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THE CONTINENTAL SHELF AND PUBLIC INTERNATIONAL LAW

THÈSE

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par

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THE CONTINENTAL SHELF AND PUBLIC INTERNATIONAL LAW

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Introduction

Section 1. Definition

The term, "Continental Shelf", is used to denominate the submarine extension of the continent outwards into the sea. In numerous places the continents do not disappear suddenly or precipitously into the depths of the ocean, but between the continental heights and the oceanic depths there is often a shelving plain which may easily cover a considerable distance seawards declining gradually till the waters above reach an approximate depth of 100 fathoms, before sloping off abruptly into greater depths.

The distribution of these shelves over the surface of the world is very unequal, i.e. the eastern margins of North and South America have wide continental shelves, whilst the western coasts plunge with relative abruptness to oceanic depths. Similarly the eastern edges of the continents of Asia and Australia, together with the intervening region of the East Indies, have very extensive stretches of shallow continental shelf waters, whilst the Mediterranean has comparatively few.

The Continental Shelf though a world-wide well-defined geomorphological feature, is of very uncertain extent, as the geographical configuration of the different parts of the world that possess such a shelf can vary enormously. Thus the problem may and actually does arise as to whether the extent of the Continental Shelf can be fixed once and for all in advance and thus be standard,

or will depend in each case on the special configuration of the sea bed.

In strict geographical terms, a Continental Shelf can only be said to exist when the underwater continuation of the land-mass fall off, either abruptly or gradually, to a greater depth; usually understood to be greater than that of 100 fathoms or its approximate equivalent, 182—183 metres. When the land-mass forms a continent, then the term Continental Shelf is appropriate, whilst when the land-mass forms an island, the term island or insular shelf is more correct.

It is happens, though, that in many parts of the world, but most especially in gulfs or narrow waters, the underwater continuation of the land-mass, though gradually shelving, never reaches a point where the superjacent waters reach or surpass the depth of 100 fathoms — in other words, there is no gradual or abrupt fall off. In such cases the term Continental Shelf, as used by geographers, is not applicable.

In legal language though, these last cited exceptional cases are likened to those where a normal Continental Shelf is said to exist, though the terms "shallow waters" or "submarine areas" are also occasionally used. These latter terms, though, are too vague and general to provide a stable and satisfying definition, therefore as used today in legal language the "Continental Shelf" ought to be understood to extend not only to those cases where that would be considered the true geographical definition, but also to cases where insular shelves are concerned or those other exceptional cases in which no abrupt or gradual fall off exists and the shallow waters continue till the opposite shoreline is reached.

This divergence between the geographical and legal doctrines is not surprising as the geographical doctrine and its definition existed long before the legal one was even thought likely to become necessary, and it appears to have become obvious that the transplanting of the doctrine from one science and field into another, in its original form and accompanied with its original uncertainties, was thought neither practicable nor beneficient to the growing legal concept.

Section 2. Historical background

The conception of the Continental Shelf is no novel one, though the legal problems which arise thereunder today are due mainly to the sudden development which the whole notion has undergone during the last few years.

During the past century when the galleries of coal mines in Cornwall penetrated under the sea, a special enactment was made, known as The Cornwall Submarine Mines Act of 1858 [1], which contained provisions that "all mines and minerals lying below the low water mark under the open sea adjacent to but not being part of the County of Cornwall are vested in Her Majesty the Queen in right of Her Crown as part of the soil and territorial possessions of the Crown".

Similar provisions are to be found in the Norfolk Estuary Act of 1846, and the Lincoln Estuary Act of 1851.

In 1894, petroleum was discovered for the first time on the Continental Shelf with the drilling of a well from a platform erected in shallow waters off the coast of California.

In 1916 a Spanish expert, concerned over the depletion of fisheries, urged that territorial waters be extended to include the whole Continental Shelf, where the important food species chiefly flourished [2]. Similar recognition of the importance of the shelf with respect to fisheries was being voiced by Argentine writers [3] who emphasized the need for adequate controls, and this concern was reiterated some years later in the League of Nations Committee of Experts for the Progressive Codification of International Law [4].

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[1] The weight of this Act of Parliament in support of the Continental Shelf theory has become problematic since it was stated in *Queen v. Keyn* (1876, 2 Ex.D. 63) by Cockburn CJ. that the Act merely served for "settling a dispute as to the specific mines which were in question".

[2] De Buren, later Spanish Director General of Fisheries, cited in League of Nations Document C. 196. M. 70. 1927, at p. 63.

[3] S. R. Storni; Intereses Argentinos en el Mar, 1916, at p. 38 and J. L. Suarez; Diplomacia Universitaria Americana, 1918.

[4] Committee Report, League of Nations Document C. 196. M. 70. 1927 V.

In 1927, Professor José Leon Suarez, when a reporter to the Sub-Committee for Exploitation of the resources of the Sea, in the preliminary proceedings to the Hague Codification Conference, proposed to acknowledge the right of Coastal States to the Continental Shelf [1], although he brought into discredit the basic principle of the theory by claiming that the usual 3 mile limit of the territorial waters (or the exceptional 4, 6, 10, or 30 mile limit) should be replaced by the fall of the Continental Shelf.

In quite another connection, the year 1916 also saw the assertion by the Russian Imperial Government of a claim to certain uninhabited islands north of Siberia on the ground that they formed "the northern continuation of the Siberian continental shelf". This same thesis was to be taken up again by the Soviet Union Goveroment in a memorandum dated 4 November, 1924 [2].

Serious legal problems, though, do not appear to have arisen till recent geological and technical progress led to a series of developments which ended in the crystallization of the present day theory of the Continental Shelf with all its resulting uncertainties.

Section 3. Technical developments

The gradual and steady geological and technical progress that has taken place during the last few years is the main reason for the reappearance and rapid development of the Continental Shelf as a doctrine in Public International Law.

The concept of the Cootinental Shelf could hardly have arisen had not knowledge of ocean relief been sufficiently advanced for the regularity of the phenomenon of discontinuity between land and sea to be ascertained. That such advance became possible was

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[1] "There is no stable, permanent and convenient solution except to adopt the rule of the Continental Shelf with some modifications according to circumstances". League of Nations Doc. C. 196. M. 70. 1927. V. pp. 63 and 122.

[2] Imperial Declaration of September 29, 1916; Soviet Memorandum of November 4, 1924. French texts in V. L. Lakhtine; Rights over the Arctic, 1928 pp. 43—45.

due mainly to the progress in sounding; the progress enabling the relief of the ocean bed to be determined.

Echo sounding which was fully developed by about 1920, marked the opening of a new era in the technique of sounding and also in the knowledge of the sea bed.

However, what rendered possible the utilization of such knowledge by mine technicicns and experts, and has undoubtedly proved to be the greatest step in the field of under-water mine exploitation, is the recent development and perfectioning of directional drilling.

Directional drilling was gradually developed during the years 1930—1938, but it was only just before the war that it came to be considered far enough advanced for use on a large scale. This new system revolutionized under-water exploitation techniques, as, till then, drilling could only be effected from the coast, which rendered exploitation only possible on a very reduced scale and, apart from the enormous expense necessitated for tunnel digging, production was low and the chances of discovery of new wells further out at sea and tapping them, negligible.

With directional drilling it is possible to explore a relatively wide area with a single installation serving as a base for several drills. Furthermore the actual drilling can take place from any wanted part of the water surface straight from the installation which is fixed on derricks, artificial islands, barges, rafts, or specially constructed vessels or other floating objects, through the waters to the sea bed. As the drilling is done at an angle, it is possible for many drills to work simultaneously from the same installation, thus cutting expenses and speeding up exploitation.

Already enormous works have been accomplished in this field, and though details are only available as to those works situated off the coasts of the United States, it is to be understood that other States have made similar progress. The Russians claim [1] to have constructed an artificial metal island measuring 2400 square metres in the Caspian Sea, to serve as foundation for an oil well derrick. Seven wells seem to have been drilled there, six of which

[1] Pravda of 7th July, 1948. Construction of island ended in 1947.

are directional drillings at a certain angle. Some similar type of installation is said to have been erected between the Tunisian coast and the islands of Kerkennah and Djerba in the Sfax district [1].

As for the United States of America, already in 1949 28 companies were said to be interested in the prospecting and extraction work being carried out on the coasts of Louisiana and Texas over a distance of some 30 miles. Eleven separate oilfields had already been discovered by that date off Louisiana and three off Texas.

In these areas wells have already been sunk at a water depth of over 30 metres, and at a distance of some 30 miles from the mainland. The deepest of these under-water wells was sunk on Weeks Island off the coast of Louisiana, the depth of this well is estimated to be of 4613 metres which very nearly attains the depth of the deepest dry-land oil well, which is reputed to be that of Kern Country in California, the depth of which is 4730 metres.

Robert Hardwick [2], in an interesting article on this subject explains that prospecting, drilling and extraction, if that stage is reached, come up against a great number of difficulties not encountered on dry land. He mentions that one operator constructed a giant double decked structure of a 100 piles driven 150 to 200 feet into the gulf floor and capable of sustaining a load of ten million pounds. A more common arrangement makes use of a smaller platform for the derrick and drilling equipment, supplemented by a barge securely anchored and moored to serve as a floating warehouse, repair shop and houseboat.

In the early stages the drill operates within a large diameter tube (at least 20 inches), which is driven at least 100 feet into the ground [3].

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[1] This is comparatively recent and based on a prospecting concession which was granted in 1949 for these precise areas; Le Monde, of April 20, 1949.

[2] (Robert Hardwick was Chief Counsel for the Petroleum Administration for War) His article "The Tidelands and Oil" appeared in The Atlantic monthly, june 1949, vol. 183, No. 6, pp. 21—26.

[3] loc. cit. p. 23.

Work of this kind is naturally very costly and so far the results have not proved as good as expected. The amount spent in the Gulf of Mexico operations by all companies between the middle of 1945 and the end of 1949, has been estimated at more than 100,000,000 dollars. To offset this, the cumulative production of oil during that period in the same area of operations, did not exceed the total value of 300,000 dollars. And at least sixteen dry holes had been drilled off the Louisiana coast, and nine off the Texas coast up to January 1, 1949 [1].

Section 4. The present position

As a result of all these developments, today we are faced with a series of new problems, new in so far as the extent of the areas concerned is vast, and the economical factor involved is of such vital importance to the whole world that it can not possibly be neglected.

Existing provisions in Public International Law prove inadequate to deal, at least in detail, with the new and rapidly growing doctrine of the Continental Shelf, and the economical factor involved, though of primary importance, ought not to be allowed alone to govern the development of this new theory.

It is a case of progressive development of the law, and this can only be accomplished if the new rules to be formed are based not only on the economical factor and necessity, but on a cooperation between existing established and recognised rules of International Law and present day necessities which the law must help to govern and serve.

One preliminary observation ought to be made: in the present state of International Law the Continental Shelf concept is important only in regard to the littoral State's extension of its rights beyond the limits of its territorial waters. There is no need to go back over the juridical nature of territorial waters as unani-

[1] loc. cit. p. 24.

mously defined in principle by the Hague Codification Conference of 1930.

If, therefore, on any given coast or section of coast there is no Continental Shelf, or if the Continental Shelf is narrower than the littoral State's territorial waters, the rights of that State within its territorial waters are unaffected.

