resources of the sea-bed? The sea-bed is nothing else than the surface dividing the sea

MOUTON (p.281)

from the subsoil. But it is an evasive thing. If we dig into it, if we dredge sand or shells out of it, the material once forming part of that dividing surface is taken away, but the sea-bed is still there. The bottom of the pit we have made forms the new sea-bed. It is true that the sea-bed is the roof of the subsoil, but it is infinitely thin. Even if we take only a tiny quantity of material from it, this material actually belongs to the subsoil. One could argue that in practice the upper layer is called sea-bed and the deeper layers subsoil. We would ask, how deep is this upper layer, and nobody could answer this question. If we dump sand or clay on the sea-bottom, the sea-bottom rises. In short the sea-bed is indestructible. How then can we extract resources from the sea-bed? If we dredge mud from the sea-bottom in order to extract tin-ore as is done in the drowned river valleys in the Singkep-tin concession in Indonesia, we do not take anything from the sea-bed, we only displace the sea-bed to a lower level. The material, the mud with the tin-ore we get to the surface, we appropriate, is in fact subsoil and nothing else. It is a generally accepted fact, that the sea-bed and subsoil under the territorial waters belong to the coastal State. It is a generally accepted fact that the subsoil, even outside the territorial waters of the coastal State can be appropriated or occupied by that State, as is proved by the acquiescence of the States in the exploitation of submarine mines (although we believe that none of them actually pass the three-mile limit).

(p.283)

The use we make of the sea-bed, however, does not interfere with the rights of other States to use the sea-bed. The sea-bed cannot be consumed. Taking tin-ore from the sea-bed does not interfere with the rights of other States. Once the area has been exploited and left, another (deeper) sea-bed is left and another State can lay its telegraph cable to rest on the new sea-bed. A ship can anchor on that new bed and if the soil is not too rough after dredging, a trawler can again try to catch the bottom-fish which have returned. Laying a cable says Hurst, p.42, is not occupation of the sea-bed. The mere fact that a cable is lying on the sea-bed does not prevent to lay another cable.

"Contiguous to the Coast"

NORWAY

What is precisely meant with the expression contiguous to the coast? There may be a stretch of deep water near the coast and areas of shallow waters further out. This is for instance the case outside the coast of Norway. Along the coast of Southern and Western Norway stretches a long and rather narrow belt of deep water. On the outer side of that narrow belt the North Sea as a whole is rather shallow with depths inferior to 200 metres. It would obviously be most unfair if Denmark, Germany, the Netherlands and the United Kingdom should share between them the whole North Sea, while Norway should be excluded because of the above-mentioned belt of deep water. If there are to be any rules governing the continental shelf, article 1 ought to be redrafted so that it is beyond doubt that the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas lying off the coast, even if these submarine areas are separated from the coast by stretches of deep waters.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government...wish to place on record their opposition to any system...which would allot to coastal States submerged plateaux (themselves possibly less than 100 fathoms below the water) separated from the coast by a channel more than 100 fathoms deep. In the opinion of Her Majesty's Government, such submerged plateaux are either res communis capable of acquisition by prescription or res nullius capable of occupation and exploitation by any State according to the normal law of occupation.

RYGH (I.L.A.)

We are in that position that close to our coastline in south and southwest Norway there is a deep, but narrow, cut called "den norske renne", that cuts the Norwegian coast off from the adjoining part of the North Sea. Just across this deep channel the level of the North Sea is again less than 100 fathoms and remains less until the Scotch coast. The consequences of the American doctrine would be, that if some oil wells should be discovered in that part of the North Sea, they should belong to Scotland, not to Norway, though the distance to Scotland is 4 or 5 times as large as the distance to the Norwegian coast.

Article 2

Comments Nos. 1 and 7

BRAZIL

Regarding article 2, the Brazilian Government feels that the word "exclusive" should be inserted before the word "purpose". This would avoid possible doubts and would give better expression to the points of view of the members of the Commission, as stated in paragraph 1 of the commentaries to the same article. If the members of the Commission felt that the "control and jurisdiction over the continental shelf should be exercised solely for the purpose stated" we can see no objection to inserting the word "exclusive" in the phraseology of the article.

CHILE

The conclusions of the International Law Commission on this point are unrealistic and are out of harmony with the usual international practice.

The Governments of Mexico, Argentina, Chile, Peru, Costa Rica, Guatemala, Honduras, El Salvador, Nicaragua, Brazil and Ecuador have all, at different times, made unilateral statements of their positions on this matter, declaring categorically that their rights over the submarine shelf contiguous to their national territory amount to more than mere "control" or "jurisdiction", and are proper to or inherent in sovereignty and dominion.

Thus the Chilean Official Statement of 23 June 1947 declares that "The Government of Chile confirms and proclaims its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered". (Memoria del Ministerio de Relaciones Exteriores, 1947, p. 204).

Similar concepts are expressed in the statements issued by the other American Governments just mentioned.

There are various reasons to justify sovereignty and dominion over the continental shelf as this is now understood.

In the first place, this area is actually an extension and a part of the national territory; it should therefore be subject to the sovereignty of the State of whose territory it is an under-sea extension in the same way as the rest of that territory.

As Mr. Miguel Ruelas so justly remarks, the continental shelf belongs to the coastal State, because generally the rivers of that State have brought down the rich deposits which cover the coastal area of the shelf (See Miguel Ruelas, "La Corniza Continental Territorial". Revista de Derecho Internacional, year IX, Vol. XVII, January-June, 1930, p. 130).

In the second place, the security and the right of self-preservation of the coastal State have some importance. These fundamental rights include the right of a State to dispose of and use its national territory in all possible ways.

To deny a coastal State the right of sovereignty and jurisdiction over the continental shelf is equivalent to denying it part of the national territory with which, as an international entity, it came into being. In other words, that State will be deprived of a source of wealth which, sooner or later, given the natural rate of growth of all communities, it will wish to use and dispose of as owner.

The right of self-preservation has another aspect, namely the action necessary to repel aggression and to avert imminent danger.

The claim by a nation that its continental shelf should be subject to its exclusive sovereignty, dominion and jurisdiction lessens that danger and the probability of disputes between nations.

A strong foreign nation, desiring to exploit actually or ostensibly the resources in the waters adjacent to the territorial waters of a State might set up installations or other appropriate equipment which would not only decrease the natural resources in a way prejudicial to the coastal State, but also positively threaten the security and territorial integrity of that coastal State.

In the third place, fisheries are still a vital necessity and an element of the problem, since if the deep-sea fishing grounds, which are usually over those areas, are left at the mercy of the first comer, the species will be depleted.

Finally, Chile is so situated geographically that both the waters and the submarine areas in question are absolutely necessary to its survival.

Furthermore, the theory of the extension of sovereignty over the continental shelf and the superjacent waters is confirmed by international practice.

For all these reasons the Government of Chile feels obliged to reject article 2 of the draft and to suggest that the principle that sovereignty, dominion and jurisdiction over the continental shelf are vested ipso jure in the coastal State should be confirmed.

DENMARK

The avoidance of any reference to sovereignty in the established sense of the word is another useful aspect of the draft which refers only to an exclusive right to exploration and exploitation without involving, for instance, the question of the status of such areas during conditions of war and neutrality. The Danish authorities would find it appropriate that the right of the coastal State as set out in part I, article 2, be expressly characterized as an exclusive right since that would preclude any idea of expansion of the territory of the State concerned.

ECUADOR

Although our law begins by laying down that the Ecuadorean State "shall exercise the right of use (aprovechamiento) and control to the extent necessary to ensure the conservation of the said property and the control and protection of the fisheries appertaining thereto", it does not limit the State's jurisdiction to the exploration and exploitation of the shelf's natural resources.

ISRAEL

The formulation of draft article 2 is thus seen to be unduly restrictive on two counts. In the first place, it is not clear what is the precise implication of the phrase "control and jurisdiction". In fact, and from the legal point of view, this control and jurisdiction seems to be indistinguishable from sovereignty, particularly having regard for what might be termed the non-terrestrial manifestations of sovereignty (air-space and territorial waters). Yet the phrase "control and jurisdiction" may be capable of conveying an impression of something less or different from sovereignty. It is doubtful if it would be possible to assure a satisfactory legal basis for the exploration and exploitation of the natural resources of the continental shelf unless it is recognized that the coastal State is capable of exercising full rights of sovereignty over it, and not merely what may be lesser and somewhat ambiguous rights of control and jurisdiction. In the second place, the limitation on the purposes for which these rights may be used as proposed by the International Law Commission, namely, exploration and exploitation, seems to be somewhat unduly restrictive. The coastal State may desire to exercise rights of sovereignty in other directions. One example, which springs to mind, is that of protection against abuse of rights by third States, as well as for purposes of defence. The coastal State might not be able for the time being to undertake the exploration or exploitation of the continental shelf for a variety of reasons, including such reasons as an immediate lack of the necessary financial resources, considerations of national economic policy, which may regard such exploration or exploitation as being for the present undesirable, and so forth. States finding themselves in such a position should none the less be able to acquire, by extending their sovereignty over the appropriate areas, the possibility of exploring and exploiting them at some future date, as well as the opportunity of preventing their exploration and exploitation by other States.

NORWAY

Article 2 of part I of the draft articles seems to imply that the coastal might exercise control and jurisdiction over the continental shelf in such as to exclude foreigners. As it has already been pointed out above, it is ful whether it is really necessary to give such a monopoly to nationals of coastal State.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government would prefer to say that "the continental shelf is ject to the sovereignty of the coastal State". In the opinion of Her sty's Government there is no sufficient reason for substituting for the liar concept of "sovereignty" the new and undefined expression "control and sdiction", even though the two expressions are probably intended to have the meaning. If the expression "sovereignty" were used, there would be no t that a crime committed in a tunnel under the continental shelf would come in the jurisdiction of the coastal State; if the expression "control and sdiction for the purpose of exploring the continental shelf and exploiting natural resources" were used, there might be some doubt on this point. In the opinion of Her Majesty's Government the rights of the coastal State the continental shelf are of the same nature as its rights over its land itory, and it would be desirable to state this precisely in the draft.

UNITED STATES OF AMERICA

The Government of the United States is under the impression that the draft icles in Part I, Continental Shelf intend to establish in favour of the coastal be an exclusive right to the exploration of the continental shelf and the loitation of its resources. The Government wonders, accordingly, whether it ld not be advisable to make it clear, at least in the commentaries, that trol and jurisdiction for the purpose indicated in the draft articles mean in t an exclusive, but functional, right to explore and exploit.

SWEDEN

The Swedish Government thinks it proper that the rights of coastal States in respect of the continental shelf should be confined to the purposes stated. The claims to sovereignty, even over wide stretches of water extending far beyond the coast, which have been made by certain States, would thus be rejected. In the opinion of the Swedish Government, these claims are certainly not consistent with existing international law. It also follows that where there is no exploration or exploitation, the coastal State has no rights over the continental shelf, except the right to prevent its exploration or exploitation by others. It should be expressly stated that "natural resources" are understood to mean mineral resources, in order to show that fishing is not included.

FRANCE

The provisions of draft article 2 give the coastal State "control" and "jurisdiction" over the maritime area defined as the continental shelf. One may wonder whether the distinction drawn by the Commission between the notion of "control and jurisidction" and that of sovereignty is a real one. The legal consequence of the monopoly of exploitation vested in the coastal State will be the exercise of effective though limited, sovereignty over the continental shelf and this sovereignty will be a fact even though the actual term is not employed.

UNION OF SOUTH AFRICA

The Union Government would prefer to see the word "sovereignty" used in place of the phrase "control and jurisdiction for the purpose of exploiting..." in the Commission's draft. There appears to be no good reason for distinguishing between the nature of the right which a State possesses in relation to territorial waters and the right now in process of being recognized in relation to the Continental Shelf. Moreover the phrase used in the Commission's draft is ambiguous, since the words "control", "exploring", "exploiting" and "natural resources" are all open to interpretation. The word "sovereignty", on the other hand, has a clear connotation in international law and appears to describe very adequately the relationship which the littoral state will bear to the continental shelf.

The right of foreign states to lay cables on the Continental Shelf is safeguarded in the draft articles and will not, therefore, be affected by the exercise of sovereignty in other respects.

GIDEL (p. 13)

A basic point which the Conference has to consider is the meaning of the words "control and jurisdiction" which the ILC used to describe the rights it recognized to be enjoyed by coastal States "for the purpose of exploring [the continental shelf] and exploiting its natural resources."

These words had previously been used in the Proclamation of 28 September 1945 of the President of the United States of America. When certain governments disregarded them and used the word "sovereignty", the State Department (e.g. Notes of 2 July 1948 to Chile and Peru) and the United Kingdom (e.g. Notes of 6 February 1948 to Chile and Peru) signified their reservations. Yet eminent United Kingdom commentators on the Truman Proclamation (Sir Cecil Hurst, paper read before the Grotius Society on 1 December 1948) state that they do not clearly see the difference between "control and jurisdiction", where exclusive control is claimed, and "sovereignty" itself. "Sovereignty", Sir Cecil says, "is not an easy term to define, but in a case of this sort, I think we are entitled to look at the facts of the situation more than at the language used... One cannot read this Proclamation without feeling that within the area of its continental shelf, the United States is claiming rights which are as large as sovereignty; the claim may be unjustified and impossible in law - that is another matter. What I am suggesting at the moment is that if the rights claimed over the continental shelf and its resources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation."

Official United Kingdom practice had already moved in the direction of "sovereignty". The Orders in Council concerning British possessions on the American continent have proceeded as follows: by way of annexation in the case of the submarine areas of the Gulf of Paria (Trinidad and Tobago, O. in C. 6 August 1942, U.K. Statutory Rules and Orders, 1942, vol. I, p. 919; cf. Submarine Oil Mining Regulations, Trinidad and Tobago, 22 May 1945, in Proc., Orders, Regs. etc. 1945, p. 101); and by way of boundary changes in the case of the Bahamas (O. in C. No. 2574, 26 November 1948; cf. Petroleum Act, Bahamas, 3 April 1945, ch. 2, sect. 12, chap. 3, sect. 3); in that of British Honduras (O. in C. No. 1649, 9 Oct. 1950; cf. Honduras Oil Mining Regulations, 2 Sept. 1949

No. 56 of 1949); in that of Jamaica (O. in C. No. 2575, 1948); and in that of the Falkland Islands (O. in C., 21 Dec. 1950, No. 2100).

Professor Lauterpacht (Sovereignty over Submarine Areas, British Year Book of Int. Law, vol. 27, 1950, pp. 376 to 433) outlines the tenor of these texts as follows:

> "The purely British Proclamations, such as those embodied in the Orders in Council relating to the Gulf of Paria and to the Continental shelf of the Bahamas, Jamaica and Falkland Islands, amount, by clear implication, to an assumption of rights of full sovereignty. No other interpretation can be put on the announcement that the boundaries of the territories in question are extended so as to include the continental shelf or that the Gulf of Paria is annexed."

However, the provisions of these documents - for example, sections 4 and 5 of the Order in Council on Trinidad and Tobago, section 3 of the Bahamas Order in Council, and others - attempt to forestall any objections based on the general principles of international maritime law to which the measures contemplated in them might give rise. Like the proclamation of the President of the United States, they specify: "Nothing in this Order shall be deemed to affect the character as high seas of any waters above the continental shelf and outside the limits of territorial waters."

But these qualifications in keeping with the content of customary international law on the use of superjacent waters in no way affect the fact that the claims asserted over the entire transterritorial continental shelf constitute an extension of sovereignty - i.e. of the complex of State's powers - not an extension of control and jurisdiction for the exploitation of natural resources, i.e. of particular and specialized powers.

Thus it is easy to see why one of the themes of English legal thought on this question is to minimize the distinction between "control and jurisdiction" and "sovereignty" and conversely to lay stress on the limitations to which sovereignty may be subject.

Professor Lauterpacht (art. cit., particularly section IV, pages 387 to 393, "The nature of the rights over submarine areas") writes (page 391):

> "Sovereignty over the adjacent submarine areas - like sovereignty over territory in general - is not incompatible with restrictions imposed by customary international law or undertaken by treaties. Thus although the rights acquired or claimed by States over submarine areas are rights of sovereignty, this does not mean that they are not subject to such limitations as follow from international law and, in especial, from any reasonable requirements of the principles of the freedom of the seas" (Cf. pp. 388 and 392).

The ILC's draft differs widely both from this practice on the part of certain States and from the doctrine designed to give the practice legal expression.

Article 2 of the ILC's draft, prepared at a time when the claims of coastal States not only to "control" and "jurisdiction" but also to "sovereignty" over their continental shelf had been fully asserted, expressly rejects "any reference to 'sovereignty' of the coastal State over the submarine areas of the continental shelf" (paragraph 7 of the comments on article 2). In the same article, care is taken to limit strictly the scope of the expression "control and jurisdiction" itself.

In this respect article 2 of the ILC's draft embodies a significant innovation. Hitherto the expression "control and jurisdiction" had been used in the practice of States without qualification. The ILC, on the other hand, combines it with a precise statement of the two strictly limited powers to which "control and jurisdiction" may apply in connexion with the continental shelf.

Article 2 of the draft has been cited above. The ILC's rejection of any idea of general control and jurisdiction by the coastal State over the transterritorial continental shelf and its "acceptance" of such "control and jurisdiction" subject only to strictly specialized purposes could not be more clearly - nay, bluntly - expressed. And as though that were not enough, paragraph 7 of the comments on article 2 reemphasizes the strictly limited construction which the ILC places on those powers over the transterritorial part of its continental shelf that it "accepted" as belonging to a coastal State.

Thus there are two conflicting lines of thought about the rights of a coastal State over its continental shelf. Article 2 of the ILC's draft differs as widely from the provisions of the British Orders in Council concerning the continental shelf as do the views of the two English Professors H. Lauterpacht and G. Schwarzenberger.