CHAPTER I

Historical Introduction

Historically, the first steps taken since technological progress has made the exploitation of the mineral resources under the High Seas practicable, were the Anglo-Venezuelan Treaty of 1942 and the Argentine Decree of 1944. There is no doubt, though, that the United States Proclamation of September 28th 1945 was the action most responsible for the present day developments.

The different ways in which States have approached this new problem is of some interest to us, especially as the policy and the legal ideas on which State practice in regard to the self is based, can be better appreciated on examination and analysis of State Practice.

With the exception of the Argentine Decree of 1944, which is treated together with the later South American practice, the following outline will be chronological.

Section 1. United Kingdom practice prior to 1945

The Anglo-Venezuelan Treaty has proved to be the starting point of United Kingdom practice in the exploitation of mineral resources lying under the Seas outside territorial waters. The problem has been approached by the path of occupation. This treaty [1] provided for the division between the United Kingdom and

[1] Treaty of February 26, 1942. Ratifications exchanged in London, September 22, 1942. G.B. Treaty Series No. 10 (1942) Cmd. 6400.
The Treaty has 10 Articles, the 3 most important are:

Venezuela, of the sea bed and sub-soil of the submarine areas of the Gulf of Paria [1] outside territorial waters. No claims to

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Art. 1. In this Treaty the term "submarine areas of the Gulf of Paria" denotes the sea-bed and subsoil outside of the territorial waters of the High Contracting Parties to one or the other side of the lines A-B, B-Y and Y-X.

Art. 2. His Majesty the King declares that he for his part will not assert any claim to sovereignty or control over those parts of the submarine areas of the Gulf of Paria which lie westerly of the line A-B or southerly of the lines B-Y and Y-X respectively described in Article 3 of the present Treaty, and that he will recognise any rights of sovereignty of control which have been or may hereafter be lawfully acquired by the U.S. of Venezuela over the said parts of the submarine areas of the Gulf of Paria.
The President of the U.S. of Venezuela declares ....
(as above) ... lie easterly of the line A-B or northerly of the lines B-Y and Y-X. ...

Art. 3. The lines A-B, B-Y and Y-X mentioned in the preceding Article are drawn on the annexed map (not reproduced) and are defined as follows: Line A-B runs from point A, which is the intersection of the central meridian of the Island of Patos with the southern limit of the territorial waters of the said Island, the approximate co-ordinates of which are: Latitude 10° 35′ 04″ N., Longitude 61° 51′ 53″ W. From there the line runs straight at the point of their intersection with the meridian of 62° 05′ 08″ W., the approximate latitude of which is 10° 02′ 24″ N.
Line B-Y runs from Point B, already established, and follows the limits of the territorial waters of Venezuela to Point Y, where the said limits intersect the parallel of 9° 57′ 30″ N., the approximate longitude of which is 61° 56′ 40″ W.
Line Y-X runs from Point Y already established, and follows the said parallel of 9° 57′ 30″ N. to Point X, situated on the meridian of 61° 30′ 00″ W.
The longitude of the central meridian of the Island of Patos to which this Article refers shall be determined by taking the mathematical half of the most eastern and most western longitudes of the said Island. Should the straight lines A-B or Y-X described in this Article intersect in their course the outside limit of the territorial waters of either of the two High Contracting Parties, the dividing line shall follow along the said limit until it reaches again the intersecting straight line in conformity with the stipulation of Articles 1 and 5 of the Treaty which exclude the bed of the sea and the subsoil of territorial waters.
The co-ordinates of Points A, B, and Y which are here given approximately shall be determined with exactness by the Commission provided for in Article 4 of the Treaty.

[1] The Gulf which separates Venezuela from Trinidad is about 70 miles long by 35 miles wide, with openings at each end of six and ten miles respectively. It is shallow and petroleum deposits are reported to be beneath its waters.

sovereignty over these areas as against other States exist in the Treaty. Each party undertook not to assert any claim to sovereignty or control over those parts of the submarine area lying on the other side of the boundary, and to recognise any rights of sovereignty or control which had or might thereafter be lawfully acquired by the other.

The Treaty looked forward to the legal occupation of parts of the sea bed and meanwhile guarded against quarrels by a political agreement concerning spheres of interest.

The United Kingdom soon afterwards issued an Order-in-Council [1] annexing the submarine area renounced by Venezuela under the Treaty and attaching it for administrative purposes to Trinidad and Tobago, Venezuela was described as having taken similar action in its part of the Gulf.

Both the Treaty and Order-in-Council were clearly restricted to the submarine areas and were declared not to affect in any way the status of islands, islets and rocks, nor the status of the waters, nor freedom of passage or navigation.

Section 2. United States Presidential Proclamation September 28, 1945

The Proclamation [2] starts off with three introductory recitals, stating:

a. the existence of a world-wide need for new sources of petroleum and other minerals;

b. the possibility, according to expert opinion, of extracting these resources by means of technological progress which has made their exploitation already practicable to a certain extent;

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[1] Submarine Areas of the Gulf of Paria (Annexation) Order. 6 August 1942.

[2] Proclamation No. 2667.
io Federal Register 12303.
American Journal of International Law, 40 (1946) Suppl. pp. 45—48.
A copy of the Proclamation figures in the Appendix of this work at p. 145.

c. the necessity for the existence of some recognised jurisdiction over these resources in the interests of their conservation and prudent utilization;

d. that the exercise of jurisdiction over the natural resources of the sub-soil and sea-bed of the Continental Shelf by the contiguous nation is reasonable and just.

This was supported by the following arguments:

1. The effectiveness of measures to utilise or conserve these resources would be contingent upon co-operation and protection from the shore. Practical and economic considerations do at present render exploitation of the mineral resources of the shelf scarcely feasible without some co-operation from the shore.
2. The Continental Shelf may be regarded as an extension of the land mass of the coastal State and thus naturally appertaining to it. This appears to be a geographical doctrine analogous to the hinterland and watershed doctrine.
3. The resources under the shelf frequently form a seaward extension of a pool or deposit lying within United States territory. This seems to be partly a specialised geographical doctrine and partly a claim to protect resources within the United States which might be tapped from the High Seas.
4. Self-protection compels a coastal nation to keep close watch over drilling and mining operations off its shores. Self-protection is the doctrinal root of "contiguous zones" and one of the roots of territorial waters.

After these recitals the Proclamation declares as the policy of the United States that it "regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the High Seas but contiguous to the coasts of the United States, subject to its jurisdiction and control". These words clearly amount to an attempted appropriation of the actual resources and to an assertion of jurisdiction over the sea-bed and sub-soil of the shelf in respect of the resources.

One explanation of the restriction of the claim to jurisdiction over resources rather than over the sea-bed itself, may be that the

submarine claims previously recognised under International Law have been claims to exclusive rights in particular resources and the United States Proclamation may have been framed as an extension of the same principle.

A more probable explanation is that for cogent reasons of domestic politics, is was preferred to make the claim by Presidential Proclamation rather than by Act of Congress, and under the United States Constitution the formal acquisition of new territory without the assent of Congress would have raised constitutional issues [1].

The Proclamation next provides that "in cases where the Continental Shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles". In other words, the seaward limit of the United States claim is, in general, the physical edge of the submarine shelf but where the shelf reaches without a break to the coast of another State, then the boundary is to be fixed by agreement.

Similarly the submarine boundary with an adjoining State, is to be a matter of agreement.

Finally, the Proclamation declares that "the character as high seas of the waters of the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected".

An accompanying press release stated that the Shelf is, in general, regarded as extending up to the 100 fathom line [2].

With respect to the attitude of other governments, it is understood that the substance of the proclamation was communicated to the Governments of Canada, Mexico, the Soviet Union and the United Kingdom, as the States more directly affected by the United States claim [3].

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[1] The controversy between the Federal Government and the States concerning the resources of the sea-bed under the maritime belt was raging when the Proclamation was issued. (U.S. v. California 332 U.S. 19). See pp. 42—50.

[2] 13 Department of State Bulletin. 484. American Journal of International Law, 40 (1946) Supplement, pp. 45—48.

[3] Letter from the Department of State, April 28, 1948.

None of these is known to have made any public observation; of the four, only Mexico has announced any similar action of its own.

Section 3. South American Practice since 1945

Mexico.

On October 29, 1945[1] the President of Mexico issued a declaration[2] modelled on the American proclamation of a month earlier, though not identical in scope.

The Declaration starts with four introductory rêcitals, in which are explained, *a*) the need for preserving that natural wealth that so far had been outside control and complete utilization, *b*) the existence and nature of the Continental Shelf, c) the existence, now ascertained through scientific investigation, of great natural wealth "whose legal incorporation into the patrimony of the nation is of the greatest importance, and cannot be delayed", and *d*) the existence of fishing resources of extraordinary richness, which (the Government) "should ensure that these resources are adequately protected, exploited, and developed".

The Declaration then continues: "For these reasons, the Government of the Republic claims the whole continental shelf adjacent to its coasts and all and every one of the natural riches, known or still to be discovered, which are found in it, and will proceed to supervise, utilize and control the zones of fishing which are necessary for the conservation of this source of well-being".

Any intent to challenge legitimate rights of third parties, or rights of free navigation on the high seas, was expressly disclaimed; the sole purpose of the action taken being the conservation of "these resources for the welfare of the nation, of the continent, and of the world".

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[1] For text see "International Law Documents 1948—1949" The United States Naval War College, 1950, at pp. 182—183.

[2] Also Presidential Decree of February 25, 1949 incorporating the property of "Petroleos Mexicanos", the subsoil of the lands covered by the territorial waters of the Gulf of Mexico and other lands expressly specified.

When, however, in 1949, the Constitution was amended for the purpose of translating the provisions of the Declaration into it, Articles 27, 42, and 48 of the Mexican Constitution were amended and the change went much further than the Declaration.

In the amendment of Article 27 a substantial alteration was effected which resulted in declaring as direct national property, not only the sea-bed and the continental shelf, but also the waters covering these areas to the extent laid down in International Law. This reference to International Law is paradoxical since, on the other hand, no mention is made of the observance of and respects for the rights of other States, nor is there any recognition of the traditionally accepted "high seas" character of the waters above the continental shelf.

Under the terms of the amendment, the legal status of the waters would be the same as that of territorial or jurisdictional waters.

Article 42, which defines the national territory, now provides for the inclusion in such of the continental shelf "covered by the waters from a depth of 200 metres to the low water mark", as well as the sea bed of the islands owned by Mexico in the Pacific, particularly Guadeloupe and Revillagigedo, in the maritime zone south of Lower California and in the Gulf of Mexico, off Compeche, which are abounding in natural wealth.

Article 48, now provides, that the islands of both oceans and their shelves and sea-beds should be added directly to the jurisdiction of the Federal Government, with the exception of those islands over which the States had theretofore exercised jurisdiction.

The Argentine.

The Argentine, which has a broad expanse of continental shelf off much of its coast, followed the example of the United States and Mexico about a year later[1]. This Presidential Declaration makes express reference in the preamble to an earlier executive

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[1] *9 October, 1946. The Times, October 11, 1946. For text see Appendix, at p. 148.*

Decree issued in 1944[1], which at that time escaped attentinn and which is described as "a categorical proclamation of sovereignty over the "Argentine Continental Shelf" and the "Argentine Epicontinenlal Sea", declaring them to be "transilury zones of mineral reserves".

In reality this previnus decree was nol sn calegorical in language and purported to establish only mineral reserves along the coasts and in the epicontinental sea without mention of the Continental Shelf as the basis for this actinn[2].