Lauterpacht writes: "It is not believed that such a claim to sovereignty, pure and simple, over submarine areas is improper or - assuming that it is not otherwise contrary to international law in general or to the principle of the freedom of the seas in particular - that it does not provide the best solution." (art. cit., p. 390)

Schwarzenberger studies "the frontiers of international law" in The Year Book of World Affairs, vol. 6, 1952, pp. 246 to 274. He notes the following as historically accepted: "In the sense of exclusive jurisdiction of the flag State over its ships on the high seas the principle of freedom of the seas came to be acknowledged in time of peace" (p. 264), and adds immediately: "Today, this freedom is again indirectly challenged by extravagant claims of States to the so-called continental shelf" (note 29 on this passage states: See further Green, The Continental Shelf, Current Legal Problems, 1951, pp. 54 et seq.).

In choosing between two such conflicting trends of thought it will be wise to consider how far-reaching would be the results of adopting the doctrine of the coastal State's "sovereignty" over the bed and subsoil of the continental shelf, particularly since the International Court of Justice's decision of 18 December 1951, even if that sovereignty were to be limited by such qualifications as might be imposed by international law. It is not easy to see what valid objections could be raised against claims to other uses of the continental shelf, once the coastal State's "sovereignty" over it on the high seas had been conceded.

VALLAT (I.B.A.)

The natural and reasonable view from every angle seems to be to regard the rights of the coastal State as being full rights of sovereignty. As already pointed out above there is no need to regard this sovereignty as extending to the waters constituting the high seas above the continental shelf, although it

would be reasonable to extend it to works established on the shelf in order to exploit its resources. Moreover, the idea of exclusive jurisdiction and control over the resources of the continental shelf is a novel idea if it means anything other than sovereignty and it would be difficult to establish its exact connotation. Therefore, it seems to be wiser for lawyers to adhere to the concept of sovereignty which is indeed well-known in international law.

ENOMOTO (I.B.A.)

Although conservation and exploitation of the resources lying in the continental shelf are matters of having some influence upon the interest of the nation adjacent to such shelf, we should always keep in mind the fact that its main object is to meet the needs of international community by utilizing oil or other resources of subsoil. Accordingly it would be impermissible for any nation to keep its own interests at the sacrifice of these of other nations. The system of continental shelf shall not be diverted to any other purpose, for instance, to defence.

MOUTON (p. 278)

It seems that there is strong evidence that control and jurisdiction is the same right, or nearly the same right as sovereignty. Several authors are of this opinion and in spite of the initial thoughts, quoted above, Hurst comes to the conclusion, p. 162: "One cannot read this Proclamation without feeling that within the area of its Continental Shelf, the United States is claiming rights which are as large as sovereignty;..."

Briefly said (S.R. 68, p. 8): "If the littoral State had exclusive rights of control and jurisdiction over the subsoil, it could be regarded as enjoying sovereignty". Waldock argues, relying on the wording of the Executive Order, p. 32: "... the Proclamation (Truman) looks very like an act of appropriation", which would, we think come very near a right of sovereignty.

COLBAN (I.L.A.)

General principles of law should - I believe - be the same with regard to any international areas, whether in the air or at sea or on the sea-bed or

sub-soil of the high seas. I cannot, at the present stage of development of international law, see any valid reason for enacting, as part of an international code, a rule placing the sea-bed and the subsoil of the sea in a category by itself and giving the coastal States a general priority right for the exploitation thereof. It would to me seem natural to leave it to practical experience, expressed in due time in agreements between interested States, to frame rules that might give all-round satisfaction without establishing now any exclusive right for single States to control and exploit large areas of the bed and sub-soil of the high seas.

GREEN (I.L.A.)

In fact it is a claim by the national State to exclude the world. It means that if a state like Chile for example is unable scientifically to exploit the resources of the continental shelf it can, in the interest of the international community, prevent anybody else from doing so.

I can only repeat that the doctrine of the continental shelf, like other geographical concepts, is merely introduced by states to lend a respectable disguise for otherwise groundless and unjustified assertions most of which are selfish and fantastic.

"The term 'sovereignty' does not appear anywhere in the Proclamation, the Executive Order or the Press Release. It is difficult, however, to see the difference between asserting that something 'appertains to the United States, subject to its jurisdiction and control', and saying simply that the subject matter is 'subject to the sovereignty of the United States'."
(Current Legal Problems, 1951, p. 73).

DE AZCARRAGA (I.B.A.)

We are able to accept this solution, but we consider that the "epijurisdictional shelf" should be regarded as a form of "submarine hinterland" or "sphere of influence and interest" of the coastal State, which would not have sovereignty over it in the sense accepted in international law, but only inchoate title for the purpose of exercising its influence and realizing its interests,

other States being precluded from exerting their rights over the shelf. The coastal State would thus possess exclusive rights of control and jurisdiction for the purpose of exploring and exploiting the natural resources of its "submarine hinterland".

See also: La plataforma submarina, pp. 181 and 171.

NETHERLANDS

Although in theory it might perhaps have been preferable to give jurisdiction over these submarine areas to the international community as a whole, the Netherlands Government feels that the practical difficulties of doing so would prove insuperable. Such a system would indeed make it impossible to exploit submarine resources properly in the interests of mankind.

On the other hand, the Netherlands Government would like to suggest that an international body should be established to control and advise on the progressive exploitation of the submarine areas, so as to promote the most effective use of these resources in the general interest.

SWEDEN

The Swedish Government is prepared to admit that there is some justification for this argument. But if such concessions are granted to coastal States, it should be stipulated that their scope should not be wider than is absolutely necessary to achieve the aim in view, and that the rights now enjoyed by all States under the principle of freedom of the seas, especially rights of navigation and fishing in free waters, should be preserved and protected as far as possible.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government agree that it is for the time being impracticable to develop submarine areas internationally;

LORD ASQUITH OF BISHOPSTONE

(1) It is extremely desirable that ...ncome in what threatens to become an oil-starved world, should have the right to exploit the subsoil of the submarine area outside the territorial limit; (2) the contiguous coastal Power seems the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control, and the alternatives teem with disadvantages.

[illegible] (p. 9)

The Commission dismissed (paragraph 2 of the comments on article 2) the suggestion that these rights should be vested in the international community, subject of course to the various methods of organization advocated by the proponents of this solution - a solution which, as the ILC has shown, is based on an attractive ideal rather than a sound appreciation of realities.

DE ARECHAGA (I.B.A.)

The ILC attributes any rights which may attach to the continental platform to the coastal State.

We are in favour of this solution, since the coastal State has the exclusive right to explore and exploit the natural resources of the sea-bed and subsoil throughout the extent of the submarine shelf, which is the natural prolongation of its territory.

EUSTATHIADES (I.L.A.)

If the time is not yet ripe for international exploitation, let us at least have international control designed to preclude the non-exploitation of resources that might augment the welfare of mankind; in any event, let us reject the conservative idea of exclusive exploitation by the coastal State. Let men agree to achieve on the high seas what cannot be done on land.

Paul DE LA PRADELLE (I.L.A.)

Can the legal status of the continental shelf be built on such dubious foundations? The fact is that the proponents of exclusive sovereignty over the continental shelf are moving towards acceptance of international control of exploitation - in the usual sense of the word "control" in French - i.e. international supervision of direct exploitation by, or exploitation under concession from, the coastal State.

Organs of this kind are visibly on the increase in Europe, in the form of "high authorities" each having its special court of justice.

Thus there already exists in telecommunications an International Frequency Registration Board responsible for regulating radio frequencies.

Might it not be possible to hold an international conference open to all coastal States to agree on the establishment of a body of the same kind for the exploitation of the resources of the sea?

A few years ago Professor Gidel suggested to the Institute of International Law the establishment of a Bureau International de la mer, whose duties were to be simply investigation and documentation. That idea might well be taken up again and in view of the development of thought and practice the proposed body might be empowered to act as an arbitrator between the various surface and subsoil interests besides merely carrying on research.

MOUTON (p. 286)

Quite a different question is, whether the comparison with the continental mine law should be taken as far as to introduce the principle of the general interest. We can imagine that times will come when the supply of oil for instance is getting scarce. Only then, it may be necessary to create an organization in order to secure a proper distribution; something on the lines of the U.N.R.R.A. after World War II.

For the time being however, we could say at the most, that the coastal State is entrusted with the task to take its share in the oil-production for the common benefit of mankind. Of course there is an element of general (world) interest in this production. At the same time there is the general (world) interest of the use of the high seas and the sea-bed. If there is a chance that these two sides of the general (world) interest would be contradictory, then an international body would, we believe, be the best way to solve the problem.

LORD ASQUITH OF BISHOPSTONE (I.L.A.)

There is no reason in principle why the subsoil of the high seas should, like the high seas themselves, be incapable of being the subject of exclusive rights in any one. The main reasons why this status is attributed to the high seas is (i) that they are the great highways between nations and navigation of these highways should be unobstructed. (ii) That fishing in the high seas should be unrestricted (a policy approved by this country ever since Magna Carta abolished "several" fisheries). The subsoil, however, of the submarine area is not a highway between nations and the installations necessary to exploit it (even though sunk from the surface into the subsoil rather than tunnelled laterally) need hardly constitute an appreciable obstacle to free navigation; nor does the subsoil contain fish.

NETHERLANDS

Needless to say, the country of Grotius attaches particular importance to the principle of the freedom of the seas. Nevertheless the Netherlands Government is aware that these principles cannot be applied in such a way as to impede a development of law which should be considered beneficial to the whole community of nations.

GIDEL (p. 22)

A promising method would be to keep in mind the two guiding principles formulated by the International Law Commission of the United Nations in 1950: to promote the exploitation of the natural resources offered to mankind by the continental shelf, the total surface of which is estimated to be more than 7 per cent of the surface of the marine waters of the globe; and to avoid confinement within a narrow and purely formal concept of the principle of the freedom of the seas. At the same time the Conference would be well advised not to depart from the general system of the law of the high seas, a system which has been built up slowly over the centuries, save to the extent necessary to meet the needs of a world faced with new situations.

VALLAT (I.B.A.)

The fact that the exercise of rights over the continental shelf may impinge on the freedom of the high seas is not sufficient reason for refusing to recognise those rights. Although some interference with freedom of navigation will no doubt follow from the exploitation of the continental shelf, some resources of the shelf can be taken without any interference. Therefore, it is possible for rights over the shelf and the freedom of the high seas to co-exist and it is the task of international lawyers to reconcile one with the other so far as possible.

Comments Nos. 4, 5 and 6

Lex lata or lex ferenda

ISRAEL

Yet the document itself is circulated with reference to article 16 of the Statute of the International Law Commission, which relates to the progressive development of international law. Having regard for the definitions of "progressive development" and "codification" contained in article 15 of the Statute of the International Law Commission, the Government of Israel is of opinion that that aspect of the law of the high seas which relates to the continental shelf is more susceptible to progressive development than to codification. On the other hand, it has less definite views as to the more appropriate treatment for the matters contained in part II of document A/CN.4/49. True, the manner in which the Commission has treated them is rather that of progressive development than that of codification, and there are doubtless many reasons why this should be preferred.

NORWAY

The International Law Commission has stated in paragraph 6 of the commentaries to part I, article 2, that it has not attempted to base on customary law the right of the coastal State to exercise control and jurisdiction for the purpose of exploring and exploiting the natural resources of the continental shelf. As we are here faced not with a restatement or clarification of existing international law but with the question of whether new rules should be established, great caution seems to be desirable. No innovation should be made before the problems involved have all been carefully considered and discussed by all interested States.

SWEDEN

The Swedish Government feels bound to regard any proposal to grant rights over the continental shelf to coastal States as being de lege ferenda and considers that such a proposal could only be put into effect by an international convention providing for certain concessions to coastal States which are in a position to exploit the continental shelf. The conclusion of such a convention is a matter of expediency. It would depend on whether the reasons for granting such rights to coastal States were strong enough to persuade other States to accept a corresponding limitation of the rights they now enjoy by virtue of the principle of freedom of the seas.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

As Her Majesty's Government understand it, it is the task of the Commission to "codify" the regime of the high seas. "Codification" was defined by the Committee on the Progressive Development of International Law and its Codification as meaning "the more precise formulation and systematisation of the law in areas where there has been extensive State practice, precedent and doctrine" (A/AC.10/51).

In the opinion of Her Majesty's Government, State practice in regard to the subjects treated by the Commission has, notwithstanding certain gaps, been sufficiently developed to justify the attempt to prepare a code. While they must observe that, in their view, some of the rules enumerated by the Commission

in its draft are not at present rules of customary international law, Her Majesty's Government do not propose to criticize them destructively on this account. Where, however, it appears that the rule suggested is based on so little practice as to amount to a mere recommendation, it is indicated in the Annex whether or not Her Majesty's Government consider the recommendation acceptable in principle, whilst reserving the right to reconsider the matter in the light of the replies of other governments.

GIDEL (p. 17)

One very difficult question is the extent to which, at the present time, the concept of the continental shelf, with the legal consequences deducible from it, is or is not part of law.

The ILC touched on this question. In paragraph 6 of the comments on article 2 of its draft, it stated: "The Commission has not attempted to base on customary law the right of a 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."

The extent to which a unilateral legal act can have effect under international law is a difficult and controversial question. The doctrine regarded as most convincing is that a unilateral legal act intended to create rights for benefit of the State declaring its will is effective only when that State, in so doing, takes its stand on legal foundations already established under international law (e.g. a declaration of neutrality).

But can it be said that there is already in existence a doctrine determining the legal position of a coastal State with respect to its transterritorial continental shelf?

Professor Lauterpacht holds that there is, on the basis of the twofold argument that some maritime Powers - indeed, as he says, some of the leading maritime Powers - have asserted rights over their continental shelf and other States have acquiesced in them. "The appropriation - or which is essentially the same, the right of appropriation - of the adjacent submarine areas have become part of international law by custom initiated by the leading maritime Powers and acquiesced in by the generality of the States." (art. cit., page 431)

Although he postulates the existence of a customary law in this connexion, the learned writer does not venture to specify exactly when this customary law took form. Was it after the Treaty of the Gulf of Paria in 1942? Or after President Truman's Proclamation of 1945? Or was it later after the Orders in Council cited above; and, if so, after which of them? Or in 1949 after the Proclamations of the Rulers of the Trucial Coast "acting under British control and responsibility"? The learned writer offers no guidance on this point, confining himself to the statement that in four years (which four?) customary law may very well take form.

It is undoubtedly true that between States which have claimed the same rights (provided that they were in fact the same, which has not always been the case) a law of the continental shelf has taken form, since each of the States which have unilaterally declared concordant claims has been unable to venire contra factum proprium (estoppel); so that a system is thus taking form which has already acquired considerable importance. But is this a "customary law", capable of serving as a framework for any similar unilateral declaration of intention and of rendering it effective erga omnes? It is noteworthy that international maritime law, in particular that concerning adjacent waters, contains few instances of doctrinal indulgence of this kind in connexion with the conditions for the formation of a valid customary law.

The ILC's reserve with regard to the concept of a "customary law" already capable of being invoked may readily be understood. There are cogent arguments against the assertion that a customary law of the continental shelf already exists: firstly, the glaring discrepancies between the rights claimed; and secondly, the fact that the total figure of some twenty declarations - declarations which are not in all cases concordant - needs to be corrected before we can decide how many may be retained in our list, since all those emanating directly or indirectly from the United Kingdom should properly be counted as a single declaration.

It would appear, then, that with regard to the formation of an international law relating to the continental shelf, all that exists is a series of unilateral acts which cannot give each of the declarant States the backing of a legal system

currently established under international law; whose sole effect, therefore, is to prevent a State from challenging the validity of an identical declaration made by another State regarding its own continental shelf, so far as concerns the mutual relations between the two States concerned.

After rejecting the hypothesis of the existence of "a new customary law", the ILC concludes its remarks in paragraph 6 (of the comments on article 2) as follows: "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."

It remains for the Conference to decide how these "general principles of law" are to be determined.

Do these "general principles of law" exist in reality? Or is it not merely a matter of the recognition of certain facts and certain material and economic necessities which, given the continued increase in world population and the constant depletion of world resources, make us wish to raise to the rank of "general principles of law" precepts of mere expediency and equity; for example, that natural resources should be exploited; that they should be exploited at once efficiently and prudently, and that as things are, it is usually the State to whose continental mass the submarine shelf is attached that is best able to undertake such exploitation? These ideas are not unlike those unerlying a resolution recently adopted by the Commission on Human Rights (April 1952) and somewhat paradoxically linked by that body with human rights through the right of peoples to self-determination. The doctrine of the continental shelf would from that point of view be akin to the right of peoples to dispose of their own natural resources.

ENOMOTO (I.B.A.)

We cannot but conclude that any legal concept connected with the continental shelf has not yet been established and any rule therefore has not yet been accepted by the international community in its legal conviction.

"Res nullius, res communis".

GIHL (I.L.A.)

The Commission says that "The principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community." I must confess that I am ignorant of the general principles of law to which the Commission is referring.

EUSTIATHIADES (I.L.A.)

Despite the contending doctrines that have been advanced as matters of existing law, the debate still remains a debate de lege ferenda.

LORD ASQUITH OF BISHOPSTONE (I.L.A.)

"It is clear that the Codifying Commission of the International Law Commission is charged with two distinct functions, (1) that of recording existing rules of international law, and (2) that of indicating what the law should be; promoting, as the phrase runs, "the progressive development of international law" by preparing draft conventions on "subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States". It seems to me clear that these Articles were framed in the discharge not of the first, but of the second of these functions. As the Commission in paragraph 6 of its commentary on Article 2 says: "The Commission has not attempted to base on customary law the right of a State to exercise control and jurisdiction for the limited purposes stated in article 2, and 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".

I therefore cannot accept these Articles as recording, or even purporting to record, established rules.

"Occupation"

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government agree...that the continental shelf is not res nullius; and that the right to exercise sovereignty over the continental shelf is independent of the concept of occupation.

SWEDEN

The Swedish Government was interested to note that in its comments on Article 2 of the draft, the International Law Commission gives negative answers to the questions whether the continental shelf can be occupied and whether claims to sovereignty over it have any basis in international customary law. On the other hand, the Commission states that "the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community". The Swedish Government is unable to reconcile these two views. Moreover, the Commission gives no particulars of the "general principles of law" to which it refers.

VALLAT (I.B.A.)