The 1946 Presidential Declaration[3], which declares in Article 1 that the "Epicontinental Sea and Continental Shelf are subject to the sovereign Natinn", is stated in the preamble to be similar to those declarations issued by the United States and Mexico and furthermnre based on the facl that "the doctrine in question, aside from the fact thal it is implicitly accepted in modern international law, ..." [4].

Article 2, explains thal "for purposes of free navigation, the character of the waters situated in the Argentine Epicontinental Sea and above the Argentine Continental Shelf, remains unaffected by the present Declaration".

The extent of the shelf and sea claimed by the Argentine is nowhere defined in the Declaration. This studied lack of precision may be of practical importance in connection with the Argentine's Antarctic claims, which comprise a sector bounded by the 25th and

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[1] January 24, 1944. Decreto No. 1386. Article 2 declared the Argentine Continental Shelf and the sea above this shell to be "zonas transitorias de reservas minerales".

[2] Richard Young in American Journal of International Law, 1948, at pp. 852-853.

[3] The United States Government protested against the extravagant features of the claim. Communication of July 2, 1948. Selak in American Journal of International Law, 1950, pp. 673—674.

[4] Prof. Jessup in his 1947 p. 117 article in American Journal of International Law, noted that the doctrine had earlier received some support in writings of modern Argentine jurists, particulorly Dr Ruiz Moreno and Dr Podesta Costa. Both these writers, though not referring to the continental shell as a basis for a claim, admit that the bed of the high sea may be acquired through occupation. Ruiz Moreno: Derecho Internacional Publico 1940 vol. II at p. 49. L. A. Podesta Costa: Manual de derecho Internacional Publico 1943 at p. 99.

74th meridians west of Greenwich. In support of these, the Argentine has laid considerable stress on the argument of geographical propinquity; and though the waters between South America and Antarctica considerably exceed 100 fathoms in depth, there are connecting geological structures between the two land masses which might be brought within the expanded continental shelf doctrine [1].

Nicaragua.

The Nicaraguan Congress adopted a declaration [2] according to which the adjacent continental shelf was claimed up to the water depth of 200 metres. On the Atlantic side, Nicaragua's shelf is the most extensive in Central America [3].

On January 22, 1948 the Political Constitution was amended so as to read: Article 2. "......, and this territory embraces also the adjacent islands, the territorial sea, the continental shelves, and the air space and stratospheric space. Boundaries which are not yet determined shall be fixed by treaties and the law [4].

In 1949, the Senate and Chamber of Deputies of Nicaragua adopted a Declaration laying down that, in conformity with Article 2 of the Constitution adopted in 1948, the continental shelf is that part of the territory which is covered by the sea up to a depth of 200 metres and that in cases in which the continental self extends to the coast of another State the line of demarcation shall be established by agreement on the basis of equity. In Article 5 of the Constitution as formally adopted in 1950, the "continental platform and the submarine shelves" ("zocalas") were enumerated, together with the adjacent islands, the subsoil of the

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1 It may be noted that the Falkland Islands (Malvinas) in connection with the Argentine's claims, are located on the South American continental shelf, even under the 100 fathom definition..

2 May 1. 1947.

3 New York Times, May 2, 1947.

4 International Law Documents 1948—1949, in The United States Naval War College, 1950 at p. 192.

territorial waters, the air space and the stratosphere as forming part of national territory [1].

Chile.

By a Presidential Declaration dated June 23, 1947 [2], it was announced that "The government of Chile confirms and proclaims the national sovereignty over the whole continental shelf adjacent to the continental and insular coasts of the national territory whatever its depth may be, ..." [3] and "...... over the seas adjacent to its coasts, whatever this depth may be ......" [4].

While, in the preamble, reference was duly made to the prior actions of the United States and Mexico, and to the fact that "an international consensus recognizes that each country has the right to consider as national territory the whole extent of the adjacent epicontinental sea and continental shelf" [5], the operative provisions of the Declaration indicate a different approach and on the whole a more extensive claim.

Clearly rejecting any implied limit of jurisdiction at the 100 fathom line, the Declaration made a direct assertion of sovereignty over the continental shelf regardless of the depth of water, and also over the epicontinental sea regardless of depth, and to whatever extent necessary to preserve the natural resources therein.

Furthermore a line 200 nautical miles distant from and parallel to the coast was laid down in Article 3, as a limit of the water within which Chile proposed to exercise protection and control, but this without prejudice to any subsequent changes; a similar zone was also claimed on all sides of Chile's island possessions,

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[1] Text in Revistá Espanola de Derecho Internacional, 2, 1949 at p. 64, by Azcarage. Also Mateesco: Vers un nouveau Droit International de la Mer, 1950 at p. 121.

[2] International Law Quarterly, vol. 2. 1948 at p. 135. The United Kingdom has protested against the extravagant features of this Proclamation, also the United States in communication of July 2, 1948. See Selak, in American Journal of International Law, 1950 at p. 673—674.

[3] Article 1.

[4] Article 2.

[5] Point 4 of preamble.

presumably including such points as Juan Fernandez, which is some 400 miles from the mainland and Easter Island, which is more than 2000 miles distant.

In Article 4, an assurance is given that "similar legitimate rights of other States, (will not be disregarded) on the basis of reciprocity", and that "rights of free navigation on the high seas" will not be affected.

Probable reasons for Chile's departure from the formula developed in the earlier actions of other States are to be found in the facts of its geographical position. The continental shelf in the strict 100 fathom sense, is narrow along the Chilean coast [1] and a claim thus limited by depth would yield far less than it would yield, for example off the Atlantic coast.

In advancing a shelf doctrine not thus restricted, Chile may be hoping for a successful claim to the so called "Chilean rise"; a high submarine plateau adjoining the coast which, though deeply submerged, is still distinctly set off from the neighbouring abysses of the eastern Pacific. In addition, Chile has the same reasons as the Argentine for advancing a view with respect to the continental shelf which will lend support to its claim of a segment of the Antarctic between the 53° and 90° west longitude [2].

Peru.

The terms of the Peruvian Decree [3] closely resemble those of the Chilean claim and obviously were modelled after it.

Here, likewise, national sovereignty and jurisdiction was asserted over the continental shelf and epicontinental sea regardless of depth, and a 200 mile limit for protection and control was

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[1] As it is along the entire Pacific coast of South America.

[2] On his visit to the Antarctic in February, 1948, the President of Chile declared that Chilean territory now "extends from Africa to the South Pole". New York Sun of February 24, 1948. R. Young in American Journal of International Law, 1948 at p. 854.

[3] August 1, 1947. International Law Quarterly, vol. 2, 1948 at p. 137. The United Kingdom has protested against the extravagant features of this claim. Also the United States in communication of July 2, 1948. See Selak in American Journal of International Law, 1950 at p. 675.

established parallel to the mainland coast and around the Peruvian islands.

Article 4 asserts that "The present declaration does not affect the right of free navigation of ships of all nations, in conformity with international law".

Undoubtedly the form of this claim was governed by reasons similar to those in the case of Chile, inasmuch as Peru has an even narrower coastal shelf above the 100 fathom line, and even greater depths of water close to shore. An additional ground for protecting the fishery resources however, was advanced in the preamble where it was stated: "that the fertilising wealth deposited by guano birds on the islands of the Peruvian coast also require for its safeguard the protection, conservation, and regulation of the use of fishing resources which serve to nourish the said birds"[1].

In language almost identical to that used in the Chilean claim, the Peruvian declaration bases its legality on the right that "has been declared by other States and has been incorporated in practice into international order"[2].

Costa Rica.

The terms of the Costa Rican Decree[3] resemble closely those used in the Chilean and Peruvian declarations. Here, likewise, the action taken is based on the assertion "that an international consensus proclaims and recognizes that each country has an inalienable right to consider as part of the national territory the whole extent of the adjacent epicontinental sea and the continental shelf[4].

Following this, the Decree Law proceeds to claim national sovereignty over the continental shelf and the epicontinental seas

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[1] Preamble, point 4.
[2] Preamble, point 5.
[3] July 27, 1948. For text see United States Naval War College 1950 — International Law Documents, 1948—1949, at p. 193. Also Decree Law No 803 of November 2, 1949. The United Kingdom has protested against the extravagant features of this claim.
[4] Preamble, point 3.

on both Atlantic and Pacific coasts out to a limit of 200 miles from the continental Costa Rican shores, regardless of the depth of the water [1].

Article 5, points out that "similar legitimate rights of other States", are not disregarded "on a basis of reciprocity", nor rights of free navigation on the high seas affected "by the present declaration of sovereignty".

Other South American States to have taken legislative action with regard to the continental shelf, are. Panama in 1946 [2], Guatemala in 1949 [3], and Honduras [4], El Salvador [5], and Brazil [6] in 1950.

The Brazilian decree, dated November 8, 1950 was procured and read by Mr Amado, before the International Law Commission [7], when that body of jurists was examining recent State practice with regard to the Continental Shelf.

„Art. 1. It is expressly recognized that part of the submarine plateau adjoining the continental and island territory of Brazil is incorporated into the territory under the exclusive jurisdiction and authority of the Federal Union.

Art. 2. The working and exploration of natural products or resources situated in that part of the national territory shall in all cases be subject to federal authorization or concession.

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[1] Articles I and 2.

[2] Constitution of March 1, 1946 (Excerpt) Article 209, "the following belong to the State and are of public use, and consequently cannot be the object of private appropriation: ... 4th, the air space and continental shelf corresponding to the national territory". United States Navol War College — International Law Documents 1948—1949, at p. 186.

[3] Guatemalan Petroleum Law of 1949 — Law No. 649 of August 30, 1949.

[4] Honduras Legislative Decree No. 102, of March 7, 1950. The National Congress decreed an amendment to Article 4 of the Constitution, which laid down that "the submarine platform or continental and insular shelf and the waters which cover it, in both Atlantic and Pacific Ocean, whatever be its depth and however far it extends, form part of the National territory". Lauterpacht in British Year Book, 1950, at p. 381.

[5] *This claim extends to a distance out at sea of 200 marine miles and covers* subsoil of the continental shelf, epicontinental seas and air space above. The United Kingdom and the United States have protested. Communication of December 12, 1950 addressed to El Salvador; Bulletin of State Department, 24 (1950) at p. 24.

[6] Decree No. 28, 840.

[7] United Nations Doc. A/CN.4/SR. 113 at p. 10.

Art. 3. Regulations governing shipping in the waters above the said plateau shall remain in force, without prejudice to any future regulations enacted, in particular those relating to fishing in that area".

Cuba.

In addition to the foregoing actions, steps of similar character have been under consideration in Cuba, although it is understood that they have not been completed. In December 1946, legislation was introduced in the Cuban Congress to amend Article 3 of the Constitution by including in the national territory there defined the "insular shelves ... up to those points at which the depth of the sea is two hundred marine fathoms" [1].

The proposed extension of jurisdiction to the 200 fathom line was presumably dictated by the precipitous character of the Cuban insular shelf, which in many places offshore falls steeply. Opposition to the proposal was voiced in some Cuban circles on the ground that it would be of relatively small benefit to the nation because of the narrowness of the shelf, and it was further pointed out that recognition of the doctrine by Cuba might operate to bar Cuban access to shelf areas claimed by neighbouring countries [2]. This might be of particular importance with respect to fisheries off the coasts of Florida and Mexico.

Section 4. United Kingdom and other State Practice

Bahamas.

A few months before the Truman Proclamation, the Bahamas legislature passed the Petroleum Act of 1945. Whilst not asserting exclusive rights over the whole shelf, this act sought to achieve the same result by control over shore facilities.

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[1] approximately 370 metres.

[2] Gustavo Gutierrez, in La libertad del mar y las plataformas continental e insular; Anuario de la Sociedad Cubana de Derecho Int. 1947, at p. 225.

The act provided that leases and licenses could only be held by nominee companies incorporated within the Bahamas. Thus, in effect, foreign companies had to acquire Bahamas nationality and submit to Bahamas domestic jurisdiction in order to operate in these areas off the Bahamas shores.

In 1948, the United Kingdom adopted the Truman Doctrine, and by the Bahamas (Alteration of Boundaries) Order-in-Council [1], extended the boundaries of the Colony, thereby indicating that the case was regarded as one of occupation of territory.

In the preamble of this Order-in-Council it is briefly stated that:

"Whereas it is desirable to extend the Boundaries of the Colony of the Bahamas so as to include the continental shelf contiguous to the coasts of the Colony",

The operative part, is likewise brief:

Art. 2 "The Boundaries of the Colony of the Bahamas are hereby extended to include the area of the continental shelf which lies beneath the sea contiguous to the coasts of the Bahamas".

Art. 3 "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".

Similarly worded Orders were made for Jamaica [2], and British Honduras [3]. And on December 21, 1950, a further Order was made for the Falkland Islands [4]. Here again the same language was used with the exception of Article 2 which is more detailed and descriptive in character

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[1] Statutory Instruments, 1948. Order-in-Council No. 2574 dated November 26, 1948.

[2] Statutory Instruments, 1948. Order-in-Council No. 2575 dated November 26, 1948.

[3] Statutory Instruments, 1950. British Honduras (Alteration of Boundaries) Order-in-Council No. 1649, dated October 9, 1950.

[4] Statutory Instruments, 1950. Falkland Islands (Continental Shelf) Order-in-Council No. 2100.

Art. 2 "The Boundaries of the Colony of the Falkland Islands are hereby extended to include the area of the continental shelf being the sea bed and its subsoil contiguous to the coasts of the Falkland Islands. The boundary of such area shall be from a position on the 100 fathom line 110 nautical miles 023 degrees true from Jason West Cay (The westernmost of the Jason Islands, latitude 50 degrees 58 minutes South, Longitude 61 degrees 27 minutes West approximately), following the 100 fathom line as shown on Admiralty Chart No 2202 B round the northern, eastern, southern and western sides of the Falkland Islands to a position 20 nautical miles 278 degrees true from Jason West Cay, thence by a straight line crossing in its narrowest part the area where the depths are less than 100 fathoms, in a 032 degree true direction for 115 nautical miles to the starting point".

In the meantime other States started taking an interest in this newly developed attitude with regard to the Continental Shelf, and a series of further claims followed.

Iran [1] and Saudi Arabia [2], were probably the first independent States, not forming part of the American Continent, to take action. The wording of the Saudi Arabian Declaration in especial, closely resembles that of the United States Proclamation; the operative part consisting of:

"The subsoil and sea-bed of those areas of the Persian Gulf seaward from the coastal sea of Saudi Arabia but contiguous to its coasts are declared to appertain to the Kingdom of Saudi Arabia and to be subject to its jurisdiction and control. The boundaries of such areas will be determined in accordance with equitable principles by Our Government in agreement with other states having jurisdiction and control over the subsoil

[1] March 19, 1949.
[2] May 28, 1949. — American Journal of International Law, 43, 1949, suppl. at p. 156.

and sea-bed of adjoining areas. The character as high seas of the waters of such areas, the right of free and unimpared navigation of such waters and the air space above those waters, fishing rights in such waters, and the traditional freedom of pearling by the peoples of the Gulf are in no way affected".

Following this example, the Persian Gulf Sheikhdoms, which are in law and in fact under the International responsibility of Great Britain, and on the advice of this latter, took similar action and during the month of June 1949, a series of Proclamations were issued by the Sheikhs; rulers of these small international entities. Bahrain [1], on June 5; Qatar, on June 8; Abu Dhabi, on June 10; Kuwait, on June 12; Dubai, on June 14; Shayah, on June 16; Umm al Qaiwain, on June 20; Ajman, on June 20 and Ras Al Khaima.

The operative clauses of all these Proclamations are virtually identical [2]: each ruler declares the contiguous sea bed and subsoil under the High Seas to belong to his State and to be subject to the State's absolute authority and jurisdiction, the seaward boundaries to be determined after consultation with the neighbouring governments in accordance with the principles of justice, when the occasion so requires.

These claims will have no certain boundaries until agreements have been reached as the 100 fathom depth limit is never exceeded throughout the Gulf.

In these claims there is also to be found a clause regarding the high seas and traditional fishing rights:

"There is nothing in this proclamation that may be interpreted as affecting dominion over the islands or the status of the sea bed and subsoil underlying any territorial waters.

There is nothing in this proclamation that may be interpreted as affecting the character of the high seas in the waters of the Persian Gulf overlying the sea bed and beyond the limits

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[1] For text see Appendix at p. 150.

[2] Proclamation No. 37/1368, of June 5, 1949 (Bahrain Government). For text see Appendix at p. 150.

of the territorial waters, or the status of the air space above the waters of the Persian Gulf beyond the territorial waters, or fishing, or the traditional rights of pearling in these waters".

Pakistan [1] was the next State to take action and the Pakistani Government published a declaration stating that "the sea bed along the coasts of Pakistan extending to the one hundred fathom contour into the open sea should with effect from the date of this declaration be included in the territories of Pakistan".

Iceland, by the Icelandic Law of 1948 [2], has made certain provisions for the scientific conservation of the Continental Shelf fisheries, and the Philippines Government by the Philippines Petroleum Act of 1949 [3] seem to have adopted President Truman's attitude, expressed in the United States Proclamation.

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[1] March 9, 1950 — The Gazette of Pakistan, Extraordinary, March 14, 1950.
[2] Law No. 44 of April 5, 1948.
[3] Act No. 387, of June 18, 1949 — Official Gazette Vol. 45, at p. 3192.

CHAPTER II

Detailed Analysis of the State Action taken

This summary of the actions so far taken by States with regard to their continental shelves clearly indicated that differences are to be found among these legislative and other acts, not only in so far as the nature of the rights claimed and the extent of the very claims themselves, but also with regard to such essential matters as the actual denomination of the shelf areas, justifying reasons for the advancement of such claims, provisions dealing with future demarcation problems that may arise with neighbouring States, and attitude adopted with regard to the status of the high seas above the shelf areas in question.

Furthermore certain claims purport to incorporate into, or assimilate with, the Continental Shelf, other pretensions entirely foreign to this conception and in no way bearing any relation to it.

A more analytical and classified study of these points where differences are to be found would help show that the general tendency so far has been and how far the exceptional cases differ, and to what extent such existing divergencies are a mere matter of words or clear abuse.

The concepts of the legal nature of the claims, the extent of the areas claimed, and the demarcation problems as between neighbouring States, are treated in detail in Chapters III and IV.

Section 1. Denomination

The Continental Shelf *eo nomine* is not mentioned in the Anglo-Venezuelan Treaty of 1942, instead the term "submarine

areas" is used to describe the areas concerned. Likewise the Brazilian decree employs the term "submarine plateau", and the Saudi Arabian enactment refers to "the subsoil and sea-bed of those areas of the Persian Gulf seaward from the coastal seas of Saudi Arabia but contiguous to its coasts".

Similarly no reference to the Continental Shelf is to be found in those Proclamations made by Sheikhs in the Persian Gulf. The term "sea-bed and subsoil of the high seas bordering on the territorial waters of ..." being used instead.

This omission, especially in those cases of States bordering on the Persian Gulf, is taken to be intended as no shelf in the true geographical sense of that term exists throughout this Gulf.

On the other hand, Mexico, Panama, The Argentine, Chile, Nicaragua, Costa Rica and Peru, expressly refer to the areas as the "Continental Shelf" adjacent to their continental and island coasts. In the Costa-Rican and Peruvian proclamations the expression "the submarine platform or continental shelf" is used.

Likewise the Orders-in-Council for the Bahamas, Jamaica, British Honduras and the Falkland Islands expressly refer to the "continental shelf", and in the Falkland Islands Order, to this is added: "being the sea-bed and its subsoil contiguous ...".

The Mexican, Chilean and Costa Rican declarations furthermore expressly denote that the "whole Continental Shelf" is in question. The other enactments omitting the word "whole".

The lack of uniformity found in the various enactments concerning the denomination of the areas appropriated is understandable as the conception is still very new and at the time these declarations and proclamations were promulgated, no understanding existed as to what the correct denomination ought to be. The differences found to exist, though, as has been seen, are not serious. Whether the terms — continental shelf — or, the whole continental shelf — or, the submarine plateau — or, submarine areas — are used, in practice it is clear that the subject matter treated is the same. Those States that do not possess a Continental Shelf in its true geographical sense, quite properly refrain from using that term.

Section 2. Justifying reasons given in claims

The British inspired enactments unlike the United States Proclamation, do not invoke the principle of "effectiveness" and of "self protection", but simply state that the appropriation of the adjacent sea bed by a coastal State is not open to objection on grounds of justice, without claiming that the sea-bed already belongs to a coastal State under International Law. Furthermore the United Kingdom has made it quite clear that it still looked on a coastal State's right in submarine areas under the high seas as being dependent on an act of appropriation [1].

This attitude, though, of extending national sovereignty by what appears to be a constitutive act of annexation, was not followed by all the other interested States. The majority of these have couched their official enactments in language consistent only with a declaration of an already existing title, of these the more notable being: The Argentine, Chile, Peru, and Costa Rica. These four States have based the legality of their actions on the claim, that the United States and Mexico (to start with and later other States are quoted) had already advanced similar pretensions, and what is even more important, that an international consensus recognizes a State's right to advance claims in this sphere.

Chile and Costa Rica use such language, whilst Peru states that this "right" "has been incorporated in practice into international order" and the Argentine that "in the international sphere conditional recognition is accorded to the right of every nation to consider as national territory ...".

The Panamanian, Nicaraguan and Brazilian constitutional amendments give no justifying reasons for their claims. They merely confine themselves to a bare announcement of the measures taken. The same can be said with regard to the Pakistani declaration.

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[1] In the recent Arbitration concerning the submarine areas of the Qatar peninsular, there was abundant evidence in correspondence signed by the Indian Office, the Ministry of Fuel & Power and British Political representatives in the Persian Gulf that in 1949 the United Kingdom considered the issue of the Proclamations to be an essential step in the acquisition by the several Sheiks of oil rights in the sea-bed outside territorial waters.

The Saudi Arabian declaration resembles closely that of the United States. These two proclamations can be understood to adduce the reasons of the apparently new departure in the realm of the law of the sea — to the philosophy as it were of the Continental Shelf.

The variancies in this matter are of considerable importance as, apart from those States that have merely confined themselves to a mere statement as to the action taken or anticipated, without giving any reasons justifying this action, the attitude adopted by the remaining States seems to have followed one of two courses; either that of a constitutive act of annexation, or that of a declaration as to an already existing title. This difference may prove of great practical importance as from the action taken and the attitude adopted by those States that have followed the first course, it is to be deduced that these States consider their declarations, or proclamations, or other official enactments, as constitutive — creative in other words of a new right or title, whilst those States following the second course merely consider their acts as declarative of a pre-existing title.