It would probably be admitted almost universally by writers on international law that rights can be acquired over parts of the sea-bed outside territorial waters by effective control or occupation as in the case of sedentary fisheries. Whether the analogy of oyster and pearl fisheries need be applied to the continental shelf is another question but the possibility of acquiring legal rights in such sedentary fisheries shows that there is nothing manifestly contrary to international law in the acquisition of rights over the sea-bed outside territorial waters.

Assuming, therefore, that rights can be acquired over the continental shelf or at least parts of it, how can such rights be acquired?

In 1946, shortly after the issue of President Truman's proclamation, the present writer, with some doubts, took the view that occupation was necessary to establish title over the continental shelf. This view was based on one of the methods of acquiring title formerly known in international law, and, on what must now be admitted to have been a misreading of the article "Whose is the Bed of the Sea?" by Sir Cecil Hurst in the British Year Book of International Law of 1923-24. The occupational theory, however, has been subjected to close scrutiny and criticism and cannot any longer be accepted as sound. There is not space here to set out in full the reasoning. This has recently been done in an admirable article by Professor Lauterpacht.

Once it is acknowledged that rights can be acquired over the continental shelf as a whole, and not only over small parts of it, it becomes apparent that the acquisition of title by occupation can be no more than a fiction. It would obviously be impossible to occupy vast submarine areas in the same way in which it is possible to occupy dry land. But if once more we consider the status of territorial waters, we may well ask whether the conception of occupation applies in any real sense there either. As was stated by Sir Arnold McNair in his dissenting opinion in the Fisheries Case mentioned above (page 160) "To every State whose land territory is in any place washed by the sea, international law attaches a corresponding portion of marine territory consisting of what the law calls territorial waters (and in some cases national waters in addition)." Here is a conception of title to territorial waters existing not so much by virtue of any occupation or control as by virtue of international law.

It does not seem unreasonable, therefore, to suppose that international law may attach to the coastal State certain rights over the continental shelf surrounding its shores. It is perhaps too early in the development of this concept to say exactly what the position in international law is. But there is much to be said on grounds of geography and geology, of economic and security needs and of convenience for the view that the coastal State has some form of prior right as against all other States. It may be that in time international law will come to regard the title of the coastal State as existing under international law in the same way as the title to territorial waters exists, but we can surely go so far as to say even now that the coastal State may be legislation of other acts or State establish rights in international law over the continental shelf which are good against all the world.

If it was difficult to go so far as this a few years ago, the series of claims made since President Truman's proclamation, coupled with the absence of protest against such claims in general, would justify one in moving towards the conclusion that rights over the continental shelf may be established by the unilateral act of the coastal State without the need for any actual or fictional occupation.

YOUNG

(American Journal of International Law, vol. 46, No. 1)

Two further assumptions of importance underlie Article 2 and are noted in the Commission's comments. The first is that the right of jurisdiction is independent of any requirement of occupation. In view of the difficulties and inequities which result from any attempt to apply a rule of occupation to submarine areas, the Commission's stand would seem realistic and proper. There is indeed a departure from traditional rules with respect to the acquisition of land territory; but the situations are quite dissimilar and the Commission would appear fully justified in its opinion that a requirement of occupation might lead to chaos.

GREEN

(Current legal problems 1951, Vol.4, p. 79)

It has been suggested throughout this paper that title to the continental shelf and its resources depends upon effective occupation, in the same way as does title to land or guano islands, although it is true that the requirements for effective occupation depend on the nature of the terrain, the difficulty of settlement and the like. What is necessary for land, therefore, may be more than the minimum required for the sea-bed. Nevertheless, mere proclamations and unilateral declarations can amount to no more than inchoate titles requiring some measure of occupation or exploitation to perfect them. It is insufficient to base claims on an alleged legal doctrine of the continental shelf, which, as we have seen, the International Law Commission regards as unnecessary, recognizing claims to exploit marine resources regardless of the existence of the shelf, while some States, like Chile, pay but lip service to the concept in order to claim vast areas of territory for themselves. There is no need for dialectical acrobatics. As Professor Waldock has said, "we should not be in a hurry to accept a totally new concept as a substitute for the existing customary law of occupation. There is probably less risk of the existing law failing to meet the legitimate requirements of States in the exploitation of the sea-bed than of a hastily advanced new doctrine undermining the international character of the high seas".

BINGHAM

(Inter-American Bar Association)

My remaining comment will be addressed to the argument of those who do not deny the possibility of legal property in bed or sub-soil, but insist on occupation as the proper basis of title. I select for instances the paper read before the Grotius Society on April 5, 1950 by Professor Waldock, Chichele Professor of International Law and Diplomacy of the University of Oxford, on "The Legal Basis of Claims to the Continental Shelf," and an article on "The Continental Shelf" by L.C. Green, published in Current Legal Problems, 1951, under the auspices of the Faculty of Laws of University College, London. Neither of these gentlemen denies the desirability of coastal State jurisdiction over the oil resources of the continental shelf, but they consider that international law requires that extra-territorial proprietorship and jurisdiction must be founded on prior occupation, because of the traditional Grotian premises so far as they have not been invalidated by State practices. Professor Waldock admits that actual occupation of submarine areas is difficult. He leaves uncertain what acts would be sufficient as occupation. Apparently he would consider a declaration such as that of the Truman Proclamation to be an initiatory act of occupation if followed in reasonable time by physical acts such as exploration. Would he require the occupational acts to extend to the whole shelf as a requisite of title to the whole? Or would occupation of part under claim to the whole be sufficient?

Both Professor Waldock and Mr. Green think that the British Orders in Council extending the territories of West Indian colonial possessions to include the sea-covered shelves of the islands, follow the occupation doctrine and therefore are proper, although both leave open the question of whether the Orders in Council alone are sufficient legal title in international law. The American method of acquiring jurisdiction over shelf oil they consider technically objectionable.

My opinion of these objections to the Truman Proclamation can be deduced from the previous part of this paper. Since through development of State practice from case to case, States have acquired and maintain property and sovereign jurisdiction over coastal marine territorial belts at least three miles

wide without occupation (although there is no settled common agreement on how wide a belt the law should allow); I am unable to understand why now State practice should not likewise be capable of making legally valid such a limited extension of proprietary interest and jurisdiction as that provided in the Continental Shelf Proclamation. Nor do I see any common sense or barring established principle of State policy or practice which demands that such extensions of jurisdiction must rest on occupation, because other territorial acquisitions dissimilar in particulars, must, for sound reasons of policy, be acquired by title of occupation.

LORD ASQUITH OF BISHOPSTONE (I.L.A.)

To treat this subsoil as res nullius - "fair game" for the first occupier - entails obvious and grave dangers so far as occupation is possible at all. It invites a perilous scramble. The doctrine that occupation is vital in the case of a res nullius has in any case worn thin since the East Greenland Arbitration and more especially since that relating to Clipperton Island. But leaving that aside, it is difficult to imagine any arrangement more calculated to produce international friction than one which entitles nation A, it may be thousands of miles from nation B, to stake out claims in the Continental Shelf contiguous to nation B by "squatting" on B's doorstep - at some point just outside nation B's territorial water limit."

Articles 3 and 4

CHILE

The principles accepted by the International Law Commission lead to a manifest contradiction; whereas, as we have already suggested here, the continental shelf should be subject to sovereignty i.e. to the total jurisdiction of the State whose territory extends beneath the sea. Thus the sea-bed and subsoil would be subject to the dominion and sovereignty of the coastal State, while over the superjacent waters that State would only exercise restricted rights of an economic and administrative nature, which might well give rise to conflicts of jurisdiction.

These principles should therefore be brought into line with a realistic rule or system which would safeguard the rights of the coastal State.

Whenever a rule is needed to settle disputes between nations, jurisprudence produces one which, under the test of time, is confirmed if satisfactory and amended or superseded if not.

In this belief the Government of Chile would reject articles 3, 4, 5 and 6 and propose their replacement by a new provision proclaiming that the sovereignty of a coastal State extends to its continental shelf and to the superjacent high seas, subject to the limitations imposed by international law to ensure the innocent and peaceful passage of the ships of all nations and the establishment and maintenance of submarine cables.

This theory of sovereignty, adopted by the Government of Chile, appears to be borne out by the practice of certain States. The Governments of Argentina, Chile, Peru, Costa Rica, Honduras and Nicaragua, in proclamations dated respectively 11 October 1946, 23 June 1947, 1 August 1947, 27 July 1948, 28 January 1950 and 1 November 1950, have categorically claimed the sovereignty of their States over the continental shelf adjacent to their coasts and over the superjacent waters to the extent required to guarantee to those States ownership of the resources therein contained.

ECUADOR

However, under our law the superjacent waters may be high seas in some cases and territorial waters in others.

ISRAEL

The Government of Israel finds itself in agreement with the principle underlying draft articles 3 and 4.

NETHERLANDS

The Netherlands Government is pleased to note that the Commission's draft maintains the principle of the freedom of the seas, particularly as regards navigation and fishing.

YUGOSLAVIA

Since these two articles cover the same subject, the Yugoslav Government considers that they should be joined into one article with two paragraphs. The second paragraph, dealing with the infringement of the legal status of the air-space above the continental shelf, should be amended as follows:

"...subject to the right of the coastal state defined by article 6, paragraph 2."

Overflying below a certain height should be prohibited, in order to protect the already existing installations.

ICELAND

The Icelandic Government is unable to agree with these views.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government are entirely in favour of this Article and would not be prepared to accept any convention on the continental shelf which did not contain such an Article.

SWEDEN

The Swedish Government approves of the provisions of Articles 3 and 4, namely, that the exercise by a coastal State of control and jurisdiction over the continental shelf must not affect the legal status of the superjacent waters or of the airspace above them.

RYCK (I.L.A.)

If first a right over the subsoil and sea-bed shall be established, I cannot see any reason to except fisheries. In so far I agree entirely with the standpoint of Peru and Chile. Here again it appears that it is the interest of the different countries, who fix their standpoints. Some of the countries that are interested in establishing a control of adjoining subsoil, are also interested in fishing on the sea, covering the subsoil of other countries.

Article 5

DENMARK

The Danish authorities are in full agreement with this provision. With the present formulation it may be doubtful, however, which of the two interests shall be overriding or, in other words, whether a State may be required to move the cable or, vice versa, whether a cable can be laid even where this is at variance with an exploitation intended by the coastal State. It would seem natural here to distinguish between cables already existing, in which case a removal, if any, should probably entail a compensation for the expenses incidental to such removal, and to the laying of new cables which should be effected in such a way as not to interfere with steps for exploitation of the sea-bed already taken by the Coastal State. Also where other installations are involved which have already been placed by other States, for instance the mooring of light-ships and the like, some regard should be had to arrangements existing already.

On the other hand, the commentaries indicate that this provision shall not be extended to pipelines, which is probably intended to mean the laying of new pipelines. However, other types of installations may be placed on the sea-bed and in view of the Danish authorities it would therefore be desirable to have it expressly established that the exclusive right recognized for the coastal State (see the remarks to part I, article 2 above) shall cover any other exploitation of the sea-bed and the subsoil, with submarine cables as the only exception, for instance the right to cultivation (algae and other marine plants), establishment and maintenance of permanent installations for exploitation of the sea-bed, including the fixing of permanent stakes and other fishing devices, stone-gathering and pearl-fishing on the sea-bed, etc., so that other States could not in any case, apart from submarine cables, use the sea-bed or the subsoil without the consent of the coastal State, with the explicit recognition that the exclusive right comprises all such forms of exploitation.

ECUADOR

We have no comparable provision in our law on the subject, but clearly Ecuador may do any act and take any measures whatsoever within the confines of its own territory, which includes the continental shelf where the superjacent water is not more than 200 metres deep.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government are entirely in favour of this Article and would not be prepared to accept any convention on the continental shelf which did not contain such an Article.

UNITED STATES OF AMERICA

It is also the view of the Government of the United States that Article 5 does not carry out precisely enough its purpose which, as stated in the commentary, is to bar the coastal State from excluding the laying or maintenance of submarine cables. As it stands, Article 5 appears to imply that the coastal State may do so if the measures resulting in such exclusion are reasonable. The matter, it is believed, deserves clarification.

GIDEL (p.12)

The International Law Commission has stated (comments on article 5) that it was not thought necessary to insert a special provision on pipelines. Yet the question is not without practical interest. It calls perhaps for a useful distinction.

There could presumably be no objection to the free laying on the continental shelf of pipelines serving an oil undertaking having installations on that continental shelf.

More difficult is the hypothetical case in which a pipeline to be laid on the continental shelf of a State A is to serve for the transport of liquid fuels between two other States B and C. Such a case is that of the proposed pipeline from Mexico to Canada via the continental shelf of the United States. If the establishment or maintenance of submarine cables may not be prevented on the high seas over the continental shelf (article 5), why should the establishment or maintenance of pipelines be differently treated?

MOUTON (p. 244 and 245)

We hope that the Commission will discuss this matter again at its next session, because the pipelines connecting the collecting platforms with the shore are lying on the continental shelf under the high seas, are liable to be damaged by anchoring ships or fishing vessels and will, if damaged, cause pollution of seawater and will give rise to conflicts of an international character. Some provisions have to be made for protection. We are even thinking of a "safety zone" of let us say 250 metres width, following the

pipeline on both sides, where it should be forbidden to anchor. Pipelines should be marked on the map. This proposal will probably meet strong opposition because of strategical considerations.

It should be kept in mind that damaging a pipeline has a more serious character than damaging a telegraph cable, because of the pollution of the sea water which would be the result. Not only the private interest of the owner, but the general interest is involved, perhaps even more than in the case of cables. Such provisions should either be laid down in a Convention or in the Convention an international body should be given the power to make regulations for each case, following, if this is more acceptable, draft rules ("règlement-type" or "projet de règlement) added as an annex to the Convention.

We believe that the subject deserves further consideration.

Article 6

ECUADOR

There is no comparable provision in our law, but it is easily gathered that where the Ecuadorean continental shelf extends beyond territorial waters, the principle in the Civil Code that fishing in the sea is free prevails. Where the Ecuadorean shelf ends within the area of territorial waters, the matter is governed by the principle in the Civil Code that only Ecuadoreans and aliens domiciled in Ecuador may fish in territorial waters, and by the provisions of the Sea Fishing and Hunting Act relating to foreign vessels.

ISRAEL

In the view of the Government of Israel the formulation of draft article 6 (2) is defective in that it confuses the two distinct elements of territorial waters and protection of the installations. From the theoretical aspect it would appear to be desirable to establish that the installations do not have the status of islands from the point of view of delimiting the territorial waters of the coastal State, if it is understood by this that the coastal State is not to be able artificially to increase the general width of its own belt of territorial waters as measured from the low water mark or other defined base-line, solely by means of constructing a chain or chains of such installations extending from the coast into the high seas. But to deduce

from this desirable theoretical proposition that the installations themselves cannot have their own territorial waters seems to involve a non sequitur. Clearly the problem of the defence and security of the installations, both those emerging through the sea and those permanently under the surface of the sea, will be a difficult one, and the radius of 500 metres suggested by the Commission in its comment to the draft article seems not to have taken into account all the problems involved in this delicate aspect.

YUGOSLAVIA

No objections. We agree with point 4 of the commentary to this article, with the remark that a safety zone over the installation in a height of 500 metres should be provided.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Her Majesty's Government agree in principle to this Article. They believe, however, that the Commission's recommendation of a 500 metre navigational safety zone should be written into the body of the Article in place of the rather vague formula "to reasonable distances".

SWEDEN

The Swedish Government considers that the proposed provisions of Article 6 are likely to cause some anxiety, since they appear to encroach, to some extent, on the principle of freedom of the seas. As already pointed out above, the granting of rights over the continental shelf to coastal States should be conditional upon the rights of navigation and fishing in free waters, which belong to all States, being restricted as little as possible. The Swedish Government cannot help feeling that this stipulation has not been adequately formulated in the proposed text of Article 6. To say that "the exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing" does not appear to provide a guarantee in this matter. Precise rules should be drawn up concerning notification and warnings, particularly in regard to the question of

the parties to be notified. In any case, it will be necessary to ensure that notice is given before installations are constructed. With a view to the safety of shipping, it will also be necessary to draw up rules on the equipment of installations. An obligation to pay compensation for damage resulting from negligence or carelessness on the part of the exploiter should also be created.

The Swedish Government considers that in some respects the most strikingly novel feature of the draft is the provision in Article 6, paragraph 2, regarding the establishment of safety zones around installations. This provision undoubtedly departs from existing rules of law on the freedom of the seas. It may be asked whether coastal States will acquire the right to stop and punish ships entering navigable waters to which they now have an undisputed right of access. The provision on safety zones should give details both of their nature and of their extent. In its comments, the Commission states that a radius of 500 metres would generally be sufficient. If that is so, this figure should be included in the text of the future convention.

FRANCE

Article 6 stipulates that "the exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing".

This wording calls for a number of comments:

(a) It would seem useful to make it clear also that the exploitation of the continental shelf should not have the effect of reducing fish production, for example, by causing the local disappearance of the general depletion of certain species.

(b) The question necessarily arises who will have the power - and when - to judge whether the action taken by the coastal State is, in effect, likely or not likely to interfere with navigation or fishing. The draft article in no way specifies what authority would be competent to refuse permission or to declare an action prohibited, or how serious the interference must be before such a decision becomes a necessity.

(c) Finally, the ability to exploit under article 6 ipso facto seems to imply the ability to install pipe lines. Perhaps it would be better to say so in so many words.

Note 4 to article 6, paragraph 2, refers to the possibility of establishing "narrow safety zones" extending for perhaps five hundred metres around the installations. If and when discussions are held concerning the determination of the width of such zones, care should be taken to avoid any infringement of the freedom of navigation and fishing through the establishment of such contiguous zones.

UNION OF SOUTH AFRICA

The Union Government is inclined to favour express provisions for a safety zone of 500 metres round installations on the continental shelf. It is felt that the phrase "reasonable distance" is uncertain and may give rise to disputes.

DE AZCARRAGA (I.B.A.)

The installations necessary for the exploration and exploitation of the natural resources of the "epijurisdictional shelf" might be set up direct from the sea or by tunnels or subterranean galleries starting from the national territory or territorial waters of the coastal State, but they would be required not to interfere substantially with navigation, fishing, the establishment or maintenance of submarine cables and the like.