Section 3. Attitude adopted towards that part of the High Seas that overlies the shelf areas

The United States Proclamation very clearly indicates the attitude taken in this matter:

> "The character as high seas of the waters above the Continental Shelf and the right of their free and unimpeded navigation are in no way thus affected".

This example was followed in wording bearing very close resemblance to the above by the United Kingdom in article 3 of the Orders-in-Council for the Bahamas, Jamaica, British Honduras and the Falkland Islands, and is again to be found in the Saudi Arabian and the Persian Gulf Sheikhdom Proclamations. These last mentioned States furthermore expressly disclaim any pretension with regard to the air space above such waters, fishing

rights and traditional freedom of pearling. In addition the Persian Gulf Sheikhdoms expressly state that their Proclamations do not affect "dominion over the islands or the status of the sea-bed and the subsoil underlying any territorial waters".

Most South American States have advanced claims far more extensive than those of other States, especially in so far as areas of the high seas are concerned. Notwithstanding this the greater number of these States have, in one way or another, disclaimed interference with navigation in the waters above the shelf areas claimed.

Mexico: "... does not mean" ... "rights of free navigation on the high seas is affected".

Chile: Art. 4. "... does not affect rights of free navigation on the high seas".

Peru: Art. 4. "... does not affect the right of free navigation of ships of all nations, in conformity with international law".

Costa Rica: "... does not affect the right of free navigation on the high seas".

The Argentine: Art. 2. "For purpose of free navigation, the character of the waters ...... remain unaffected ...".

Brazil: Art. 3. "Regulations governing shipping in the waters above the said plateau shall remain in force, without prejudice to any future regulations enacted, in particular those relating to fishing in that area".

The Panamanian and Nicaraguan constitutional amendments make no reference whatsoever to the seas lying above their shelf areas.

What all these enactments do have in common is that they all disclaim any intention of interference with the principle of the freedom of navigation on the high seas, as established by accepted principles of International Law. Some in quite categorical language state that the character as high seas of these waters shall remain

unaffected, whilst the South American States in especial do not go that far but merely refer to free navigation. This is due to the fact that these latter States have advanced claims over these very areas of the high seas, giving themselves the exclusive right to all the products to be found therein, fisheries included.

It is undoubtedly evident to all, though, that once exploitation of the shelf areas has been undertaken and developed on a large scale; installations on the very waters overlying the areas worked on will prove a hindrance to free navigation — and this even more so if the region exploited happens to be on a shipping route or near one. As a consequence certain regulations will have to be established governing the passage of shipping and the formation of safety zones round such installations; measures of this kind are unavoidable as only thus can material and lives be safeguarded.

That such measures are necessitated appears obvious today, and undoubtedly also appeared obvious at the time of these official declarations and Proclamations, therefore it would appear that the United States and other States that so categorically denied any future interference with the regime of the high seas and free navigation, either have shown themselves overoptimistic with regard to future unregulated passage of shipping within an area strewn with installations floating on the waters, or that these States wished to avoid the criticism of having issued regulations over areas outside their jurisdiction and this in direct contradistinction to existing rules of International Law governing the regime of the high seas.

Section 4. Incorporation into claims of matters foreign to the Continental Shelf

The United States Proclamation declared it to be the national policy to extend authority over the resources of the sea-bed and subsoil of the continental shelf, primarily for petroleum. There was no intent to control under the shelf doctrine, fisheries or other resources in the sea itself. This was done in quite a different

manner, by another proclamation of the same date as that of the Continental Shelf [1].

In this instrument the President asserted the right of the United States to establish fishery conservation zones in areas of the high seas contiguous to the coasts of the United States, either unilaterally or in concert with other interested States; simultaneously the character of the waters as high seas and the right of free navigation were declared to remain unaffected. The claim made no reference to the continental shelf but proceeded on a general theory of the right of a coastal State to protect its contiguous fisheries; the zone concept was very probably derived from the customs enforcement areas authorised by the Anti Smuggling Act of August 5, 1935.

Whatever may have been the propriety of this step with regard to the creation of fishery zones, it was independent of the claim to the continental shelf, yet some States in following the apparent example of the United States, have sought to combine in the same instrument the claim to adjacent shelf areas with sweeping assertions of sovereignty over the high seas.

Thus Mexico did no more than join in her one Proclamation the substance of the two separate proclamations of the United States, but some other States went even further. For instance Chile, Peru and Costa Rica, in addition to proclaiming sovereignty over

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[1] Proclamation by the President with respect to coastal fisheries in certain areas of the High Seas. September 28, 1945, American Journal of International Law (1946) Suppl. pp. 46—47.
Reasons for this action in the preamble are given as: the protection and perpetuation of fishery resources contiguous to the coasts of the United States. The Proclamation then states that,

1. In those areas where United States nationals alone used to fish, explicitly bounded conservation zones are established; subject to the regulation and control of the United States.
2. In those areas where United States nationals and nationals of other States fished — explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulations and control as provided in such agreements.

The Proclamation ends with an assurance that the character as high seas of these areas, and free and unimpeded navigation likewise, are in no way affected.

the continental shelf "confirmed" and "proclaimed" national sovereignty over the adjacent seas of whatever depth, to "within" the limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas".

Peru and Costa Rica have designated that this zone of waters concerned would extend to an imaginary line out at sea, which will be parallel to their respective continental and island coasts and at a distance of 200 marine miles from these. Chile's claim is identical with the only difference that there it has been made quite clear that the 200 mile wide zone is but considered sufficient for present purposes; to be amplified or modified in the future, in conformity with the knowledge, discoveries, studies and interests of Chile, whenever the Government considers this necessary.

The Argentinian claim briefly states that the "Argentine Epicontinental Sea and Continental Shelf are subject to the sovereign power of the Nation".

In the case of these States the only connection between the assumption of sovereignty over the continental shelf and the assertion of sovereignty over the adjacent sea is that both are contained in the same instrument, furthermore these claims to sovereignty over the high seas are limited to the protection and exploitation of its natural resources.

El Salvador appears to have gone even further than this, though, as from her Constitution it is obvious that sovereignty has been asserted over the adjacent seas generally and not merely for limited purposes. Article 7 of the 1950 Constitution of El Salvador provides, in language of some simplicity, that the territory of the Republic "includes the adjacent seas to a distance of two hundred nautical miles from low-water mark and includes the corresponding aerial space, subsoil and continental shelf". Although the same article expressly laid down that its provisions "do not affect freedom of navigation in conformity with the accepted principles of International Law", it is clear that the claim thus made was contrary to International Law. For the freedom of the sea includes other freedoms in addition to that of navigation,

moreover, as stated in the communication of the Government of the United States addressed to the Government of El Salvador [1] and expressing the formers' "deep concern" at the implications of this provision of the Constitution, the disclaimer of intention to interfere with the freedom of navigation, when coupled with an assertion of sovereignty "might be claimed to be a privilege granted by El Salvador rather than based on a right derived from International Law".

The actions taken by these States indicate that whilst all have relied for support on the United States Proclamation and many have expressly stated to be advancing indentical claims, they have gone considerably beyond their prototype thus indicating divergence in the purpose sought to be accomplished. Apart from the El Salvador enactment that expressly declares it, the others presumably imply sovereignty in the air space over the claimed areas — a question of the first importance, for, in the absence of international agreements and conventions, there is no right of innocent passage by air. Even on the surface, though rights of free navigation be recognized in such claims, there is in the very claims themselves an infringement in principle at least, of traditional views on the character of the high seas.

It may be debated whether this theoretical impairment is harmful, in view of the desirability of conserving resources and so long as adequate guarantees of free passage, by air as well as by sea, are forthcoming. But recognition of the need for reasonable measures of control within the limits of the geographical continental shelf should not be permitted to beget a distorted application of the continental shelf theory to areas beyond these limits. Claims which expressly disregarded depth as criterion, and which set an arbitrary limit 200 miles at sea, may justly be suspected of employing the continental shelf as protective cover for assertions of a wholly different character. Whether or not a 200 mile limit is desirable it should not be received under the guise of an appli-

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[1] Communication of December 12, 1950, addressed to El Salvador. Bulletin of State Department 24 (1950) at p. 24.

cation in the continental shelf doctrine unless the geographical facts justify it. Where measures of control beyond the shelf are needed, they should be rested on other and more appropriate grounds, as otherwise they tend to cast doubt upon the justification of the claim to shelf areas and the essential conformity of this latter claim with International Law.

CHAPTER III

Legal Problems

Section 1. The legal nature of the rights claimed over submarine areas

On this subject the wording of the various proclamations and other enactments differs considerably and on closer examination we find that whilst some make mention of sovereignty being extended over these new areas, others but consider them to come under the State's jurisdiction and control.

The purely British proclamations such as the Order-in-Council for the Gulf of Paria and those for the Bahamas, Jamaica and the Falkland Islands amount by 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 certain parts of the Gulf of Paria are annexed.

Full sovereignty is claimed explicitly in some Proclamations, such as those of the Argentine, Chile, Peru, Costa Rica, Nicaragua, Honduras, El Salvador, Brazil, Pakistan and Mexico. The Saudi Arabia Proclamation claims not only the resources of the subsoil and sea-bed but the areas themselves, to appertain to her and to be subject to exclusive control and jurisdiction. The wording of those declarations put forward by the British protected States of the Persian Gulf is also somewhat similar.

On the other hand the text of President Truman's Proclamation does not purport to effect any extension of the sovereignty of the

United States. The rights claimed are of jurisdiction and control and do not refer to the sea-bed and its subsoil as such but merely to their resources.

One provision in the preamble to the Proclamation suggests that it was intended that there should be a distinction between the legal situation before development of the resources of the Continental Shelf began, and the situation after such development had begun [1]. It is somewhat difficult, though, on the basis of this one sentence taken by itself, to say that the intention of the Proclamation [2] was to draw a distinction in law between the claims to the Continental Shelf and its resources before any development of such resources was undertaken and the claims to the Shelf and its resources after such development had been started. On the other hand one could regard the Executive Order [3] issued by the President on the same day as the Proclamation as constituting something in the nature of an official counterpart of the Proclamation, and therefore affording some guide to the Proclamation's interpretation.

The Executive Order draws no distinction between the situation before and the situation after the commencement of development work [4]. Taken together these two documents show the intention on the part of the United States Government to claim as from the issue of the Proclamation and without waiting for the commencement of any development work an exclusive right to control the Continental Shelf adjacent to the coasts of the United States and thereby to control all operations for winning its resources, whether within or outside the three mile limit. But no claim to sovereignty

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[1] para. 3. "whereas recognised jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken".

[2] For text of Proclamation, see Appendix at p. 145.

[3] For text of Executive Order, see Appendix at p. 147.

[4] "It is ordered that the natural resources of the subsoil and the sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States declared this day by Proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes pending the enactment of the legislation in regard thereto".

over the whole of the Continental Shelf can be deduced nor any claim to sovereignty over the waters above the Continental Shelf.

Paragraphs 4 and 5 of the preamble of the Proclamation can be read to imply a claim to exclusive control. It is furthermore stated that such control must be exercised by the coastal State. But again no clear claim to sovereignty in words.

Sir Cecil Hurst when addressing the Grotius Society in 1948[1], comes to the conclusion that the United States is claiming rights which are as large as sovereignty. His reasoning is most persuasive and when defining sovereignty, he says: "stripped of the semi-philosophical language in which it is so often defined in text books, I do not think that sovereignty denotes more than the right and the determination of a State to be master in its own household, and the limits, i.e. the geographical limits, within which a State is sovereign are the limits of the area within which the State is entitled so to be master. 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 ...".