Such installations will be effectively and visibly marked. Furthermore, all States will be notified of their situation and characteristics through bathymetric and hydrographic charts published by the owner State. In addition, they will be equipped with all the devices and apparatus requisite for preventing hindrance to navigation, such as lights, audible signals, radar, buoys etc.

These installations should not be regarded as islands with respect to the adjacent waters (hence they would have no territorial waters), but they should have safety zones of 500 metres radius. Their legal status should be defined simply by the word "safety" as properly interpreted.

GHIL (I.L.A.)

Whether this article adequately serves its purpose is doubtful. It is to be hoped that the duty of the exploiting State to take safety measures will be more specifically stated.

The same is true of the provision in article 6, paragraph (2), for the establishment of safety zones around the installations. This provision undoubtedly amounts to a derogation from the rules of law on the freedom of the seas at present in force. I think it advisable that the provision on safety zones should define their nature and size more precisely.

YOUNG

(The American Journal of International Law, vol.46, No. 1)

In Article 6 the principle is asserted that exploration and exploitation of the shelf must not result in substantial interference with navigation or fishing. In support of this requirement, the comment observes that "navigation and fishing must be considered as primary interests." The motives behind these statements are understandable; yet it is perhaps unfortunate that in this article the Commission failed to show the same farsightedness which marked its approach in Article 1. It would seem that the question whether navigation or fishing or the exploitation of natural resources is the chief interest in any particular area is a question of fact, and that priority of right ought to be determined accordingly. In many areas of shallow waters, off the beaten track but rich in resources, navigation may be of no real importance; it would seem absurd to impose elaborate restrictions on development of the resources to protect a "primary interest" amounting to a few small craft a year. Conversely, one may well wish to avoid development installations in the midst of a busy seaway. Still another consideration which militates against the Commission's view is that the relative importance of various activities may shift with time; the navigation or fishery which is a primary interest today may be no more than a dead hand on other developments a few years hence. Sight should not be lost of the fact that the potentially vast uses of the sea are only beginning to be recognized.

The second paragraph of Article 6, though less important, is open to something of the same objection. It provides that development installations shall not have the status of islands for the purpose of delimiting territorial waters, although safety zones may be established around them to a reasonable distance (500 metres is suggested in the comment). The principle may be sound with respect to the relatively small and temporary installations of today, but what of tomorrow? If artificial islands of a permanent character were to be built, possessing area and population greater than many natural islands, it would seem unrealistic to deny them the legal status of islands merely because of their origin.

MOUTON (p. 220, 221, 248, 286)

We believe that it would be preferable to establish eventually international rules concerning marking of such installations.

However, the question now to be answered is: is such an installation, marked on the charts, illuminated, and we may add supplied with a proper fog warning device, an obstacle to shipping? Our answer is theoretically yes, practically no.

In pure theory and "ad absurdum" we could say that pure freedom of navigation would only exist if but one ship sailed the oceans. As soon as a second one appears, the first one might be hindered in its movements. But now more realistic: a ship may anchor in or outside the territorial waters. As such it contstitutes an obstacle. Hence the rule laying down that it shall warn shipping of its presence by bell signals in fog and by showing anchor-lights at night. What is the difference between a ship at anchor or an installation as described? The latter does not sway round its anchor on the tide or changing wind, like the ship may do, but is fixed on its poles. Moreover the installation is marked on the chart, the ship is not! If anchoring is free and within the common use of the high seas, which it is, why should it not be permitted to erect an installation? Of course they must be equipped with warning devices which have to be operated. Both have in common that they can in case of fog be detected by radar.

Where frequented shipping lanes are concerned, not of direct interest to the coastal State adjacent to the shelf, interest of oil-companies and shipping may clash. This is one of the reasons which we adduce for the idea of creating an international body before which both interests could be submitted and weighed, and which should be given the power to decide, which of the two interests in a given case should prevail.

.....

The question arises, what prevails, the right of the State to build on its "territory" or the right of inoffensive passage through that "territory". Personally we should think that the greater right, namely the right of the greater community, i.e. all the sea-faring nations of the world, would prevail above the smaller right, i.e. the right of the smaller community, the coastal State.

.....

That navigation and fishing are considered as primary interests, must, we believe, be explained in this way, that they represent the general interest, whereas the oil-exploitation is, at least for the time being, more particularly the private interest of the coastal State. Of course oil is a generally needed commodity, but we feel that as long as the world production fulfils the needs, and as long as the activities of a particular producer are not strictly necessary to satisfy the total demand, these activities are limited to the order of commercial competition rather than belonging to the order of the general interest.

Article 7

DENMARK

For the special conditions existing off the Danish coasts, part I, article 7 prescribes that two or more States to whose territories the same continental shelf is contiguous, shall establish boundaries by agreement; failing agreement, the parties are under obligation to have boundaries fixed by arbitration, involving - according to the commentaries - a possible recourse to the International Court of Justice.

This alternative, however, is not practicable in all cases. In the first place, not all States would be willing to abide by a solution of that nature; more particularly, some of the countries which would be involved by the areas in question are known to be opposed thereto as a matter of principle. But even when the question is to be referred to arbitration or to a court, a solution would seem unlikely, unless the treaty itself already contained certain directives or guiding principles, since these problems involve entirely new aspects which can hardly be decided according to existing legal or political principles. In this connexion the commentaries admittedly refer to a decision ex aequo et bono by which the court may, to some extent, disregard existing law or the fact that the existing law contains no definite rules or guiding principles. Nevertheless, this expression has certain bearings upon a legal or a general moral evaluation, but provides no guidance for decision of entirely new technical problems or political pretentions.

Hence, the Danish authorities would find it desirable that the treaty itself should provide for a body composed of experts which could submit proposals for such delimitations, possibly with some form of appeal or recourse to arbitration or to a court. This body might consist of, for instance, three non-partisan expert members, one appointed by the Security Council of the United Nations, one by the General Assembly, and one by the President of the International Court of Justice.

The decisions of this body should be reached on the bases of directives laid down in the treaty. Should a State interested in the decision find that such directives had not been complied with, or that the decision was otherwise unreasonable, it should be entitled to refer that question to a court of arbitration established by the parties or, failing this, to the International Court of Justice which should have authority to decide the aspects specifically mentioned in the treaty, and possibly to refer the matter back to the expert body for reconsideration if the circumstances were found to warrant such action.

In regard to the directives mentioned above, the commentaries already refer to the median line, and where this line is applicable, such reference is fully approved by Denmark. Cases may occur, however, where a median line is not directly applicable, for instance, because the interests in the exploitation of the shelf are more or less at right angles to each other; in such cases reference could be made to a solution according to the bisector.

Furthermore, it is felt desirable that the points of view referred to on page 71 of the Rapporteur's second report were expressly incorporated into the treaty, namely the reference to a line perpendicular to the coast drawn from the point at which the frontier between the territorial waters of the two countries reaches the high seas. If such a boundary between the two territorial waters of two countries has previously been fixed according to a line of demarcation which can be prolonged towards the high seas, such prolongation should be indicated as the starting point for the line of demarcation also on the continental shelf.

However, in some cases an area may have to be dived between three or more countries. In such cases reference may be made to planes forming the locus of the points which are closer to one of the countries than to any of the others.

Such directives or guiding principles would establish a basis for a solution in cases where agreement among the interested countries could not be reached, while the absence of such principles may entail differences of opinion and disputes which the draft tends to obviate.

ECUADOR

As there is no express provision in our law governing this situation, we should be entitled to establish such boundaries by bilateral treaty.

ISRAEL

With regard to draft article 7, the Government of Israel is at one with the Commission on the desirability of neighbouring States agreeing between themselves as to the boundaries of their respective areas of continental shelf. Such agreements would have the legal effect of establishing a lex specialis in force between the parties to them. However, the expression of such a desire would appear to be more appropriate to a voeu to be emitted by the General Assembly or the diplomatic conference which will give final consideration to the draft convention as a whole. It is not so clear that it is a correct manner of approaching the problem of codification or progressive development of international law to include in the draft articles under discussion a pactum de contrahendo couched in such general terms, the legal value of which is questionable. In the same line of thought it is difficult

to acquiesce at this stage in a proposal put forward, it is assumed, de lege ferenda, that States should agree in advance to submit certain disagreements to arbitration or judicial settlement ex aequo et bono. There are two main objections to this proposal in the form in which it has been put. In the first place, an agreement to proceed to arbitration or judicial settlement whether or not ex aequo et bono, should be placed in a general compromissory clause and then stand in a certain defined relation with the whole draft convention - and it will be recalled that in the view of the Government of Israel the draft articles here being discussed can in the last resort only be satisfactorily considered within their context in a more comprehensive draft convention relating to the status of the high seas. Secondly, and more important, it is not a necessary consequence of the draft articles actually contained in document A/CN.4/49 and the commentary thereon that even at this stage it is not possible to establish some general principles of law regarding the determination of boundaries of areas of continental shelf. The general principles of law relating to the settlement of territorial claims are relatively well developed, at all events in so far as concerns land territory, and it is felt that a document possessing a law-declaring or law-creating character such as the draft articles should proceed from a more positive attitude towards established principles of law. At least it should proceed from an examination into the problem of how far these established principles can be regarded as having application to the matter here being discussed. States have in the past shown little propensity to proceed to arbitration or judicial settlement ex aequo et bono in preference to such mode of settlement of disputes based on strict law, and it seems reasonable to express grave doubts as to whether the proposal of the International Law Commission is in accord, either with the manifest tendencies of States or with the tasks actually imposed upon the Commission in relation to the codification and progressive development of international law.

NETHERLANDS

The Netherlands Government wishes to emphasize the advantage of an international system to regulate the delimitation of the continental shelf between adjacent States and States separated by a stretch of sea. It is not sufficient simply to express the hope that such States will reach agreement on the subject. Compulsory arbitration, as provided for in the article, might prove very useful, but it would very definitely be advisable to lay down specific rules of law upon which arbitrators could base their decisions.

YUGOSLAVIA

...if article 1 of this draft remains unchanged, article 7 is inadmissible. Since neighbouring countries do not know to what distance their continental shelves can extend, because technical possibilities of extraction of oil will be different in two countries not equally industrially developed, they will not be able to establish the boundaries mentioned in article 7. Second, the Yugoslav Government considers the geometric middle the best way to apply in establishing boundaries, and it proposes to amend article 7 in this sense.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

While attaching great importance to the principle that international disputes should be settled by judicial methods, Her Majesty's Government are unable to agree to this Article in its present form. In particular they cannot accept the recommendation that States should be under an obligation to submit such disputes to arbitration ex aequo et bono. They consider that such disputes should be solved by "judicial settlement" rather than by "arbitration in the widest sense" and they consider that the Commission might draw up a system of rules to regulate the division of the continental shelf in congested areas in cases where it has been impossible to reach agreement. These rules might form the basis of treaties between States, and in any case, provided they took account of international practice to date, they would be of the greatest value to international judicial tribunals seized of disputes of this type.

SWEDEN

In Article 7 of the draft, the Commission deals with the need for boundaries between areas of the continental shelf belonging to States to whose territories the same continental shelf is contiguous. It may be expected that the fact of granting coastal States a monopoly of exploitation of the natural resources of the continental shelf will give rise to disputes between the States concerned. In such cases submission to arbitration should presumably be compulsory. The Swedish Government is not convinced of the advisability of arbitration ex aequo et bono. It is most desirable that rules of law on which arbitrators can base their decisions should be drawn up. Practice between States and previous arbitration cases may possibly provide useful material for the drafting of such rules of law. In this connexion, the Swedish Government wishes to draw attention to The Hague Arbitral Award of 1909 on the Maritime Frontier between Sweden and Norway.

UNITED STATES OF AMERICA

[The] Government [of the United States] does not believe that it is advisable to limit the scope of judicial arbitration by defining it as arbitration ex aequo et bono, as suggested in the commentary to Article 7.

UNION OF SOUTH AFRICA

While entertaining no very strong views on the relative merits of arbitration and judicial settlement of disputes which may arise from the inability of littoral States to agree upon boundaries in the area of the continental shelf, the Union Government would prefer an express stipulation in favour of the latter. It is felt that judicial settlement of disputes which may arise is more likely to contribute to the orderly development of international law than is the creation of a network of ad hoc arbitral awards based upon political rather than legal considerations.

DE AZCARRAGA (I.B.A.)

This is a wise solution, but some precise rules should be laid down for use as a basis in agreement and arbitration:

(A) Case of adjacent States:

The jurisdictional boundary line should be the prolongation of the territorial frontier to sea, projected vertically to the shelf.

(B) Case of two States separated by a branch of the sea open at both ends:

The jurisdictional boundary line should be the median line of the sea-bed. (This is an eclectic method, being based on two rules, 1 and 2).

(C) Case of two or more States fronting the same gulf:

Many difficulties arise in this case. The division of the shelf either in proportion to the length of the coasts of the States concerned (as proposed by VALLAT) or by a construction based on the system of equidistant points (as advocated by PLOWDEN in 1575 and incorporated in a study by Jean-Marie PY) might prove unsatisfactory, being based on mathematical speculation.

We believe that the method most likely to prevent dispute, as Professor GIDEL wisely saw, would be the conclusion of an agreement or treaty among the States fronting the same gulf and sharing the same shelf etc. He adds that the problem may be more acute when the boundary crosses a mineral deposit, particularly an oil deposit... If the agreement or treaty is to be placed on a sound basis, the principle of the unity of the deposit must be over-weighted.

YOUNG

(The American Journal of International Law, vol.46, No.1)

The comment suggests that the boundary between States on opposite sides of an arm of the sea should be in general some median line between the two coasts, but no proposals are made for other situations. In its approach the article shows a wise appreciation of the impossibility of laying down any universal rule for establishing boundaries on the shelf. Each situation is unique, and can be solved satisfactorily only in the light of its own facts and the particular interests there involved. The mention of arbitration, in this one place alone, seems both unnecessary and inappropriate; it would appear to have little relevance to the substantive problem with which the Commission was dealing.

Part II, Related subjects

RESOURCES OF THE SEA

Articles 1 and 2

CHILE

The problem of the continental shelf is closely linked with that of the conservation of resources of the sea. The International Law Commission has accordingly prepared three articles based on the former practice of international law by which, as a corollary to the freedom of the seas, no State could reserve to itself absolutely and as against all other nations a monopoly of hunting and fishing in any part of the "free" or "high" seas.

That used to be the international law or rule, but the principle of the freedom of the seas must be re-examined in the light of the present facts.

The seas are in reality dominated, used, and - it may almost be said - possessed by States maintaining powerful navies, fishing and merchant fleets, bases, supply ports, docks and shipyards. The nationals of those States are the only persons who fully enjoy all the privileges of the "freedom of the seas".

Such a state of affairs has a direct bearing on the area of the territorial sea, as it would not suit the major sea powers to have the territorial waters, where international custom has recognized the exclusive right of the coastal State to fish and hunt, increased in area.

It is a well-known fact that fishing fleets under the direct control of the great sea Powers engage in activities prejudicial to the States bordering upon the Pacific coast.

The American community could not remain indifferent to such acts, and since 1945 there has grown up the practice of protecting, conserving, regulating and supervising the operation of fishing and hunting, in order to prevent the diminution or exhaustion, by illicit activities such as those mentioned, of the considerable resources of the seas of those areas, which are indispensable to the well-being and progress of the American peoples.

On 28 September 1945 the President of the United States of America formulated a new doctrine when he issued a proclamation accompanied by an executive order, declaring the right of his country to establish fisheries

conservation zones in the high seas areas contiguous to the coasts of the United States, either exclusively or in agreement with other States concerned.

In an Official Declaration dated 23 June 1947 the President of Chile, on the basis of existing doctrine and of similar measures taken by Mexico and Argentina, laid down the following:

"2. The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within the limits necessary to reserve, protect, conserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the Government especially all fisheries and hunting activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of those riches to the detriment of the country and the American continent.

"3. The demarcation of the protection zones for hunting and deep sea fishing in the continental and island seas under the control of the Government of Chile will be made in virtue of this declaration of sovereignty at any moment which the Government may consider convenient, such demarcation to be ratified, amplified or modified in any way to conform with the knowledge, discoveries, studies and interests of Chile as required in the future. Protection and control are hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 sea miles from the coasts of Chilean territory. This demarcation will be calculated to include the Chilean islands, indicating a maritime zone contiguous to the coasts of those islands, projected parallel to those islands at a distance of 200 sea miles around their coasts.

"4. The present declaration of sovereignty does not disregard the similar legitimate rights of other States on a basis of reciprocity, nor does it affect the rights of free navigation on the high seas." (Memoria del Ministerio de Relaciones Exteriores, 1947, p. 203).

Other countries followed our example - Peru in 1947, Costa Rica in 1948, and El Salvador and Honduras in 1950 - using in their declarations on the subject terms very similar in form and content to those in the Chilean proclamation. All this is ground enough for saying that the doctrine that the State may establish exclusive zones of control and protection of maritime fishing and hunting in areas of the high seas contiguous to its territory known as "continental seas or waters" has become part of the American international system.

The Government of Ecuador promulgated on 22 February 1951 a Maritime Fishing and Hunting Act, article 2 of which extends the territorial seas to a distance of twelve sea miles outward, subject to any future definition of the term jurisdictional waters of the Republic of Ecuador (see Registro Official, year III, No. 747, p. 6149).

If we turn from the practice of States to recently concluded multilateral treaties, we find the same tendency to limit hunting and fishing on the high seas.

Article 9 of the Treaty of Peace with Japan obliges that country to conclude agreements regulating and limiting fishing on the high seas.

For these reasons the Government of Chile is obliged to scrutinize articles 1, 2 and 3 of part II of the draft prepared by the United Nations International Law Commission, and believes that there should be a reaffirmation of the right to establish an exclusive hunting and fishing zone 200 sea miles wide.

This measure, which the Chilean Government supports, is based on the following reasons: (1) the special configuration of the submarine shelf along the coasts of Chile: (2) the exploitation of the fisheries, which are of vital concern to Chile; (3) the inadequacy of three miles of territorial sea for protecting the fishing industry and preventing destruction of marine life; and (4) the improper jurisdiction exercised in the past and present by certain foreign vessels over Chilean fishermen, whose living comes mainly from the sea.

DENMARK

The Danish authorities take a favourable view of the efforts expressed in these articles to provide possibilities for the conservation and control of fishing on the high seas in such geographical areas where adequate preservation and control have not been established already. Moreover, it is acknowledged that in areas where only few countries take part in fishing, such countries have a primary interest in the enforcement of provisions of this nature. It is felt, however, that such States should not be in a position where they could use the initiative that would have to be left to them for these purposes to establish priority for their own fishermen to the exclusion of fishermen from other countries who might later wish to take part in such fishing activities. Such priority would, in fact, be feasible even if the arrangement formally placed all countries taking part in such fishing on an equal footing, if for instance the permissible fishing methods did not have the same value to fishermen of other countries - or could not be used at all. (In this connexion, reference is made to the procedures which in some cases have rendered illusory the application of the most-favoured-nation clause). Hence, it would be essential to clarify the issue as to when and under what conditions any countries arriving later should be entitled to participation in the establishment of new regulations in order that, if agreement cannot be reached, such countries should not have to be governed by previously adopted provisions for an indefinite period. It is therefore suggested that procedures should be established for application if provisions for preservation and control have already been adopted by a certain number of countries for a geographical area in which other countries later wish to take part in the fishing activities and consider the provisions already established to be at variance with their interests, or consider the control applied to be inadequate.

In regard to the international body referred to in article 2, the Danish authorities wish to point out that it has been charged with two different tasks, viz. to make regulations where interested States are unable to agree among themselves, and to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them.

In the former respect it is pointed out that Denmark is in agreement with the principle of an international regulation of fisheries in cases of disagreement among the interested parties, but a final attitude to the draft proposal cannot be decided upon until the composition and organization of the proposed body is known in greater detail. It should be noted, however, that such regulation could, to a large extent, probably be undertaken by existing international agencies such as the International Council for the Exploration of the Sea.

In regard to the function of the body referred to in article 2, in respect of investigations, it should also be noted that in the opinion of the Danish authorities the existing international bodies such as the International Council for the Exploration of the Sea have functioned satisfactorily and that their activities have provided valuable experience and practical working methods; hence, it would not be desirable at the present time to replace the existing bodies by one single international body. The Danish authorities therefore propose that the body referred to in article 2 should conduct its investigations in consultation with the existing international bodies and in geographical areas where such investigations are not already being carried out by existing international bodies.

ECUADOR

Because our Civil Code recognizes the principle that fishing in the sea is free, there are no provisions comparable to the Commission's draft articles 1 and 2 in either the Legislative Decree of 6 November 1950 or the Sea Fishing and Hunting Act and Regulations.

ISRAEL

In the light of its general views as to the manner in which the International Law Commission has performed this phase of its task, as described in paragraph 2 above, the Government of Israel has considered very carefully whether and to what extent it is in a position to submit ary comments on the draft articles contained in part II (related subjects) of document A/CN.4/49. With regret it has come to the conclusion that this is not possible

at this stage, because of the absence of clarity as to whether these draft articles are being submitted as part of the Commission's work of codification or as part of its work of progressive development of international law. Clearly the type of comment that can usefully be made depends upon the nature of the work being performed by the International Law Commission in connexion with the topic. However, the Government of Israel finds it necessary to reserve its rights to submit further comments at a later stage.

NETHERLANDS

In connexion with this article also, the Netherlands Government wishes to point out that no effective solution of the problem will ever be achieved if the regulation and control of fishing in the waters above the continental shelf depends on agreement among all the States concerned, especially if - as the article states - any newcomer will be entitled to participate in making the regulations. Here again arbitration is essential, but specific rules must be established to guide arbitrators. Clearly, therefore, it is necessary to set up a permanent international body, as is stated in article 2.

In certain respects, agencies like IMCO, which are already projected, might be able to help.

NORWAY

According to the existing rules of international law, a State is free to regulate and control the fishing activities of its own nationals on the high seas. Where the nationals of several States are engaged in fishing activities in an area, the States concerned may of course conclude an agreement between themselves in which they provide for measures binding on their respective nationals.

It is not clear whether article 1 of part II adds anything to these rules apart from the provision that a coastal State is entitled to take part in any system of regulation within 100 miles of its territorial waters even though its nationals do not carry on fishing in the area. The last sentence of article 1 seems however to indicate that one or more States may, in certain circumstances, take measures which are binding on the nationals of other States, provided no area is closed to them. The second sentence of the article, on the other hand,

says that if the nationals of several States are engaged in an area, measures are to be taken by those States in concert. This seems to exclude the possibility of applying any measures to nationals of States which have not taken the measures in question, either alone or in concert with other States. Have the authors of the draft articles meant that if the nationals of a State fish only occasionally in an area they should be bound by measures taken by those States whose fishermen fish regularly in the same area, although their own State has not acceded to the measures? Or was it their intention to say that when all those States whose nationals fish in an area agree on certain measures, these measures should be binding on newcomers from other States?

The exact meaning of article 1 should be explained. In any case the article seems to require re-drafting, so as to become more clear, if it should not be left out altogether.

There exists in several areas a great danger of over-fishing. In some areas, indeed, conservation measures are long overdue. The purpose of article 2 of part II therefore deserves great sympathy. It is doubtful however whether this article represents the best solution of the problem. It might prove very difficult, at any rate at the present time, to reach agreement among all interested States about the creation of the proposed permanent international body. Furthermore, an international body would probably not be the best agency for dealing with the various problems arising in different parts of the world. The most adequate means of reaching practical results in a not too distant future would be to continue to negotiate agreements between the interested States for the regulation of fisheries in particular areas. If such a procedure were to be followed, it would not be necessary to wait for the agreement of all fishing nations in the world, and it would also be possible to make agreements suited for the particular requirements of the different fishing areas.

According to paragraph 5 of the commentaries to part II, article 2, the International Law Commission has discussed a proposal that the coastal State should be empowered to lay down conservation regulations to be applied in a zone contiguous to its territorial waters. This idea might be given further consideration. It is possible - although not certain - that one ought to

create contiguous zones in which the coastal States should have the right to regulate and control the exploitation of the resources of the sea as well as of the sea-bed and subsoil without, however, having the right to exclude foreigners from taking part in such exploitation. One ought of course in such a case to specify what sort of regulations are permitted in order to prevent the coastal States from making any abuse of their rights.

PHILIPPINES

At present there is established in the Southwestern Pacific an international body, known as the Indo-Pacific Fisheries Council, under the auspices of the Food and Agriculture Organization of the United Nations. Is this Council considered, under this article, a permanent international body upon which competence may be conferred? In the case of States not being able to agree among themselves, it may be stated that the Agreement which is the charter of this international body does not contain any provision referring to settlement of conflicts between member countries.

YUGOSLAVIA

As a principle, the Yugoslav Government accepts the draft articles 1 and 2, with the following observations:

(a) Articles 1 and 2 are too concise and they therefore require numerous comments, which actually have been successfully prepared by the Commission. Therefore, in consideration of the Commission's remarks Nos. 2-5 to article 2 of the draft, the Yugoslav Government proposes that two or three additional articles should be drafted on the basis of these comments, in order to include the observations of the Commission.

(b) Considering that FAO is already dealing with these and similar problems, the Yugoslav Government insists that FAO should be the respective international body mentioned in article 2, in the form that this body has already been constituted within the said organization, consisting of a number of the FAO members.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Article 1

Her Majesty's Government are in general sympathy with the objects of this Article. In their view, the first, second and fourth sentences contain statements of existing international law, whilst the third sentence is a recommendation de lege ferenda. Whilst they understand the reasons for which the Commission put forward this recommendation, Her Majesty's Government nevertheless consider it superfluous and probably unworkable in practice. It is implicit in the very notion of the high seas - as the Commission realized in drafting the fourth sentence of the Article - that it is contrary to international law to prevent or even to regulate fishing by the nationals of a foreign State in any area of the high seas except with the agreement of that State. From this basic principle it follows, in the opinion of Her Majesty's Government, that any State which claims an interest in the fishing in a particular area of the high seas is entitled to take part on an equal footing in any system of regulating the fishing in that area, whether it is more or less than 100 miles away from that area and whether its nationals are or are not at present engaged in fishing in that particular area.

Article 2

Her Majesty's Government agree that the question of setting up a permanent international body to conduct investigations of the world's fisheries is within the competence of the Food and Agriculture Organization and that pollution is within the competence of the Economic and Social Council and will eventually be dealt with by the Intergovernmental Maritime Consultative Organization.

Her Majesty's Government wish to place on record their emphatic opposition to the proposal contained in note 5. In the opinion of Her Majesty's Government no State has the right to enforce conservation measures against the fishing vessels of other States outside its territorial waters except by international agreement. Unilaterally declared conservation zones outside territorial waters are illegal as being in contravention of the principle of the freedom of the seas.

SWEDEN

The Swedish Government considers this a difficult but important task. Under present conditions there is great danger of these resources being destroyed by over-intensive fishing and hunting. The difficulty is that even if a convention on measures for the protection of marine fauna were concluded between the States mainly interested, it would not be binding on non-acceding States. As international law now stands, it is hard to see how this difficulty could be overcome. A coastal State clearly has no right to prohibit or regulate fishing beyond the limits of its territorial waters. The method proposed by the Commission, which appears to be that a general convention should empower the States mainly concerned to take measures binding on other States as well, may perhaps be practicable. Here, it must be clearly laid down that such measures may in no case result, either directly or indirectly, in the exclusion of nationals of other States from participation in fishing or hunting. From this point of view an international body, to which complaints could be submitted regarding the measures taken, appears to be essential.

SYRIA

...in view of the importance to Syria of the problem of preserving the resources of the sea, the proposal contained in Part II, Article 2 of the above-mentioned draft, concerning the establishment of a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, has been favourably received.

FRANCE

Article 1 gives each State the right to regulate fishing in any area if its nationals are engaged in fishing in that area, subject to the proviso that the measures to be taken shall be taken "in concert" if several States are involved. This is a proposition which is based on general and internationally accepted principles and which has been acted upon on previous occasions. It follows that no unilateral measure by one of the States concerned may be pleaded against the nationals of another State. The same observation applies to the situation, also covered by article 1, where the area in question is within one hundred miles of the territorial waters of a coastal State.

Article 2 provides for the possibility of establishing a permanent international body with competence not only to conduct investigations of fisheries but also 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. In the French Government's view, it would be desirable to establish such a body, with powers to take regulatory, technical and economic decisions. However, there are two observations to be made in this connexion:

(1) Obviously, if practicable general regulations are to be worked out one must envisage the contingency that one of the States might find itself in disagreement with the others. It may be recalled that when the International Convention for the Northwest Atlantic Fisheries of 8 February 1949 was being drafted, some thought was given already then to the establishment of a body of this kind to deal with all questions relating to the maintenance of the level of the stocks of fish covered by the Convention. However, as there was some opposition on this point, the Convention merely provided for the establishment of a qualified body to submit proposals for the approval of the various governments concerned. That is a first step which should perhaps be judged in the light of the experience gained before it is planned to establish an international body with powers of decision, such as that described in the draft article.

(2) It should also be pointed out that the system recommended can be useful only in so far as it includes all the interested States, for the non-participation of any one of them can prevent the proposed measures from materializing.

UNION OF SOUTH AFRICA

The Union Government concur with the first, second and fourth sentences of the Draft Article, but consider that the third sentence which reads "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", is superfluous and contains an implied derogation from the principle of the freedom

of the high seas. It flows necessarily from this principle that it is contrary to international law to prevent or even regulate fishing by the nationals of a foreign State in any area of the high seas, except with the agreement of that State.

The Union Government concur with the body of the Draft Article but are strongly opposed to the suggestion contained in Note 5 of the Comments, which is to the effect that pending the establishment of a permanent international body, coastal States should be empowered to lay down conservatory regulations in a zone contiguous to their territorial waters. The Union Government consider that to permit coastal States to enforce conservatory regulations against the nationals of other States outside the limit of territorial waters, and without the consent of those States, would be to allow a serious derogation from the freedom of the high seas.

The Union Government consider that apart from the Food and Agriculture Organization mentioned in paragraph 3, the International Council for the Exploration of the Seas (I.C.E.S.) should also be consulted.

YOUNG

(The American Journal of International Law, vol.46, No.1)

It would seem a not unlikely inference that the foregoing article owes a good deal to President Truman's proclamation on fisheries of 28 September 1945, which enunciated similar principles with respect to control of a fishery by the State or States participating. There is in the Commission's draft, however, the additional proviso as to the rights of any coastal State within 100 miles; this would seem to be not unreasonable as a safeguard for the interests of such a State. The Commission's text also declares that an area may not be closed to nationals of other States who desire to fish there (and who presumably are willing to abide by the regulations). This is a point of potential importance on which the Truman proclamation was notably silent.

Article 2 proposes a permanent international body to conduct studies of the world's fisheries and also to make conservation regulations for any fishery area where the States concerned are unable to agree among themselves. Some such international bodies, composed of representatives of several States, already exist

with respect to particular species - e.g., the International Whaling Commission - or to particular areas - e.g., the Northwest Atlantic Fisheries Commission and the Indo-Pacific Fisheries Council. One may speculate whether such specialized groups, particularly familiar with one or another fishery problem, may not be better agencies to achieve the purpose the Commission has in mind than a single world-wide body.

MOUTON (p. 173)

It may be noted that the reasons of the activities of the Economic and Social Council are not oil-pollution caused by offshore oil-exploitation, but pollution caused by ships. In the 1926 and 1935 draft Conventions the States were given "contiguous zones" in which their regulations concerning prevention of pollution would be applicable, based on the principle of self-protection.

Here we feel that another element enters the picture. The coastal State, under whose supervision oil exploitation on the continental shelf adjacent to its coasts takes place, takes on an international responsibility to prevent oil pollution in the interest of other States, whose fisheries or shores may be damaged by the oil. At the same time it is of course in its own interest to prevent this pollution. If the activities of the Economic and Social Council should remain limited to pollution caused by ships, we may expect that the International Law Commission will take up the prevention of pollution caused by offshore drilling again in its next meeting. As the two causes of pollution are so different we believe that the original idea of the International Law Commission should be considered again.

It should, however, not be forgotten that due to the drift of oil patches, it may well happen that fisheries are affected in an area where the State whose oil installations have caused the pollution has no fishery interests. This consideration may make a redraft of Article 2 of the proposals of the International Law Commission necessary.

Rules could also be embodied in a Convention amongst all maritime States, concerning the exploitation of mineral recources of the continental shelf, to the effect that if the coastal State does not take efficient measures to prevent

pollution either obligatory arbitration or jurisdiction of the International Court of Justice or an International Maritime Court will be accepted or powers will be given to an international body to intervene and lay down the proper regulations.

SEDENTARY FISHERIES

Article 3

DENMARK

In regard to part II, article 3, the Danish authorities refer to their comments on part II, article 1, and point out that it would be natural for coastal States to have an exclusive right to place permanent installations for sedentary fisheries on that part of the high seas that is contiguous to the territorial waters of such State, analogous to the exclusive right of coastal States to place installations for exploitation of the coastal State's part of the continental shelf as stated above. It would also be desirable to ensure free navigation by adding a provision to the effect that sedentary fisheries must not result in substantial interference with navigation, cfr. a similar provision in part I, article 6, concerning the exploration and exploitation of the continental shelf.

The commentaries of the International Law Commission define sedentary fisheries as fishing activities carried out by means of stakes embedded in the sea-floor. Such stakes, it is presumed, are placed during the fishing season and then removed, whereas the establishment of permanent installations as already mentioned, should be reserved for the coastal State. Sedentary fisheries, it is noted, can be undertaken also by devices other than stakes, e.g. buoys and anchors.

NETHERLANDS

The term "sedentary fisheries" should be clearly defined.

The provision that the regulation will not affect the general status of the areas as high seas is, strictly speaking, superfluous. In any case its inclusion could not lead to an argument a contrario affecting contiguous zones, for which no such provision has been inserted.

NORWAY

...it is difficult to understand why so-called sedentary fisheries should be treated in a different way than other fisheries.

PHILIPPINES

It is desired that a clearer definition of the term "sedentary fisheries" be made. It is not definite whether fisheries for sponges, commercial shells, such as trochus, gold-lip pearl shells, black-lip pearl shells, et cetera found on sea bottoms are considered as sedentary fisheries in the sense of this Article. With reference to fishing gear, it is not also known whether fishing appliances placed or anchored on sea bottoms, as fish traps (weirs), fish pots, anchored floating traps and submarine trap nets are considered sedentary.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

As stated in the comments on Article 1 of Part II, Her Majesty's Government consider that, as a matter of general principle, no State is entitled to regulate fishing by the nationals of other States in areas of the high seas except by agreement with the States concerned. In their opinion, however, international law recognises an exception to this general rule in cases where the coastal State has acquired, on the basis of prescription, sovereignty over sedentary fisheries lying on the seabed which have long been carried on exclusively by its nationals, even though the area where the sedentary fisheries are carried on may be outside territorial waters. The legal basis underlying prescriptive claims of this type was examined by Sir Cecil Hurst in a well-known article

entitled, "Whose is the bed of the sea?" (British Year Book of International Law, 1923-24, page 34), in which the learned author concluded that these claims are valid provided they conform to certain conditions, namely:

(i) The coastal State must have exercised effective occupation of, and jurisdiction over the sedentary fisheries on the seabed for a long period;

(ii) There must be no interference with freedom of navigation in the waters above the seabed;

(iii) There must be no interference with the right to catch swimming fish in the waters above the seabed.

Her Majesty's Government consider that the law was correctly stated by Sir Cecil Hurst in the above article and they are in entire agreement with the author's conclusion that "the claim to the exclusive ownership of a portion of the bed of the sea and to the wealth which it produces in the form of pearl, oysters, chanks, coral, sponges or other fructus of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas".