There is no doubt that should the rights claimed over the Continental Shelf and its resources be called sovereignty, they would be no more extensive than those claimed in the Proclamation. In view of the exclusive nature of the control claimed it is difficult to justify that the rights claimed are less in extent than sovereignty. Professor Lauterpacht in his recent article[2] seems to be of the same opinion and describes an "area declared to be henceforth within the State's exclusive control and jurisdiction becomes part of its territory". "As such it benefits from rights accruing to the State by virtue of the treaties previously concluded by it; similarly it is subject to obligations arising from such treaties. For exclusive jurisdiction and control is sovereignty. This is necessarily so seeing that State territory "is the space within which the State exercises its supreme authority" "[3].

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[1] "Transactions" of the Grotius Society. 1948. Vol. 34, p. 161.
[2] British Year Book. 1950. "Sovereignty over Submarine Areas", p. 389.
[3] Oppenheim-Lauterpacht. International Law, vol. 1. (1947) at p. 408.

In the course of the deliberations of the International Law Commission [1] those members who voiced a reasoned opinion on the subject expressed themselves in favour of the view that the powers of the State in the adjacent submarine areas are those of sovereignty [2]. This in particular was the view of Professor Brierly, and the Rapporteur, Professor Francois. Professor Brierly was of the opinion that "if the littoral State has exclusive rights of control and jurisdiction over the subsoil, it would be regarded as enjoying sovereignty. "George Scelle, the Chairman of the Commission, seems not to have shared this view though, in his words: "what is important, is that there should be exclusive rights to explore and exploit". The question of sovereignty seemed to him purely academic.

In the course of the deliberations Professor Francois made an interesting suggestion that there existed a substantial distinction between sovereignty on the one hand and jurisdiction and control on the other. He submitted that while in regard to the first the powers of the State were limited only to the extent of obligations specifically undertaken, with regard to the second its powers extended only to the extent to which they had been expressly conceded [3]. In other words where sovereignty was involved the State had all rights existing and these only subject to the limitations prescribed by International Law, whilst where rights of control and jurisdiction were concerned, a State had only those rights which had been expressly conceded to it.

The other members of the Commission did not follow this line of thought though, and there appears to be no warrant for such a distinction in accepted terminology.

Somewhat later in the discussion Professor Francois [4] declared

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[1] The International Law Commission took up the problem of the Continental Shelf in connection with the study of the regime of the High Seas, during its second session at Geneva in the summer of 1950 and again in greater detail during the summer of 1951. United Nations Doc. A/CN.4/S.R. 63 — A/CN.4/SR. 71, and A/CN.4/SR. 113 — A/CN.4/SR. 134.

[2] United Nations Doc. A/CN.4/SR. 68.

[3] United Nations Doc. A/CN.4/SR. 68.

[4] United Nations Doc. A/CN.4/S.R. 68 at p. 7.

himself in favour of a distinction that ought to be made between the regime of the sea-bed and that of the waters above it. With regard to the sea-bed and subsoil, he saw no objection to recognising the sovereignty of the littoral State; with regard the waters on the other hand he would prefer that such waters were part of the high seas, subject to certain restrictions for the benefit of the littoral State. Professor Brierly had argued that such restrictions amounted to saying that there was sovereignty, or control and jurisdiction. He himself was not altogether sure. If there was sovereignty, the State would have full rights over such waters, and an agreement would be necessary to restrict these rights. Failing an agreement, the right of sovereignty would exist in full. If it were maintained that there was control and jurisdiction, the State would have only specified rights. What was not expressly recognised in that sphere would not belong to the State. There would be no question of State sovereignty, and the high seas would remain free. From the practical point of view, the consequences of adopting one or the other of these courses were important, e.g. in regard to the air above the waters.

The consensus of the majority of the Commission was ultimately to the effect that a coastal State was entitled to exercise control and jurisdiction over submarine areas outside its territorial waters with a view of exploring and exploiting the natural resources; such an area should be limited in extent, but should not be dependent on the existence of a Continental Shelf. The result of the Commissions work on this question indicates that by limiting the rights to be exercised over the shelf areas to those of jurisdiction and control for exploring and exploiting the resources therein contained, it was hoped that the status of the waters over these areas would remain unaffected and the rights thereover exercised by coastal States not exceed those obviously necessary for exploitation purposes.

Concerning the particular wording of the United States Proclamation on this point, this may possibly be explained in view of the persisting attitude of the United States in matters of acquisition of sovereignty over arctic and antarctic regions, — attitude based

on rigid insistence of effective occupation as a condition of acquisition of a valid title, or to the fact that any formal acquisition of new territory according to the United States Constitution must have the approval of the Senate.

It must be recalled that when the President of the United States issued the Proclamation a controversy was raging with some heat between the Federal Government and the several States concerned relating to the ownership and control of the subsoil and sea-bed lying beneath the waters surrounding the United States.

Also that in face of considerable authority and weighty dissent, the Supreme Court affirmed the ownership of the United States over the subsoil and the sea-bed both under territorial waters [1] and outside them [2]. The declaration that the United States regards the resources of the shelf contiguous to its coasts as appertaining to the United States suggests an appropriation couched in diplomatic language more than anything else and it seems to have been so regarded by Lord Radcliffe in the Qatar Arbitration [3].

Subsection 1. United States v. California

In June 1947, the Supreme Court of the United States handed down its decision in this case. Substantially the Court held that "California is not the owner of the three-mile marginal belt along the coast and that the Federal Government rather than the State has paramount rights in and over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil".

Thus the Court determined that it did not lie within the power of the State of California to lease the submerged lands in

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[1] United States v. California, 332 U.S. 19 (1947).
[2] United States v. Texas, 339 U.S. 707 (1950).
[3] Interrupting Counsel's argument that the Proclamation was merely declaratory, he asked: "Is there any real distinction between formally saying: "It is annexed" and saying "It is declared to be appurtenant" or "to belong to a State"?"

the open sea beyond low water mark for the purpose of oil production. A landmark case in the history of state national relations had thus been decided.

This issue of which authority, state or national, should control the submerged soils of the three mile zone, is of comparatively recent origin; until the 1930's there appeared to be little doubt that these submerged lands not only were under the primary control of the littoral State but were actually a part of it, subject only to the exercise of those powers specifically granted to the National Government by the Coostitution.

The grant of admiralty and maritime jurisdiction, it was early held, left to the State its "residuary powers of legislation" over the waters within its territorial limits [1].

The coastal States had utilized and controlled the marginal sea area as though they owned it. They had regulated the fisheries in the area, applying state law to vessels enrolled and licensed under national statutes and operated by out of State persons. They had regulated the size of fish that might be taken, had prescribed the manner in which fish might be caught, and had even exercised successful though indirect control over the operation of floating canneries operating outside the three-mile limit. Oysters, shrimps, and sponges had been subjected to similar controls by the coastal States. Yet nowhere does it appear that, down to the 1930's any person seriously contested these actions on the part of the States. The Supreme Court of the United States had used general language on some fifty two occasions to the effect that a State held the title to the shores and beds of all navigable waters within its boundaries.

Specifically, the Court had ruled that the States and not the National Government held the title to the beds of navigable rivers [2], lakes [3], bays, and harbours [4], and the strip of land between high

[1] United States v. Bevans, 3 Wheat. 336, 389 (1818).
[2] Barney v. Keokuk, 94 U.S. 324 (1876); U.S. v. Utah, 283 U.S. 64 (1931).
[3] Great Lakes: Illinois Central R. Co v. Illinois, 146 U.S. 387 (1892).
Massachusetts v. New York, 271, U.S. 65 (1926).
Interior Lakes: McGilvra v. Ross, 215, U.S. 70 (1909).
[4] Pollard's Lessee v. Hagan, 3 How. 212 (1945).

and low water marks on the shores of the oceans, technically known as "tidelands" [1].

It is true, however, that down to the filing of the U.S. v. California in 1945 the question of ownership of the area from low water mark and to the three-mile limit had never before been squarely presented to the Court. In 1937 a Bill was introduced in Congress declaring that lands under the marginal seas of all the coastal States were part of the public domain of the United States [2]. Soon later Senator Nye, who had introduced this bill, substituted for it a resolution which asserted that all submerged lands below low water mark and within the three-mile limit were the property of the United States [3].

This resolution the Senate passed with very little debate [4] but in the House of Representatives it was severely attacked and by early 1939 the representatives of the States had so grouped their resources that they were capable of meeting and defeating any attempt at Congressional action to declare the rights and title of the United States. War brought a temporary cessation of the fight in Congress, but the necessity for petroleum production was such that immediately after the war the fight restarted.

With the accession to office of President Truman, Secretary of the Interior Ickes who had for a long time been trying to force court action on the issue, finally accomplished this end. In October 1945, an action was brought against California [5].

The Courts decision which was taken by a 6—2 majority, was based on the fact that it was considered that in the valid exercise of the commerce power, the national authority has powers overriding any exercise of State authority with which the power may come into conflict. Yet the exercise of the commerce power is still

[1] Borax Consolidated v. Los Angeles, 296 U.S. 10 (1935).
[2] S. 2164, 75th Congress, 1st Session.
[3] S. J. Res. 208, 75th Congress, 1st Session.
[4] 81 Cong. Rec. 9326.
[5] Supreme Court of the United States. No. 12. Original, 1945 term. As a result of this action and political opposition Mr Ickes had to resign from Secretary of the Interior, in February 1946.

subject to the prohibitions of the first ten amendments to the Constitution.

The paramount rights accrue to the United States solely in that capacity and are not subject to any concept of federalism with its historic differentiation between delegated and implied powers, the powers of the United States in international affairs are not subject to the limitations present when the Congress exercises an enumerated power.

The protection of the three-mile belt is a "function of national external sovereignty"[1].

In no place does this decision say that the United States controls this area by virtue of the constitutional powers that have been assigned to it. Instead it says that the national Government alone, as a function of external sovereignty, has the power and authority to control the three-mile zone of the marginal belt.

Subsection 2. United States v. Texas

The United States brought an original action against Texas, alleging that it was and is the "owner in fee simple of, or possessed of paramount rights in, and full dominium and power over, "the land and minerals underlying the Gulf of Mexico off Texas seaward of the low water mark and outside territorial waters". It asked for a decree declaring these rights of the United States, enjoining Texas and those claiming under it from trespassing on the area, and requiring Texas to account for all money derived by it from the area after June 23, 1947.

Texas answered, inter alia, that as an independent nation the Republic of Texas had full jurisdiction and this claim had been recognised by the United States, and that at the time of annexation of Texas there was an agreement that Texas would not cede such lands or minerals to the United States but retain them together with other public lands. The United States motion for judgement

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[1] At. 34.

on the pleadings because of the insufficiency of the Texas defences was granted, relying strongly on the U.S. v. California.

The sum of the argument in this case was that prior to annexation Texas had both dominium (ownership of property rights) and imperium (governmental powers of regulation and control) as respects the lands, minerals and other products underlying the marginal sea. In the case of California it had been found that she, like the original thirteen colonies, never had dominium over that area.

The Court argued that the first claim to the marginal sea was asserted by the National Government. "We held that protection and control of it were indeed, a function of national external sovereignty ... The status of Texas, it is said, is different: Texas when she came into the Union, retained the dominium over the marginal sea which she had previously acquired and transferred to the National Government only her powers of sovereignty — her imperium — over the marginal sea ......".