In drafting this Article, the Commission would appear on the whole to have shown a similar agreement with the conclusions of Sir Cecil Hurst. Her Majesty's Government note, however, that the Commission would make the right to regulate sedentary fisheries outside territorial waters subject to the requirement that non-nationals be "permitted to participate in the fishing activities on an equal footing with nationals". In the opinion of Her Majesty's Government, it depends on the historical facts of each case whether or not non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Where the coastal State has in the past permitted non-nationals to participate in the fishing, then there is no right to exclude such non-nationals in the future; where, however, the coastal State has in the past reserved the fishing exclusively for its own nationals, then non-nationals have no right under international law to participate in the fishing in the future. Further, it may be a nice doctrinal point whether a State, which has (a) a title by prescription to sedentary fisheries lying on the seabed, has also (b) a title to the surface of the seabed on which the sedentary fisheries lie. The distinction, if there is one at all, between (a) and (b) must be a fine one, yet it seems that

this distinction is the basis of the distinction which the Commission makes in note 1 between sedentary fisheries on the one hand and the continental shelf on the other hand. In any case the basic distinction must be that between the seabed (sedentary fisheries or continental shelf) over which the coastal State is entitled in appropriate circumstances to full sovereignty and the superjacent waters over which the coastal State is not entitled in any circumstances to sovereignty. The Commission has (in Articles 3 and 4 of Part I) emphasized this distinction in the case of the continental shelf; it does not appear, however, to have stressed it with due clarity in the case of the sedentary fisheries.

FRANCE

(1) Attention should be drawn to the vagueness of article 3, so far as the definition of the term "sedentary fisheries" is concerned. The note to this article merely states that the term means fisheries which should be regarded as sedentary because of the species caught or the equipment used. It would be absolutely necessary to delimit the scope of this definition more particularly.

(2) It should be noted that while a non-coastal State may maintain and exploit the fisheries in question on an equal footing with a coastal State, it has to be "permitted" to do so. This stipulation obviously places it in an inferior position with respect to the coastal State and deprives it of the freedom of action it enjoyed previously over a part of the high seas.

SWEDEN

There are probably certain sedentary fisheries (pearl and oyster beds) over which coastal States have exercised exclusive sovereignty de facto for a long time. This is a matter of special cases rather than a general rule. In such cases, where the rights of a coastal State have a historical foundation, the basic principles of international law would hardly permit them to be

impaired by a convention concluded in our time. It seems scarcely necessary to discuss this question, except perhaps with a view to formulating a reservation of such rights to be inserted in Article 1 of Part II. A special article on sedentary fisheries would then be unnecessary.

YOUNG

(The American Journal of International Law, vol. 46, No. 1)

With respect to Article 3, which deals with sedentary fisheries, the chief difficulty seems to have been whether to consider such fisheries as part of the resources of the sea, or as part of the resources of the continental shelf because of their connection with the sea-bed. It might be claimed that to place sedentary fisheries in the latter category simplifies the legal basis for protecting them by bringing them within the scope of the continental shelf doctrine. The Commission, however, decided otherwise on the ground that its continental shelf proposals were meant to deal only with the mineral resources of the subsoil.

The Commission intentionally avoided any reference to such areas as "occupied" or "Constituting property" - phrases which have been used by governments and writers from time to time in an effort to supply a basis for the control exercised. The Commission's approach, which looks to long-continued use as a basis, would seem more realistic. It is doubtful, however, whether the Commission's proposed admission of non-nationals reflects existing practice with respect to many sedentary fisheries, where non-nationals of one class or another appear often to be excluded.

CONTIGUOUS ZONES

Article 4

CHILE

By the term "adjacent zone" or "contiguous zone", international law recognizes the existence of a maritime belt or area between the high seas and the territorial waters over which a coastal State may exercise certain limited rights of a generally administrative nature relating to sanitary and customs control, safety of navigation and the protection of fishing.

Its legal nature should not be confused with that of the territorial sea, which is a part of the territory of the coastal State and therefore subject to its sovereignty. The total jurisdiction of the coastal State is exercised over the territorial sea, but it has only partial and special powers over the contiguous zone.

In the draft prepared by the United Nations International Law Commission the contiguous zone appears as a belt of the high seas, contiguous to the territorial sea, over which the coastal State may exercise the control necessary to prevent infringement within its territory or territorial waters of its customs or sanitary regulations and any attack on its security by foreign vessels. According to article 4 of the draft, the breadth of the zone may not exceed twelve nautical miles measured from the coast, a much less favourable provision than that of the draft prepared in 1929 at Harvard University, in which the contiguous zone may be of any width. (Draft of Convention on Territorial Waters, article 20; the text appears in Supplement to the American Journal of International Law, vol. 23, April 1929, p. 245).

Moreover, how can these twelve miles be reconciled with the vast extent of ocean prescribed in article 4 of the Inter-American Treaty of Reciprocal Assistance, an area of sea classified by doctrine as a contiguous zone?

The limit adopted by the International Law Commission seems contrary to the new tendency in international law not to give the zone an exact or well-defined limit but rather to consider the jurisdiction which the coastal State must exercise on the high seas.

The Government of Chile considers that the limit prescribed in article 4 of the International Law Commission's draft should not be established, but that the contiguous zone should be extended and broadened so that the coastal State may take the steps necessary to prevent, within its territory or territorial waters, infringement of its customs, fishing or sanitary regulations and attacks on its political or economic security by foreign vessels.

The Government of Chile believes that this zone should be at least 100 nautical miles measured from the coast.

DENMARK

The Danish authorities appreciate the potential need for establishment of contiguous zones adjacent to territorial waters where a coastal State may exercise the control necessary to prevent the infringement, within its territory, of customs, fiscal or sanitary regulations. The limit of twelve miles from the coast fixed for such zones is also acceptable to the Danish authorities.

It has been noted with satisfaction that no extension of territorial waters is involved.

Some concern is felt, however, about the absence of a specific definition of the nature of the control in question, since this may lead to abuse by the institution of meticulous control measures on navigation and fisheries where such control is not required to prevent infringement of customs, fiscal and sanitary regulations. Abuses of this type might, in point of fact, be tantamount to an expansion of territorial waters.

The Danish authorities feel, therefore, that contiguous zones should not be established unilaterally by a coastal State, but only by treaties between the interested States.

ECUADOR

The right to police for national security and fiscal purposes was established by our Civil Code and Maritime Police Code for a distance of four marine leagues, but the Legislative Decree of 6 November 1950 set the area of maritime control and policing at twelve nautical miles, i.e. the minimum for territorial waters. The area of maritime control and policing may be extended by virtue of such international treaties as the Treaty of Mutual Assistance.

NETHERLANDS

It should be stated explicitly that control may be exercised on ships entering the zone as well as on those leaving it. Similarly, it should be clearly understood that control over immigration and emigration is covered by the term "customs...regulations". Finally, the article should mention not only the purpose of preventing the infringement of customs regulations, but also the desirability of punishing such infringement.

NORWAY

The proposals put forward in part II, article 4, seem reasonable. Some clarification, however, is needed on two points.

It ought to be made quite clear that the term "customs regulations" does not only mean regulations concerning import and export duties, but also all other regulations concerning the exportation and importation of goods.

The word "coast" at the end of the article might lead to misunderstandings. Some people may interpret it as meaning the line where land ends and water begins. Others would find it more natural to interpret the word coast as including the seaward limit of the interior waters. It is suggested that the word "coast" be replaced by the expression "base lines from which the breadth of the territorial waters are reckoned". This would be a practical solution. It is indeed impossible to draw a line twelve miles at sea which follows all the sinuosities of an irregular coastline. Norway makes use of straight base lines drawn between the outermost points on land or on the island fringe (skjaergard) in the general direction of the coast. The judgment which the International Court of Justice delivered in the Anglo-Norwegian fisheries case on the 18th December 1951 made it clear that the Norwegian base lines system was not contrary to International Law.

The contiguous zone which is proposed in article 4 must be distinguished from the contiguous zones which have been mentioned above and in which the coastal State might have the right to control the exploitation of the resources of the sea and of the sea-bed and subsoil. There is no reason why the contiguous zones which different States have established for customs, fiscal and sanitary purposes should not overlap. Such overlapping would render it easier to prevent smuggling. If contiguous zones should be established for the regulation of the exploitation of the natural resources of the sea and of the sea-bed and subsoil, such contiguous zones must of course never overlap.

YUGOSLAVIA

The Yugoslav Government cannot at all agree with the formulation of this article, because it takes no account of the legitimate defensive rights of the coastal States. The establishment of this zone without authorizing the coastal State to protect the security of its shores in strictly limited and exactly specified scopes, is untenable in the view of the Yugoslav Government. This question and the pro et contra reasons have been thoroughly discussed at The Hague Codification Conference in 1930, so that it would be unnecessary to repeat them now.

Article 4 should, therefore, read as follows:

"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, either of its customs, fiscal and sanitary regulations, or its security laws. Such control shall not be exercised further than twelve miles from the outer limit of its interior waters."

In view of the fact that interior waters, which otherwise are under the full sovereignty of the coastal State, are considered as an integrant part of its land, there is no difference between the Commission's and the Yugoslav proposal for the delimitation of this zone. The Yugoslav proposal is only more concise and will avoid arbitrary interpretations concerning the edge of the contiguous zone.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

It has hitherto been the policy of Her Majesty's Government to oppose any claims to the exercise of jurisdiction outside territorial waters. Many countries have, however, claimed to exercise jurisdiction for certain limited purposes beyond territorial limits. For the most part these purposes have related to the enforcement of customs, fiscal or sanitary regulations only and the jurisdiction has been exercised within modest limits, generally within a "contiguous zone" not more than twelve miles from the coast. Her Majesty's Government have not themselves found it necessary to claim a contiguous zone, and wish to place on record their emphatic opposition as a matter of principle

to any increase, beyond limits already recognized, in the exercise of jurisdiction by coastal States over the waters off their coasts, whether such increase takes the form of the extension of territorial waters or the exercise of wider forms of jurisdiction outside territorial waters. Her Majesty's Government are satisfied, however, that on the basis of established practice, the Article proposed by the Commission is acceptable provided that:

(i) Jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations only;

(ii) Such jurisdiction is not exercised more than twelve miles from the coast;

(iii) This Article is read in conjunction with another Article stating that the territorial waters of a State shall not extend more than three miles from the coast unless in any particular case a State has an existing historic title to a wider belt.

Her Majesty's Government would observe that the term "coast" is ambiguous. The Commission should declare whether it is the physical coastline that is envisaged or the political coastline, i.e. the base-line from which the territorial sea is delimited.

SWEDEN

As we know, this question has been keenly debated, especially at The Hague Conference of 1930, when a number of States laid claim to contiguous zones of this kind. These claims were no doubt made de lege ferenda rather than by virtue of the existing law. The Swedish Government is aware that certain States have established contiguous zones, particularly for customs control, by unilateral legislative action. But it has grave doubts as to whether a coastal State has the right to exercise control over foreign ships outside its territorial waters, without the consent of the country to which such ships belong. These doubts are confirmed by the fact that States desiring to exercise such control have often thought fit to conclude treaties to secure this right. Reference may here be made to the so-called "liquor treaties" concluded by the United States in 1924-26 and the treaty concluded at Helsinki in 1925 between the coastal States on the Baltic Sea. Moreover, this question

is so closely bound up with that of the extent of territorial waters, which is already on the Commission's work programme, that it would seem advisable to deal with the two topics at the same time.

FRANCE

Article 4 has the merit of establishing a uniform limit for the zone within which a coastal State may exercise control and might therefore be useful in putting an end to many uncertainties. The French Government would therefore be prepared to give it consideration, subject to the proviso that the grant of the right of control to a coastal State can on no account be held to constitute an extension of that State's sovereignty beyond its territorial waters.

This proviso leads to another as a necessary corollary: the proposed article will only be acceptable if it is supplemented by fixing the limits of territorial waters in such a way that the power to fix them is not left to the discretion of the States concerned. The French Government feels therefore that, with respect to this fundamental point, the work of the Commission must be completed and that any attempt to make regulations governing the so-called contiguous zones presupposes that the limits of territorial waters have been fixed.

UNION OF SOUTH AFRICA

The Union Government regard the article as being reasonable provided that it is strictly interpreted. The control and jurisdiction of the littoral State for the purpose of this Article should not go beyond what is necessary to prevent the infringement, within its territorial waters, of customs, fiscal or sanitary regulations; and in no case should it be exercised beyond the twelve-mile limit.

YOUNG

(The American Journal of International Law, vol.46, No.1)

Of the four articles in Part II of the Commission's draft, that dealing with contiguous zones does no more than restate a rule already widely recognized: that for customs, fiscal and sanitary purposes a State may exercise measures of control up to a distance of not more than twelve miles from its coast. No attempt is made to dovetail the rule into the Commission's proposals relating to the continental shelf, under which it would seem not impossible for a State to exercise such control, in connection with its exploitation program, at distances of more than twelve miles offshore.

Chapter III.

CONCLUSIONS

The Commission may well be gratified at the welcome its proposals on the continental shelf have received both from governments and among scientists.

As was to be anticipated, certain governments which had defined their continental shelf by methods other than that recommended by the Commission do not accept the latter's proposals. However, the great majority of States which replied to the enquiry give general approval to the proposals, Brazil, France, the Netherlands, the Philippines, Sweden, Syria, the Union of South Africa, the United Kingdom, the United States of America and Yugoslavia having stated this approval expressis verbis.

At its Madrid Conference in 1952 the International Bar Association adopted the following resolution:

> The fourth Conference of the I.B.A.
>
> Takes pleasure in commending the International Law Commission's work on the subject of the continental shelf;
>
> Concurs in the essential principles formulated by the International Law Commission in its draft of July 1951 (articles 2 et seq.); but
>
> Reserves its position with regard to the definition of the continental shelf (article 1); and
>
> Expresses the hope that governments will communicate their views on the International Law Commission's draft articles at the earliest possible date, in order that positive rules of international law may be established as soon as possible in a matter which is of great importance for international progress.

In November 1952 the Executive Council of the International Law Association, pursuant to a request by the Lucerne Conference, adopted a resolution establishing a commission "to examine the question particularly in its technical and legal aspects taking into careful consideration the most valuable work of the International Law Commission of the United Nations".

Among the governments which have made no declaration concerning the establishment of a continental shelf, only one put forward a point of view in its reply which does not seem consonant with the general views of the International Law Commission. This is Norway, which asks why the resources of the subsoil of the continental shelf should be treated differently from other resources of the sea. If it is to be concluded that Norway favours complete freedom of exploitation of the subsoil by all States, it is the only government which advocates this view.

Some governments express the view in their reply that the relation between the problems relating to the continental shelf and those relating to the territorial sea is so close that the two questions cannot be discussed separately. In this connexion, it may be noted that the International Law Commission began discussing the territorial sea at its last session. The debates showed that the maximum figure the Commission would wish to entertain as the breadth of the territorial sea would be twelve miles. Since the continental shelf may extend for hundreds of miles, the problems of the continental shelf remain virtually unchanged whether the breadth of the territorial sea is three or twelve miles. Thus the connexion between the two questions should not be overestimated.

PART I: THE CONTINENTAL SHELF

Article 1

Comments

1. and 2. The Commission's decision not to limit itself to the geological concept of the continental shelf was explicitly approved by certain Governments (Chile, Israel, Sweden); no government expressed a contrary opinion. Among the experts, Gidel, Mouton, Vallat and Young expressed their support of the Commission's position. Azcarraga would prefer the geologico-geographic definition, but is prepared to adopt the other view as a second choice where there is no continental shelf.

This being so, the Rapporteur thinks that paragraphs 1 and 2 may be left as they stand.

3. The choice of the term "continental shelf" was criticized by the Governments of Israel and Sweden, which prefer "submarine areas". Among the authorities, Gidel and Vallat support the term "continental shelf"; Azcarraga and Brajkovic prefer "epicontinental shelf". Mouton proposes the word "shelf", without any epithet. The Commission has already explained why it cannot accept the expression "submarine areas". The term "epicontinental shelf" has been justifiably criticized by Gidel. The term "shelf" - in French plateau - would be very ambiguous.

In the Rapporteur's opinion, there are no grounds for replacing the term "continental shelf" by some other expression.

4. No comment.

5. and 6. Arguments were advanced in a number of quarters against the International Law Commission's proposal not to adopt a fixed limit for the continental shelf. In particular, criticism was voiced by Brazil, France, the Netherlands, the Union of South Africa, the United Kingdom and Yugoslavia; among the experts, Gidel, Brajkovic, Driessen, Waldock, Vallat, Azcarraga and Mouton opposed the proposal; and the International Bar Association expressed its dissent.

In the first place, it was argued that the Commission's proposal would make it impossible to mark the limits of the continental shelf on sea charts. The Rapporteur wonders, however, what purpose such marking would serve; the boundary line would merely indicate a theoretical possibility, and would be of no practical importance for navigation. Obviously, ships would have to bear in mind any installations erected in the sea over the continental shelf, but these would be marked on charts and would have to be equipped with warning devices.

Secondly, it is asserted that the Commission's system would lead to uncertainty which would prevent the delimitation of the continental shelves of two States situated opposite each other. The Yugoslav Government noted in this connexion: "Since neighbouring countries do not know to what distance their continental shelves can extend, because technical possibilities of extraction of oil would be different in two countries not equally industrially developed, they will not be able to establish the boundaries mentioned in article 7". This objection, however, is due to a misunderstanding. The question is not the degree of technical development attained in both countries, but the depth which it might be technically possible to reach at the given moment. The limit would therefore be the same for both States. Delimitation would not cause any difficulties that would not obtain if a fixed limit were adopted.

Thirdly, there is some apprehension of undue extension in the future, should technical possibilities develop to an unforeseen extent. One answer to this might perhaps be that in this event a 200 metre depth-line could certainly not be maintained, so that the practical difference does not seem to be very great. However, this reply does not seem to us conclusive. It is not beyond the bounds of possibility that minerals of small bulk may in the near future be brought to the surface not by fixed installations but by devices installed on ships - a similar development has already occurred in connexion with deep-sea exploration. If the text proposed by the Commission were accepted, the consequence might be that in this respect too exclusive rights extending to unlimited depths - and distances from the coast - would be attributed to the coastal States. It would thus be wiser to accept at least a provisional limit, which might be re-examined if technical developments so required.