The Republic of Texas was proclaimed by a convention on March 2, 1836, whereupon the United States and other States formally recognised it. The Congress of Texas on December 19, 1836, passed an act defining the boundaries of the Republic. The Southern boundary was described as follows "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande". Texas was admitted to the Union in 1845 "on an equal footing with the existing States" [1].

The Texas claim amounted to that during the period from 1836 to 1845 she had brought this marginal belt into her territory and subjected it to her domestic law which recognised ownership in minerals under coastal waters. Also that under International Law, as it had evolved by the 1940's, the Republic of Texas as a sovereign nation became the owner of the bed and subsoil of the marginal sea *vis-a-vis* other nations. Furthermore that the Republic

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[1] Amendment of October 16, 1950. to read "on a equal footing with the original States in all respects whatever".

of Texas acquired during that period the same interest in its marginal sea as the United States acquired in the marginal sea off California when it purchased Mexico in 1848, the territory from which California was later formed.

The Court based its decision on the view taken by the judges that the "equal footing" clause of the Joint Resolution annexing[1] Texas to the Union disposes of the present phase of the controversy. The "equal footing" clause has for long been held to refer to political rights and to sovereignty ...".

Yet the "equal footing" clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant the properties to the United States but reserved them to themselves. The Court findings on this were:

> "The equal footing clause, we hold, works the same way in the converse situation presented in this case. It negatives any implied, special limitations of any of the paramount powers of the United States in favour of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held ... When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an "equal footing" with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of Treaties, defense of the shores, and the like.

[1] By amendment on October 16, 1950, the word "admitting" was substituted for "annexing".

In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States".

In reaching this decision the Court had argued that there is no necessity for it that the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. Yet as pointed out in U.S. v. California, "once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign ...". If the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. "That is the source of national rights in it". Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a substraction in favour of Texas from the national sovereignty of the United States. Yet neither the original thirteen States, nor California nor Louisiana enjoy such an advantage. The "equal footing" clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty, which would produce inequality among the States.

Subsection 3. United States v. Louisiana

In this case[1], involving no historical claim such as that of Texas, the Court followed U.S. v. California in holding that the Federal Government rather than the State had paramount rights over the sea-bed and subsoil. The only difference from the

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[1] 339, U.S. 699 (1950).

California case being that Louisiana had asserted rights 24 miles seaward of the three-mile belt.

Douglas J. is reported to have stated: "... if we held in the California case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortfiori that the ocean beyond that limit also is. "The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea".

Section 2. The legal status of submarine areas

Subsection 3. Difference between the legal nature of the sea bed and that of its subsoil

Though there is a growing tendency today to liken the legal status of the sea-bed to that of its subsoil, this view has not found general acceptance in legal circles, the reason of this being that a number of jurists maintain and follow up the assumption that the surface of the sea-bed outside territorial waters shares the same legal status as that of the high seas.

Of these jurists, Gidel[1] and Higgins and Colombos[2] appear to uphold the more extreme point of view. They regard the sea-bed as being simply the bottom of the sea and its use therefore free to each and every State, exclusive rights being obtainable, if at all, only through the acquiescence of other States. Consequently a State claiming exclusive rights in the sea-bed would have to show either a prescriptive user over a long period or the express acquiescence of other States.

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[1] Gidel, Le Droit International Public de la Mer, vol. I at pp. 498—501.

[2] Higgins and Colombos, The International Law of the Sea, 1943 at p. 541 "a *clear distinction must be drawn between the bed of the sea and its* subsoil. As regards the former, the better opinion appears to be that it is incapable of occupation by any State and that its legal status is the same as that of the waters of the open sea above it".

A less extreme attitude is taken by others though, for instance Hackworth [1], who suggests:

> "It is submitted that it would be not inconsistent with principle and would be more in accord with practice, to recognize frankly that, as a matter of law, a State may by strictly local occupation acquire for sedentary fisheries and for other purposes, sovereignty and property in the surface of the sea bed, provided that in so doing it in no way interferes with freedom of navigation and, perhaps we should add, with the breeding of free swimming fish".

Concerning the subsoil, the same writers [2], go further than others and insist that occupation of the subsoil is only permissible by operations which are begun on the coast or in territorial waters and are carried beneath the high seas wholly underground. Curiously enough Oppenheim—Lauterpacht [3] which does not share the above stated writers' views on the sea-bed, is in agreement with their views on the subsoil.

> "Since the open sea is free, no part of it can be the object of occupation nor can rocks or banks in the open sea, although lighthouses may be built on them. Likewise the bed of the sea cannot be an object of occupation but the subsoil of the bed of the open sea may become the object of occupation through driving mines and tunnels from the coast".

The reason given, is that any occupation even of the subsoil which tends to endanger the free use of the high seas is inadmissible [4]. Other writers, including Fauchille [5], Westlake [6] and

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[1] G. H. Hackworth, Digest of International Law, vol. II at p. 677.
[2] Gidel, op. cit., Vol. I, p. 510, and Higgins & Colombos, op. cit., p. 55.
[3] Oppenheim-Lauterpacht, op. cit., 1947, Vol. I, p. 508.
[4] op. cit., p. 577.
[5] Traité de Droit International Public. 1925, vol. I, part II. sec. 483 (35)—483 (39).
[6] International Law, 1904, Vol. I, pp. 187—188.

Hurst [1], consider the sea-bed not as part of the sea but as territory covered by the sea and therefore *res nullius* in its strict sense in Roman Law.

Sovereignty, according to these jurists, can be acquired over the sea-bed as it may be over land by "effective occupation" without the acquiescence of other States and subject only to no unreasonable interference in the free use of the high seas above.

With the exception of Gidel and Higgins and Colombos whose views have already been mentioned, almost all writers, whichever view they took concerning the status of the sea-bed itself, regard the subsoil as capable of "effective occupation" subject to no unreasonable interference with the free use of the high seas above.

These arguments adduced in favour of a distinction being made between the legal status of the sea-bed and that of its subsoil are being refuted today by a growing number of jurists whose reasoning is most convincing; an instance of this is to be found in Oppenheim-Lauterpacht [2]:

> "There has been a tendency in the past to assume that the surface of the bed upon which the open sea rests must be likened in legal condition to the waters of the open sea themselves. But when regard is had to the arguments which brought about the abandonment of the former claims to occupy the waters of the open sea, namely, the argument in the words of Grotius that "*occupatio non procedit nisi in re terminata*" (a theoretical reason), and the argument that the freedom of the waters of the open sea is essential to the freedom of intercourse between States (the main practical reason), it must

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[1] Sir Cecil Hurst, British Year Book 1923/4 "Whose is the Bed of the Sea? Sedentary Fisheries outside the Three Mile Limit.
"where effective occupation has been long maintained of portions of the bed of the sea outside the three mile limit, those claims are valid and subsisting claims, entitled to recognition by other States".
In Annuaire 1925, Vol. 32, p. 160, he *unambiguously accepts simple occupation* of the sea bed as distinct from the waters of the high seas.

[2] op. cit., p. 575, § 287 b.b.

> surely be conceded that these reasons do not apply to the surface of the sea-bed or to its subsoil".

Others who hold identical opinions are Bonfils-Fauchille [1], H. A. Smith [2], Verdross [3] and also Westlake [4].

The whole controversy as to the difference in legal status between the sea-bed and its subsoil may be reduced to the question whether the exploitation of the sea-bed or its subsoil violates the freedom of the open sea or not.

The reason that agreement has been possible regarding the legal status of the subsoil, is due to the fact that the means of obtaining possession of the subsoil resources have hitherto obstructed neither navigation nor fisheries. These efforts had been confined to tunnels and mine galleries, neither of which constituted any hindrance to shipping or fishing.

Richard Young, whose articles in the American Journal of International Law [5], have thrown light on many an obscure point involved in the Continental Shelf doctrine, in his recent article states:

> "The sea bed and the subsoil are but two aspects of the same thing, and as a practical matter the use of the one inevitably becomes entangled in the other".

During the International Law Commission's discussions on the Continental Shelf in 1950, this problem arose, but disagreement among the members of the Commission was at once obvious.

Mr Hudson [6] stated that in his opinion "the sea-bed and the subsoil were one and the same thing ... in a large number of treaties these two terms are frequently used in juxtaposition and

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[1] Traité de Droit International Public. Vol. I, part II, 1925. sec. 483 (7), page 18, and sec. 483 (35) page 61.
[2] Great Britain and the Law of Nations, 1932/35, Vol. II, part I, p. 122, in a reference to the opinion of Sir Travers Twiss, 18th July, 1871.
[3] Die Verfassung der Völkerrechtsgemeinschaft, 1926, p. 220.
[4] International Law, end ed., Vol. I, pp. 190 and 203.
[5] Richard Young, American Journal of International Law, 1948 "Recent developments with respect to the Continental Shelf". and same Journal, 1951 "The legal status of submarine areas beneath the high seas".
United Nations Doc. A/CN.4/SR. 66, 12 July, 1950, at p. 18—19.

with the same meaning, for instance in the Treaty of 26 February 1942, concluded between Venezuela and the United Kingdom on the submarine areas of the Gulf of Paria, under which the two countries reciprocally recognized certain rights of sovereignty over the high seas, the term "subsoil of the high seas" and "bed of the high seas" were given the same meaning.

Professor Francois, though prepared to accept that there was no rule of positive law which prohibits States from establishing their jurisdiction over the subsoil of the sea, seemed doubtful as to whether the same would apply to the sea bed once installations touched it.

Professor Brierly's opinion was that "if however the exploitation takes place through the waters of the high seas it did involve a violation".

The Commission appeared finally to agree that "where the subsoil could be reached from territorial waters or from the land itself, the right of States to occupy that portion of the subsoil of the high seas was indisputable". The only divergence of opinion within the Committee was with respect to cases where it was necessary to pass through the high seas to reach the subsoil. Professor Francois [1] especially stressed this last point. "to a greater or lesser degree all these installations (the working of petroleum deposits by means of wells drilled out at sea) restrict the possibility of using the high seas and erection must therefore be subject to the express or tacit agreement of the other States". He felt that a violation of the principle of freedom of the high seas would occur, whenever such waters had to be passed through in order to reach the subsoil. He further stated "It cannot be denied that in fact this freedom of navigation will of necessity be curtailed through the existence of various fixed or mobile installations for the exploitation of the natural resources of the continental shelf".

Professor Spiropoulos [2] was of the opinion that no State had so far considered exploiting the wealth of the continental shelf, as technique was not sufficiently advanced till only recently, there-

[1] United Nations Doc. A/CN.4/SR. 66 at p. 20—22.
[2] United Nations Doc. A/CN.4/SR. 67 at p. 12.

fore he agreed that as far as the waters were concerned. a rule ol International Law did exist, but no work on International Law made mention of the subsoil. "And as furthermore, the majority of jurists ignored the question, there was no rule of international law relating to the shelf. Must the Commission therefore conclude that no solution could be reached?" "There were no prohibitive rules forbidding a State to exercise rights over the Continental Shelf but there were, on the other hand, no permissive rules either. The Commission was faced with a question to be regulated for the first time". Professor Spiropoulos then continued:

> "When the International Court at the Hague had given a ruling on the right of the United Nations to intervene to protect its representatives, it had likewise been unable to find any rule of international law but had interpreted existing rules in order to recognize that the United Nations had that right. Similarly, the Commission would manage to derive rules relating to the continental shelf".