Accordingly, the Rapporteur, while recognizing the force of the arguments in favour of the Commission's proposal, would prefer the adoption of a depth-limit of 200 metres, and he has amended the draft to that effect. It will be for the Commission to decide.

7. and 8. Chile, Norway and Yugoslavia advocate a zone of stated breadth - e.g. 200 miles. These claims were explicitly opposed by the United Kingdom Government, which "wishes to place on record its opposition to any system which would allot the continental shelf to coastal States on the basis of distance rather than of depth". Of the authorities, Rygh and Brajkovic are in favour of a "contiguous zone", but Gidel opposes the idea.

The Commission stated in its report that it is opposed to the idea of a "contiguous zone"; in the Rapporteur's opinion, none of the arguments advanced need cause it to change its view.

The Rapporteur therefore proposes that these paragraphs should be retained as they stand.

9. and 10. There are no observations on these.

"Contiguous to the coast"

The Rapporteur again wishes to draw the Commission's attention to the expression "contiguous to the coast", used in article 1. This idea will have to be expressed in more precise terms. The Norwegian Government has pointed out that a stretch of deep water is sometimes found near the coast and areas of shallow waters further out. This is the case outside the coast of Norway. It would be obviously most unfair, in the opinion of the Norwegian Government, if Denmark, Germany, the Netherlands and the United Kingdom should share between them the whole North Sea, while Norway should be excluded because of the above-mentioned belt of deep water. The Norwegian authority Rygh voices the same ideas. Mouton (p. 17) observes: "These facts will make it difficult in some cases to delimit the continental shelf and ways have to be found to overcome these difficulties". He quotes Young's opinion: "A possible boundary line should not be interrupted by submarine canyons, running out from land". The United Kingdom Government states that it could not accept a system "which would allot to coastal States submerged plateaux (themselves possibly less than 100 fathoms below the water) separated from the coast by a channel more than 100 fathoms deep".

Considering that the Commission decided not to adopt the geological concept of the continental shelf, a concept which gives one of two States situated opposite each other almost the whole of the continental shelf stretching between the two countries merely because there is a deep-water channel- possibly a very narrow one - near the outer limit of the other State's territorial sea, would not be satisfactory. The Rapporteur feels that the expression "contiguous to the coast" does not preclude submerged areas separated from the coast by a narrow channel of more than 200 metres depth from being considered in certain circumstances as "contiguous to the coast". In such cases, the median line might offer a fairer boundary. The Commission may wish to consider elucidating this point in the comments.

The problem is even more difficult in the case of shelves surrounded on all sides by the sea and separated from the territorial sea or the continental shelf off the coast by a stretch of sea more than 200 metres depth. Can such shelves be regarded as submarine areas contiguous to the coast? The Rapporteur merely draws the Commission's attention to this problem, leaving it to the Commission to decide on the desirability of inserting a provision covering such cases.

"Natural resources"

What is the precise sense of the term "natural resources" in article 1? Clearly the Commission did not mean this term to cover fish living in the sea, even species which live on the bottom for a certain length of time (bottom fish). The Commission also agreed that the provisions concerning the "natural" resources of the continental shelf are not in general applicable to species of shellfish which cling to the sea-bottom (oysters); it considered that "sedentary fisheries" were subject to a system of regulation of their own. It should be noted that the Commission regards as "sedentary" those fisheries which are so named because of the species caught or the equipment used, e.g. stakes embedded in the sea-floor.

Some proposals were made (Sweden, Netherlands, Mouton) for the replacement of the term "natural resources" by "mineral resources", which would make it clearer that all fisheries products were excluded. It is true that the use of this term would also exclude plants growing on the sea-bed. But the only plant

of any importance in this connexion is seaweed, which derives its sustenance from the water, not the soil, and consequently is neither a "natural" product of the continental shelf nor a mineral product. The Rapporteur accordingly proposes that the term "natural resources" should be replaced by "mineral resources". It is of course understood that the control and jurisdiction of the coastal State would not extend to such objects as wrecked ships and their cargoes (e.g. bullion) lying on the sea-bed or covered by the sand of the subsoil, since these are not strictly part of the resources of the subsoil. On the other hand, the sand, constituting as it does the upper layer of the subsoil, may be regarded as a mineral resource. This would apply for example to the monazite sands, mentioned by Nehru in his address to the Lucerne Conference of the International Law Association, which are found on the Indian coast along the foreshore and in deposits extending into the marine subsoil.

Mouton has proposed that the sea-bed and the subsoil of the continental shelf should be treated separately, the sea-bed being regarded as subject to the régime of the high seas. This writer believes that "the possibility of interference with fisheries is one of the reasons to consider seriously the suggestion of giving the sea-bed another status than the continental shelf and to sever the link which the continental shelf theory emphasizes so strongly" (p. 137). He suggests that there are some analogies in mining law. Pearce Higgins and Colombos (p. 55) also consider that a definite distinction should be drawn between the sea-bed and the subsoil. The Rapporteur considers this debatable. It must not be overlooked that the sea-bottom is merely the upper layer of the subsoil of the continental shelf, and that a difference between the régimes governing the sea-bottom and the subsoil of the continental shelf might in practice unduly hamper the exploitation of the subsoil. The comparison with mining law does not sufficiently allow for the peculiar nature of the exploitation of the submarine shelf. If the line between the permissible and the prohibited operations affecting the sea-bed were clearly drawn, the proposed distinction would be unnecessary.

The Rapporteur has changed the term "natural resources" in the text of article 2 to "mineral resources", and has explained the sense of the latter term in the comments.

Article 2

Comments

1 and 7. The Commission's view that the coastal State should not be given "sovereignty" over the continental shelf did not meet with general agreement. It was criticised by Chile, Iceland, France, the Union of South Africa and the United Kingdom, which would prefer the use of the term "sovereignty". Chile alone believed that such sovereignty should extend to the superjacent waters. Among the States which support the idea of control and jurisdiction by the coastal State, Sweden accepts the Commission's proposals unreservedly. The Brazilian Government feels that the word "exclusive" should be inserted before the word "purpose". The Danish Government also believes that the right should be explicitly defined as exclusive. The United States Government thinks that it would be advisable to make it clear, at least in the commentaries, that control and jurisdiction for the purpose indicated in the draft articles mean in fact an exclusive, but functional, right to explore and exploit. Of the authorities, Gidel and Azcarraga agree with the Commission's wording, while Waldock and Mouton support the idea of sovereignty provided that this sovereignty does not extend to the superjacent sea.

Norway is the only State that does not consider it necessary to give such a monopoly to nationals of the coastal State. This view was shared by Colban, and also by Paul de la Pradelle, who at the International Law Association's Conference in Copenhagen had sharply criticized the attribution of exclusive rights over the continental shelf to the coastal State, but who was less categorical on this subject at the Association's Lucerne meeting. In his view, it is impossible to say that a right over the continental shelf vests in the coastal State ipso jure; and in view of the differences of opinion shown in the governments' replies and of recent work on the doctrine of the substance of the right it can justifiably be said that the question remains open as a matter de lege ferenda.

Thus almost all the governments and writers supported the view that authority over the continental shelf vests in the coastal State. There is a very considerable school of thought which regards that authority as "sovereignty".

Moreover, several proponents of the concept of "control and jurisdiction" stress that these rights are "exclusive". In the Rapporteur's opinion, there would be no objection to accepting the idea of an "exclusive" right. But need we go further and accept the concept of "sovereignty"? In its report covering the work of its third session the Commission stated the reasons for which it had avoided using this expression. In view of the very distinct preference which has been shown for the use of the word "sovereignty", however, the Rapporteur would have no objection against the use of this term in article 2, which would then read as follows: "The continental shelf is subject to the sovereignty of the coastal State". A meeting ground might perhaps be found in the use of the phrase "sovereign rights of control and jurisdiction". The Rapporteur has tentatively inserted this phrase in the new draft, and its sense is explained in the comments.

2. The Governments of the Netherlands, Sweden and the United Kingdom, like the Commission, expressly reject the idea of the internationalization of the continental shelf. Gidel and Azcarraga are of the same opinion, which is also shared by Lord Asquith of Bishopstone. Paul de la Pradelle, who had shown himself a fervent advocate of internationalization at the International Law Association Conference in Copenhagen, at the Lucerne Conference merely recommended the establishment of international control over exploitation, i.e. "international supervision of the direct exploitation by, or exploitation under concession from, the coastal State". Eustiathiades expressed the same view. The idea of international control had also been advocated in the reply of the Netherlands.

The Commission might perhaps consider proposing the establishment of an international organ responsible for controlling the development of the exploitation of submarine areas and giving advisory opinions on the subject, in order thereby to promote the most efficient use in the general interest. A provision to this effect has been inserted in the comments.

3. The idea expressed in this paragraph of the report was stressed in the Netherlands reply, and is also found in Gidel, Vallat and Lord Asquith of Bishopstone.

4, 5 and 6. It was asked in several quarters whether the Commission considered that the proposed rules were to be considered as lex lata or as lex ferenda; Gidel goes into the matter thoroughly. The Commission might perhaps further clarify its views in this connexion. In the Rapporteur's opinion, the report should bring out clearly:

(a) that in principle the Commission accepts as established law the right of the coastal State to the exercise of control and jurisdiction for the limited purposes stated in article 2;

(b) that this right is independent of the concept of occupation and of any formal assertion of that right by the State;

(c) that further rules for establishing the boundaries of continental shelves remain to be introduced, and that consequently the rules relating to the boundaries of continental shelves have not yet acquired the force of established law.

The Rapporteur has refrained for the present from drafting a text to this effect.

Articles 3 and 4

The Governments of Chile and Iceland oppose these articles, but they were explicitly approved by the Governments of Israel, the Netherlands, the Union of South Africa, the United Kingdom and Yugoslavia. The United Kingdom Government states that it would not be prepared to accept any convention on the continental shelf which did not contain such an article.

The Rapporteur proposes that these articles should be retained as they stand.

Article 5

Some governments believe that this article still leaves certain questions open. The Government of the United States thinks that it does not carry out precisely enough its purpose, which as stated in the comments, is to bar the coastal State from excluding the laying or maintenance of submarine cables. As it stands, the United States Government considers, article 5 appears to imply that the coastal State may do so if the measures resulting in such exclusion

are reasonable. The Danish Government, although it is in full agreement with the provision, fears that with the present formulation it may be doubtful which of the two interests shall be overriding or, in other words, whether a State may be required to move the cable or, vice versa, whether a cable can be laid even where this is at variance with an exploitation intended by the coastal State. It would seem natural here, in the opinion of the Danish Government to distinguish between cables already existing, in which case a removal, if any, should probably entail a compensation for the expenses incidental to such removal, and the laying of new cables, which should be effected in such a way as not to interfere with steps for exploitation of the sea-bed already taken by the coastal State. Also where other installations are involved which have already been placed by other States, for instance the mooring of light-ships and the like, some regard should be had to the arrangements existing already.

In drafting article 5 the Commission proceeded from the basis that in general the establishment or maintenance of submarine cables will not hamper any measures taken for the exploration of the continental shelf and the exploitation of its resources, and that consequently the coastal State cannot oppose the establishment or maintenace of such cables. Where the coastal State wishes cables already laid to be removed because it is undertaking new works for the exploitation of the continental shelf, it seems reasonable that it should pay the expenses incidental to their removal. Where there is a request for new cable-laying, the coastal State may justifiably oppose any cable-laying that might impede existing or planned exploitation of the subsoil. Even if such conditions laid down by the coastal State make it necessary for a greater length of cable to be laid, there is no reason why that State should be required to bear the costs provided that the prescribed detour does not exceed reasonable limits. The Rapporteur believes that all these considerations are covered by the use of the term "reasonable measures" at the beginning of article 5, and that further detail would be unnecessary in this article. If, however, the Commission agrees that the article is not clear, some appropriate explanatory details might be inserted either in the text or in the comments.

The Commission did not think it necessary to insert a provision on pipelines in the text, since the question does not appear to have any practical importance at the present time and 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. Some of the authorities (Gidel and Mouton) regret this decision, believing that the question is not without practical interest. Since, however, no government insisted on the insertion of such provisions, the Rapporteur sees no reason why the Commission should reconsider its decision.

Article 6

The principle stated in the first paragraph of this article was not challenged, but there were several criticisms of the way in which it had been formulated. The Swedish Government fears that these provisions might encroach, to some extent, on the principle of freedom of the seas. To say that the exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing does not appear to that Government to provide a guarantee in this matter. Precise rules should be drawn up concerning notification and warnings, and it will be necessary to ensure that notice is always given before installations are constructed. Finally, an obligation to pay compensation for damage resulting from negligence or carelessness on the part of the exploiter should also be created. The Netherlands Government expresses a similar view.

With regard to the criticism that the wording of article 6 is not precise enough with respect to the equipment of the installations and compensation for losses resulting from negligence or carelessness on the part of the exploiter, the Rapporteur considers that the Commission should limit itself, in this first attempt to define the regime of the continental shelf, to drawing the broad outlines, without entering into excessive detail which might be left to a later stage.

With regard to the comment that the Commission does not stipulate that "due notice must be given of any installations constructed", the Rapporteur points out that such a provision was deliberately omitted. When work is still in an experimental stage, particularly, it may be necessary to erect provisional and

temporary installations of which no advance notice can be given. In view of the fact that due means of warning of the presence of such installations will always be obligatory the danger does not seem considerable. Mouton rightly observes that any ship casting anchor outside the territorial sea forms an "obstacle" of the same kind, of which no advance notice can be given.

The French Government considers that it would be advisable to stipulate that the exploitation of the continental shelf should not have the effect of reducing fish production, for example, by causing the local disappearance or the general depletion of certain species.

In the Rapporteur's opinion, this contingency is already covered in article 6, which states that the exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing. It might perhaps be desirable to add: "or in reducing fish production".

The French Government also asks who will have the power - and when - to judge whether action taken by the coastal State is, in effect, likely or not likely to interfere with navigation or fishing.

In the Rapporteur's opinion, the establishment of a body competent to deal with disputes of this nature should be considered later, after some experience has been gained of the operation of such installations.

Young considers that "in this article the Commission failed to show the same farsightedness which marked its approach in article 1. It would seem that the question whether navigation or fishing or the exploitation of natural resources is the chief interest in any particular area is a question of fact, and that priority of right ought to be determined accordingly. In many areas of shallow waters, off the beaten track but rich in resources, navigation may be of no real importance; it would seem absurd to impose elaborate restrictions on development of the resources to protect a "primary interest" amounting to a few small craft a year. Conversely, one may well wish to avoid development installations in the midst of a busy seaway".

To meet Young's objections, which are shared by Mouton, the Rapporteur proposes that the last two sentences in paragraph (1) should be modified to read as follows: "Navigation and fishing must always be considered as primary

interests of all mankind. The construction of installations which hampered navigation or fishing can be justified only where they fulfil an equivalent interest; hence in narrow channels essential to navigation any exploitation which substantially interfered with a considerable volume of shipping could not be permitted".

In paragraph 2 of the article, which merely refers to "reasonable distances", the Swedish and United Kingdom Governments would have preferred a specific reference to a radius of 500 metres, as in paragraph 4 of the comments. The Commission doubted the expediency of adopting a fixed limit for the safety zones at the present time, since no practical experience has yet been gained. In the Rapporteur's opinion a definition of the rights to be attributed to coastal States in such safety zones should also be left for further consideration when more experience has been acquired. Where the installations were not islands in the legal sense of the term they could not claim any territorial sea of their own; the rights of the coastal State would have to be limited to the minimum necessary to prevent damage by ships through negligence. The prohibition of overflying below a certain height in the neighbourhood of the installations, as suggested by the Yugoslav Government, was not considered necessary by the Commission. It would seriously hamper flying and does not seem to be essential for the safety of the installations.

Article 7

As was to be anticipated, article 7 did not meet with general approval. The Commission itself was well aware of the incomplete and tentative nature of this article, but it believed that it is not yet possible to lay down rules to be applied by States for delimitation of the continental shelf. It did not blink the fact that this vagueness might lead to difficulties, but did not feel capable of proposing a more satisfactory system.

Several States emphasized that resort to arbitration, as advocated by the Commission, would not necessarily solve the existing difficulties. It was asked what rules the arbitrators should use as basis for their decisions. The judicial settlement of such disputes as might arise, as proposed by the Government of the Union of South Africa, would in the Commission's opinion

present great difficulties. In view of the absence of rules of positive law, the Commission proposed that decisions should be taken ex aequo et bono; but several governments opposed this. The proposal, according to the Danish Government, "provides no guidance for decision of entirely new technical problems or political pretentions". In the opinion of the Government of Israel, "it seems reasonable to express grave doubts as to whether the proposal of the International Law Commission is in accord either with the manifest tendencies of States or with the tasks actually imposed upon the Commission in relation to the codification and progressive development of international law". The Netherlands Government holds that "it is not sufficient simply to express the hope that States will reach agreement on the subject. Compulsory arbitration, as provided for in the article, might prove very useful, but it would very definitely be advisable to lay down specific rules of law upon which the arbitrators could base their decisions." The United Kingdom Government "cannot accept the recommendation that States should be under an obligation to submit such disputes to arbitration ex aequo et bono. It considers that such disputes should be solved by 'judicial settlement' rather than by 'arbitration in the widest sense' and it considers that the Commission might drew up a system of rules to regulate the division of the continental shelf in congested areas in cases where it has been impossible to reach agreement". The Swedish Government "is not convinced of the advisability of arbitration ex aequo et bono. It is most desirable that rules of law on which arbitrators can base their decisions should be drawn up". The United States Government "does not believe that it is advisable to limit the scope of judicial arbitration by defining it as arbitration ex aequo et bono".

The Rapporteur considers that the problem of delimitation dealt with in this article may be considered from two angles:

1. the boundaries of adjacent continental shelves;
2. the boundaries of opposite continental shelves.

With regard to the first, it will be impossible to propose fixed rules so long as the question of the delimitation of the territorial sea between two adjacent States remains unsettled. The International Law Commission has this question currently under consideration.

With regard to the second, the Commission has already pointed out that the boundary between opposite continental shelves generally coincides with the 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 there seems to be no possibility of laying down rules which would solve those difficulties once and for all.

However, in view of the objections raised by several States against arbitration ex aequo et bono, the Rapporteur proposes that the words "to have the boundaries fixed by arbitration" should be replaced by the words "to submit the dispute to conciliation procedure". The last two sentences of the first paragraph of the comments might be amended to read as follows: "If agreement cannot be reached and a prompt solution is needed, the interested States should seek a solution of the problem in accordance with the rules agreed between them for the peaceful settlement of disputes. If the dispute is not submitted to judicial or arbitral settlement, it should be dealt with by conciliation procedure".

The Rapporteur believes that the International Law Commission should endeavour to draw up general rules for the delimitation of the continental shelf as soon as it considers the task could be undertaken with reasonable prospects of success.

PART II. RELATED SUBJECTS

RESOURCES OF THE SEA

Articles 1 and 2

As was to be anticipated, the Governments of Chile and Ecuador state in their replies that they cannot accept these articles.

The Norwegian Government considers that the exact sense of article 1 needs clarification. It asks whether "the authors of the draft articles meant that if the nationals of a State fish only occasionally in an area they should be bound by measures taken by those States whose fishermen fish regularly in the same area, although their own State has not acceded to the measures. Or was it their intention to say that when all those States whose nationals fish in an area agree on certain measures, these measures should be binding on newcomers from other States?"

The answer to both questions is in the negative. The sense of article 1 might perhaps be clarified by redrafting it to read as follows: "A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States do not carry on fishing 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 any part of an area is situated within 100 miles of the territorial sea 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. The measures taken in a particular area, either by the only State whose nationals engage in fishing there or by several States in concert, shall not be binding on the nationals of other States who wish to fish there".

Apart from the provision concerning areas within 100 miles of the territorial sea of a coastal State, the article, as the Norwegian and United Kingdom Governments have rightly observed, adds nothing to existing law; it thus constitutes codification in the strict sense of the word. The provision concerning areas within 100 miles of the territorial sea of a coastal State was criticized by the United Kingdom Government which considers "that it is contrary to international law to prevent or even to regulate fishing by the

nationals of a foreign State in any area of the high seas except with the agreement of that State. From this basic principle it follows, in the opinion of Her Majesty's Government, that any State which claims an interest in the fishing in a particular area of the high seas is entitled to take part on an equal footing in any system regulating the fishing in that area, whether it is more or less than 100 miles away from that area and whether its nationals are or are not at present engaged in fishing in that particular area." The Rapporteur would point out that there is no question of "preventing or even regulating fishing by the nationals of a foreign State in any area of the high seas". This article deals with cases in which a fishing area is within 100 miles of the territorial sea of a coastal State whose nationals neither take part nor intend to take part in the fishing in that area. Without such a provision the coastal State might be excluded from the regulation of fisheries in areas in which its nationals do not and do not to intend to engage in fishing. It may nevertheless be a matter of considerable importance to the coastal State to take part in such regulation: for instance, if the extermination of fish fry in the fishing areas in question would be liable to threaten fishing in the coastal State's territorial sea. The Rapporteur accordingly proposes that this provision should be retained in article 1.

With regard to article 2, the need for the establishment of a permanent international body was stressed by the Governments of Denmark (although it reserves its final attitude until the composition and organization of the proposed body is known in greater detail), the Netherlands, Syria, the United Kingdom and Yugoslavia. It was pointed out that FAO might be able to give useful assistance in this matter. The Danish Government observes that such regulation could, to a large extent, probably be undertaken by existing international agencies such as the International Council for the Exploration of the Sea at Copenhagen.

The Norwegian Government considers that "it might prove very difficult, at any rate at the present time, to reach agreement among all interested States about the creation of the proposed permanent international body. Furthermore, an international body would probably not be the best agency for dealing with the various problems arising in different parts of the world. The most adequate means of reaching practical results in a not too distant future would

be to continue to negotiate agreements between the interested States for the regulation of fisheries in particular areas".

Although some co-ordination of the reulations on fisheries in force in the various parts of the world is essential, there seems to be no conclusive reason why the task should not be assigned, at least for the time being, to regional organizations. The International Law Commission obviously had no intention of dismissing this idea. The comments on article 2 might perhaps be supplemented by the addition of the following sentences: "Where necessary, use might be made, at least for the time being, of existing organizations in this field. Where there are a number of such organizations, arrangements should be made to co-ordinate their work".

Mouton has pointed out that article 2 does not provide for cases in which fisheries are effected in an area where the State whose oil-installations have caused the pollution has no fishery interest. The Commission decided, however, to leave aside the whole question of the pollution of waters, which presents special problems and is currently being dealt with by other organs of the United Nations.

The idea set forth in paragraph 5 of the comments was strongly criticized by the United Kingdom and South African Governments. The United Kingdom Government "wishes to place on record its emphatic opposition to the proposal contained in note 5. In its opinion no State has the right to enforce conservation measures against the fishing vessels of other States outside its territorial waters except by international agreement. Unilaterally declared conservation zones outside territorial waters are illegal as being a contravention of the principle of the freedom of the seas".

The Government of the Union of South Africa observes that it is "strongly opposed to the suggestion contained in note 5 of the comments because to permit coastal States to enforce conservatory regulations against the nationals of other States outside the limit of territorial waters, and without the consent of those States, would be to allow a serious derogation from the freedom of the high seas".

The Norwegian Government is of the opinion that "this idea might be given further consideration. It is possible - althoug not certain - that one ought to create contiguous zones in which the coastal States should have the right to regulate and control the exploitation of the resources of the sea as well as of the sea-bed and subsoil without, however, having the right to exclude foreigners from taking part in such exploitation".

In the view of the proponents of the idea contained in paragraph 5 of the comments, the regulations in question would be provisional, and would be laid down if the establishment of the body referred to in paragraph 3 met with insuperable difficulties. Since the coastal State, in establishing the zone referred to in paragraph 5, would agree in advance to the compulsory arbitration of any disputes that arose out of the regulations it laid down, such regulations would in no way be arbitrary. The Rapporteur believes that the adoption of such a system would be a very important step forward. Since, however, this proposal - on which the Commission itself was divided - has obtained little support from governments, the Rapporteur feels that the Commission cannot consider it further.

SEDENTARY FISHERIES

Article 3

The Commission had to decide whether the produce of "sedentary fisheries" should be regarded as produce of the continental shelf or as "resources of the sea". Its view was that sedentary fisheries should be regulated independently of the problem of the continental shelf.

One of the replies from governments criticizes this decision. The Danish Government considers "that it would be natural for coastal States to have an exclusive right to place permanent installations for sedentary fisheries on that part of the high seas that is contiguous to the territorial waters of such a State, analogous to the exclusive right of coastal States to place installations for exploitation of the coastal State's part of the continental shelf as stated above. It would also be desirable to ensure free navigation by adding a provision to the effect that sedenary fisheries must not result in substantial interference with navigation".

This latter proposal might perhaps be incorporated, since a similar provision was also inserted in part I, article 6, relating to the continental shelf. With regard to the first proposal, the Commission will probably not be prepared to recognize the exclusive right of a coastal State to place permanent installations for sedentary fisheries on that part of the high seas that is contiguous to the territorial sea, since it recognized a coastal State's right to undertake the regulation of sedentary fisheries only where such fisheries have long been maintained and conducted by nationals of that State.

The Norwegian Government considers that "it is difficult to understand why so-called sedentary fisheries should be treated in a different way than other fisheries". The Commission held that the very special nature of such fisheries justified special regulation. Almost all the governments supported this view. The Swedish Government, however, considers that it "seems scarcely necessary to discuss this question". The United Kingdom Government criticizes the Commission's view that the right of a State to regulate sedentary fisheries should be subject to the requirement that non-nationals "be permitted to participate in fishing activities on an equal footing with nationals". The United Kingdom Government considers that "where the coastal State has in the past permitted non-nationals to participate in the fishing, then there is no right to exclude such non-nationals in the future; where, however, the coastal State has in the past reserved the fishing exclusively for its own nationals, then non-nationals have no right under international law to participate in the fishing in the future".

In this connexion, Young observes that it is doubtful "whether the Commission's proposed admission of non-nationals reflects existing practice with respect to many sedentary fisheries, where non-nationals of one class or another appear often to be excluded". In view of these observations, the Rapporteur proposes that the words "provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals" in article 3 should be deleted and replaced by the following: "Where the coastal State has in the past permitted non-nationals to participate in the fishing, it shall not have the right to exclude them in the future".

The Governments of the Philippines and the Netherlands consider that "sedentary fisheries" should be defined in precise terms. The Philippine Government states that "it is not definite whether fisheries for sponges, commercial shells, such as trochas, gold-lip pearl shells, black-lip pearl shells etc. found on sea bottoms are considered as sedentary fisheries in the sense of this article". The proper reply, in the Rapporteur's opinion, is that such products may be regarded as products of sedentary fisheries; they cannot be regarded as mineral resources the exploitation of which is reserved to the State exercising its rights over the continental shelf.

The Philippine Government also asks "whether fishing applicances placed or anchored on sea bottoms, as fish traps (weirs), fish pots, anchored floating traps and submarine trap nets are considered sedentary". The Commission pointed out that fisheries are regarded as sedentary because of the species caught or the equipment used, e.g., stakes embedded in the sea-floor. It is not enough for the appliance to be simply attached in some way to the sea-bed - e.g. by a cable and anchor; it must be actually embedded in the sea-floor. It might perhaps be advisable to alter the relevant passage in the comments and replace the words "e.g. stakes embedded in the sea-floor" by the words "which must be embedded in the sea-floor".

The fact that the stakes may be planted only during the fishing season does not mean that the fishery ceases to be considered sedentary. The Commission did not accept the view that the permanence or non-permanence of an installation should determine the question whether it belongs to the continental shelf or to a sedentary fishery.

CONTIGUOUS ZONES

Article 4

The Chilean Government considers that "the limit prescribed in article 4 of the International Law Commission's draft should not be established, but that the contiguous zone should be extended and broadened so that the coastal State may take the steps necessary to prevent, within its territory or territorial waters, infringement of its customs, fishing or sanitary regulations and attacks on its political or economic security by foreign vessels.

"The Government of Chile believes that this zone should be at least 100 nautical miles measured from the coast".

The Danish and Swedish Governments consider that "the contiguous zone should not be established unilaterally by a coastal State, but only by treaties between the interested States".

However, several States support the Commission's proposals, while commenting on some points of detail. The Netherlands Government feels that "it should be stated explicitly that control may be exercised on ships entering the zone as well as on those leaving; similarly, it should be clearly understood that control of immigration and emigration is covered by the term 'customs...regulations'. Finally, the article should mention not only the purpose of preventing the infringement of customs regulations, but also the desirability of punishing such infringement". The Norwegian Government makes similar remarks with regard to import and export. The words "and punish" might perhaps be inserted in article 4 after "prevent", and a paragraph might be added in the comments to explain that the term "customs regulations" is to be construed as covering not only the regulations concerning import and export duties, but also all other regulations concerning the exportation and importation of goods, and also concerning immigration and emigration.

The United Kingdom and Norwegian Governments feel that the term "coast" at the end of the article is ambiguous because it may be interpreted as meaning either the line where the land ends and water begins or the base - line from which the territorial sea is delimited. The Norwegian Government proposes that the word "coast" should be replaced by the expression "base lines from which the breadth of the territorial waters is measured". The Rapporteur considers that it would be logical to accept the Norwegian Government's proposal; the article would then read: "On the high seas adjacent to its territorial sea, a coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, fiscal or financial regulations. Such control may not be exercised more than twelve miles from the base lines forming the inner limit of the territorial sea".

The Yugoslav Government proposed that provision should also be made for contiguous zones in order to prevent the infringement of the coastal State's security laws. The Commission discussed this proposal but was unable to accept it. It considered that a provision of this sort would open the way to abuses, and would in any event be unnecessary, since if a State's security was in fact threatened, it could take security measures, in accordance with its right of self-defence, not only within a twelve-mile zone, but, if necessary, even beyond that limit.

CHAPTER IV

REVISED DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS PREPARED BY THE INTERNATIONAL LAW COMMISSION 1/

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 the territorial sea to a depth of 200 metres.

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" or to use some other expression. It was decided to retain the term

1/ Changes have been underlined.

"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. In the draft articles submitted to governments the Commission had proposed the following definition of the term "continental shelf": "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". That definition was criticized in several quarters. It was pointed out that it might well give rise to international disputes; practical considerations made it essential that the continental shelf placed under the control and jurisdiction of a coastal State, should be delimited by adopting a fixed limit, as in the case of the territorial sea. The view was expressed that the practice of States is sufficiently uniform for this limit to be suitably fixed at a depth of 200 metres.

The Commission had felt 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. The Commission recognizes, however, 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. If practical considerations should ever require a greater depth to be fixed, the matter could then be re-examined.

In view of the comments on its original proposal, the Commission concluded that the definition it had proposed should be amended as above.

6. 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.

7. 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).

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

9. 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 sovereign rights of control and jurisdiction for the purpose of exploring it and exploiting its mineral 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. Consideration might, however, be given to the establishment of an international organ responsible for controlling the development of the exploitation of submarine areas and giving advisory opinions on the subject, in order thereby to promote their most efficient use in the general interest.

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 nagivation. 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. In the draft articles sent to Governments the Commission had accepted the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction should be exercised solely for the purpose stated. The article excluded control and jurisdiction independently of the exploration and exploitation of the natural resources of the sea-bed and subsoil. It avoided 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 should not, the Commission thought, be placed on the same footing as the general powers exercised by a State over its territory and its territorial sea. However, it was held by many that the contemplated authority should be specifically referred to as "sovereignty"; that while there was no question of broadening the powers which the coastal State might exercise over the continental shelf, the distinction drawn by the Commission between the concept of "control and jurisdiction" and that of "sovereignty" was unrealistic. The legal effect of monopoly exploitation by the coastal State would be the exercise of actual sovereignty, and this sovereignty would exist even if the word was not used. The attribution of sovereignty over the continental shelf would not entail sovereignty over the superjacent waters, as high seas, nor over the airspace above the superjacent waters, such sovereignty being expressly excluded by articles 3 and 4.

Since this sovereignty would thus be subject to quite exceptional limitations, the Commission still believes that the term sovereignty as such should be avoided; but it has no objection to these rights of the State being referred to as sovereign rights of control and jurisdiction.

8. In the draft articles submitted to governments the term "natural resources" was used in articles 1 and 2. The question of the precise scope of this term was raised. The Commission clearly did not intend this term to cover fish living in the sea, even species which live on the bottom for a certain length of time (bottom fish). The Commission also agreed that the provisions concerning the "natural" resources of the continental shelf were not in general applicable to species of shellfish which cling to the sea-bottom (oysters); it considered that "sedentary fisheries" were subject to a system of regulation of their own.

Some proposals were made for the replacement of the term "natural resources" by "mineral resources", which would make it clearer that all fisheries products were excluded. It is true that the use of this term would also exclude plants growing on the sea-bed. But the only plant of any importance in this connexion is seaweed, which derives its sustenance from the water, not the soil, and consequently is neither a "natural" product of the continental shelf nor a mineral product. Accordingly, it would be better to use the term "mineral resources", thus excluding all species of animal and vegetable life.

It is of course understood that the control and jurisdiction of the coastal State will not extend to such objects as wrecked ships and their cargoes (bullion) lying on the sea-bed or covered by the sand of the subsoil, since these are not strictly part of the natural resources of the subsoil. On the other hand the sand, constituting as it does the upper layer of the subsoil, should be regarded as covered by the term "mineral resources".

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 mineral 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 mineral resources must not result in substantial interference with navigation or fishing or in reducing fish production. 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 the territorial sea, 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 the territorial sea; in most cases, however, such exploitation would not be practicable. Navigation and fishing must always be regarded as primary interests of all mankind. The construction of installations which hamper navigation or fishing can be justified only where they fulfil an equivalent interest; hence in narrow channels essential to navigation any exploitation which substantially interfered with a considerable volume of shipping could not be permitted.

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 a territorial sea 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 submit the dispute to conciliation procedure.

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 seas of the interested States, and no general rule exists for such boundaries.

In the comments on the draft submitted to governments the Commission had proposed that States should be under an obligation to submit disputes arising in this connexion to arbitration ex aequo et bono. In view of the objections to this proposal advanced by several governments the Commission has amended it. If agreement cannot be reached and a prompt solution is needed, the interested States should seek a solution of the problem in accordance with the rules agreed between

them for the peaceful settlement of disputes. If the dispute is not submitted to judicial or arbitral settlement, it should be dealt with by conciliation procedure.

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

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States do not carry on fishing 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 sea 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. The measures taken in a particular area, either by the only State whose nationals are engaged in fishing there or by several States in concert, shall not be binding on the nationals of other States who wish to fish there.

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 sea 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. Where necessary, use might be made, at least for the time being, of existing organizations in this field. Where there are a number of such organizations, arrangements should be made to co-ordinate their work. 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).

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 sea, where such fisheries have long been maintained and conducted by nationals of that State. Where the coastal State has in the past permitted non-nationals to participate in the fishing, it has no right to exclude them in the future. Such regulation, however, will not affect the general status of the areas as high seas. Sedentary fisheries must not result in substantial interference with navigation.

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, which must be 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 sea.

3. Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of the territorial sea, 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 sea, a coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, fiscal or sanitary regulations.

Such control may not be exercised more than twelve miles from the base lines forming the inner limit of the territorial sea.

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 sea, without extending the seaward limits of those waters.

2. Many States have adopted the principle of a high sea zone contiguous to the territorial sea, where the coastal State exercises control for customs and fiscal purposes, to prevent the infringement of the relevant laws within its territory or territorial sea. 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 the territorial sea, the zone should invariably be measured from the base line for the measurement of the breadth of the territorial sea. The States which have claimed an extensive territorial sea have in fact less need of a contiguous zone than those which have been more modest in their delimitation. It is understood that the term "customs regulations" does not mean merely the regulations concerning import and export duties but also all other regulations concerning the exportation and importation of goods, and also concerning immigration and emigration.

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 recognised 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

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prospect of reaching agreement to extend beyond the territorial sea 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 sea 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.

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