Finally, Mr Hudson's proposal "such control and jurisdiction should not substantially affect the right of free navigation of the waters above such submarine areas, nor the right of free fishing in such waters" was put to vote and adopted by the Commission by 9 votes [1].

The Commission, thereafter, continued its discussions on the Continental Shelf, always treating the sea-bed and subsoil as one and undivided, constituting a problem in their ensemble and referred to as submarine areas.

There is little doubt that when exploitation of the submarine areas claimed in the various Proclamations and other official enactments, is undertaken on a large scale, installations will not be confined to the subsoil of these areas concerned but will be erected (as already has happened in many places, i.e. in the Gulf of Mexico) on the sea-bed and even on the high seas. This aspect of the problem is dealt with in a later Chapter where the freedom of the high seas is examined and discussed.

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[1] United Nations Doc. A/CN.4/SR. 67 at p. 24—26.

Section 3. The legal status of submarine areas outside territorial waters

Concerning the status of unoccupied dry land, no real controversy exists any longer: it is *res nullius* in the true sense and sovereignty over it can be acquired by the first State which establishes an effective occupation. The same cannot be said, though, as to the true status of elevations of the sea-bed which are dry only at conditions of tide but it is unnecessary at present to become entangled in this difficulty.

No uniformity of opinion used to exist among jurists on the question whether the open sea is subject to the joint sovereignty of all States or to no sovereignty at all and an unfortunate confusion in the use of the Roman Law phrases *res communis* and *res nullius* resulted.

The view taken by the majority of modern writers, which was endorsed by the Permanent Court in the Lotus case [1], is that the high seas are not subject to the sovereignty of any State. But, whichever view was held on this point, there was virtual unanimity on the principle that each and every State has equal and independent rights of user of the high seas in time of peace.

Since 1939, virtual unanimity also exists that a State possesses full sovereignty over its maritime belt, although controversy still exists as to its exact width.

The question of the status of the sea bed and its subsoil outside territorial waters is still undecided, as many of the leading experts [2] on the law of the sea, have insisted on the surface of the sea bed

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[1] 1927, Publications of the Court, Series A, No. 10.

[2] Gidel, vol. t, pp. 498—501, and Higgins & Colombos "The International Law of the Sea" 1943, p. 541. Oppenheim, "Zeitschrift für Völkerrecht" 1908. Vol. II, p. 1 (these authors reject the possibility of occupation of the sea bed).

sharing the status of the high seas above, whilst others[1] have refuted this notion by claiming that both the sea-bed and its subsoil under the high seas are *res nullius*.

In reality, there is no principle of International Law and certainly no rule of international practice which makes submarine areas outside territorial waters share automatically the status of the high seas.

From the body of literature which exists on the subject, three principle points of view seem to emerge:

Subsection 1. Res Communis

It is possible to look upon these submarine areas as "*res communis*", incapable of occupation by any State.

The legal status is then the same as that of the waters of the open sea above them[2] and exploitation would be reserved for the whole community of nations.

This principle though is a negative one and the practice of States confirm its rejection[3].

According to this view the sea bed is simply the bottom of the sea and, its use being equally free to each and every State, exclusive rights can be obtained, if at all, only through the acquiescence of other States. Consequently a State claiming exclusive rights in submarine areas would have to show either a prescriptive user over a long period or the express modern acquiescence of other States.

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[1] Bonfils—Fauchille "Traité de Droit International Public" 1925, Vol. I, part II, sec. 483 (7), sec. 483 (35).
H. A. Smith "Great Britain and the Law of Nations" 1932—35. Vol. II, part 1, p. 122.
Verdross, "Die Verfassung der Völkerrechtsgemeinschaft" 1926, p. 220.
Westlake, "International Law", 1904, Vol. I, pp. 187—188.
Hurst, British Year Book 1923—4, and also Annuaire 1925, Vol. 32, p. 160.

[2] Oppenheim—Lauterpacht; vol. I. 7th ed. at p. 540.
"... for as far as the acquisition of territory is concerned, the open sea is what Roman Law calls "res extra commercium"".

[3] The members of the International Law Commission, during its 68th meeting, rejected this point of view by eight votes to none with one abstention. (United Nations Doc. A/CN.4/SR. 68) at p. 9—10.

Practice of States has never conformed with this view and this is made even more apparent since 1945 with the development of the Continental Shelf doctrine and the growing number of States that have officially refuted this notion in their various Proclamations or other official enactments.

To treat the sea-bed simply as part of the high seas is to render almost all the resources of its subsoil inaccessible to any exploitation since the possibilities of exploitation wholly underground by lateral operations begun in territorial waters are very small.

This is so notwithstanding the fact that it has long been the practice for mines to be pushed out from the land under the sea bed for the purpose of tapping the mineral substances contained therein. Coal, as in the mines of Cornwall and Cumberland; iron, as at Diélette in the Cotentin; tin, as in Sumatra; and more recently petroleum, as in various areas of the United States, Mexico and the Caspian. But it is a recent innovation in oilfield technique for drilling to take place directly from the surface of the sea or lake water to tap oil deposits in the subsoil of the sea or lakes (as on the Lake Maracaïbo in Venezuela), and it is this new development that has greatly enhanced the importance of oil resources in the Continental Shelf.

The consideration that led Gidel to insist on the sea-bed being treated in the same way as the high seas was the fear that, otherwise, the freedom of the seas would be jeopardised. But this very important consideration can be met, as it was met by Fauchille, by regarding the freedom of the superjacent waters as the dominant principle. In short the sea-bed may be occupied but subject to no unreasonable interference with the freedom of the seas.

Subsection 2. Res nullius

It is also possible to look upon submarine areas as "*res nullius*", as "*terra nullius*", which is at all times capable of occupation — provided adequate measures are taken to safeguard rights of all nations with regard to freedom of navigation and fishing.

If this point of view is adopted the rights to these areas will be conditional on prior occupation [1]. Occupation of the sea-bed, is not new to the law. The novelty of the claims to the Continental Shelf lies in the fact that, instead of only appropriating limited areas in respect of particular resources after their exploitation has been in progress, certain States are now seeking to appropriate extended areas in respect of all resources before the exploitation. Where there is no exploitation, the acts of appropriation have necessarily taken the form of legislative declarations of claim which, in several cases, have been reinforced by the issuing of regulations, by the grant of concessions for exploration and by actual exploitation of scientific surveys.

The question may be asked as to whether such purported appropriations can satisfy the test of "effective occupation" which they must do if they are to give a sound title under the law of occupation.

International Law requires effective occupation as a condition of a valid acquisition of territorial title and that no such occupation is possible with regard to submarine areas, is only too obvious.

The requirements of effectiveness depend largely on the territory in question, and each case has to be decided on its own merits.

The decisions of the legal status of Eastern Greenland [2] and the award of the Clipperton Island [3] are occasionally referred to as examples of the elasticity of the notion of occupation, and fully support the proposition that full creativeness of occupation is not essential. The principles therefore applicable to acquisition of territory do not necessarily apply to submarine areas, for to speak of occupation of submarine areas is to use language even more

[1] Oppenheim—Lauterpacht; vol. 1, 7th ed. at p. 577. "the subsoil beneath the bed of the open sea is no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial maritime belt".

[2] 1931, Permanent Court of International Justice. Series A—B, No. 53.

[3] American Journal of International Law, Vol. 26, 1932, p. 390.

unreal than that referring to occupation as a basis of territorial title, of arctic and antarctic regions.

It has been suggested, though, that occupation need be only fictitious, i.e., a notional occupation such as a Proclamation or other official enactment. To say, though, that a Proclamation amounts to occupation, or that it constitutes the first step to occupation [1] giving an "inchoate title" is in fact to deny that occupation is necessary.

A proclamation is a means by which a title, claimed or acquired, is announced. It is not a source of a title or a means of acquiring it. This does not mean that the Proclamations are meaningless, as a claim however inherently valid, by a formal announcement or notification the claim is made known to others. This is especially so if the subject of the claim in question is novel in character, undefined in extent and likely to require determination in relation to similar claims by other States [2].

Proclamations are of declaratory character in relation to what was considered to be a title claimed or acquired by or belonging to, the State by reference to a legal basis other than occupation.

In so far as occupation means effective occupation — and that is its only meaning — it is not applicable to the Continental Shelf and to submarine areas generally. In so far as it is used in a figurative sense, i.e. as a mere claim to be substantiated by no more than a Proclamation or a similar nominal act such as granting of concessions, it is elastic and as open to abuse as the doctrine of the contiguity of the coastal State. The latter, at least, has the merit of using terms in their ordinary connotation.

The theory of occupation has been favoured largely for the reasons that it contains valuable checks on extravagant pretensions

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[1] Professor C. H. M. Waldock; in "The legal basis of claims to the Continental Shelf" to appear in Vol. 36. "Transactions" of the Grotius Society, states: "I am inclined to think that the Truman and similar Proclamations, having regard to the special circumstances of submarine territory and the potentiality of control which contiguity gives, may properly be regarded as effective first acts of occupation" at p. 142.

[2] This was the advice given to the Rulers of the various Sheikhdoms in the Persian Gulf in 1949 by the British authorities.

advanced in the name of the Continental Shelf and it supplies an alternative to exorbitant and altogether undefinable claims based on contiguity and continuity.

First, as occupation must be of a *res nullius*, an occupation of submarine areas cannot include the high seas above nor afford any ground for questioning the title to already occupied islands that may exist on the shelf [1]. Secondly, since occupation, to be valid, must be effective, the doctrine helps to keep within reasonable limits both the extent of area of the sea bed which may be appropriated and the depth of the sea bed which may be treated as in law susceptible of sovereignty.

Professor Waldock [2] is probably the most ardent follower of this theory, but his views are not accepted by the majority of those International jurists that have attempted to bring some light on the various problems arising from the doctrine of the Continental Shelf and submarine areas generally [3]. The most favoured view today is that of contiguity, which is treated in the following paragraph. Although it has been stated [4] that State practice has favoured this view of occupation and that Proclamations and other official documents appear to proceed on the assumption not only that submarine areas are *res nullius* but also that control and jurisdiction over this *res nullius* can be acquired without effective occupation being necessary, it is submitted that as regards the

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[1] An example of such islands would be "The Falkland Islands", which lie on the outer limits of the Argentines' Continental Shelf.

[2] The legal basis of claims to the Continental Shelf. "to appear in vol. 36. "Transactions" of the Grotius Society, at pp. 115—148.

[3] The International Law Commission by unanimous vote rejected the notion of "res nullius" and further decided that — the sea bed and subsoil were subject to the exercise by the littoral States, of control and jurisdiction for the purposes of their exploration and exploitation. The exercise of such control and jurisdiction being independent of the concept of occupation. (United Nations Doc. A/CN.4/SR. 68).
Also Richard Young, in "The legal status of Submarine Areas beneath the High Seas" A.J.I.L. 1951, says: "The insuperable objection, however, to any rule based on occupation would appear to be its disregard of the interests of the adjacent coastal State".

[4] Report of Jonkheer P. R. Feith, Febr. 1950.
The International Law Association — 43rd Conference — Brussels, 1948. pp. 168—206.

United States Proclamation, though consistent with a claim to a *res nullius* it is not founded on this assumption, British practice on the other hand can be said to be clearly founded on the law of occupation as it stands today, just as Latin American practice is in direct contradistinction to any notion of occupation however notional it may be. As far as State practice is concerned it is difficult to state a hard and fast rule, the differences that exist in the wording of the various proclamations are due to political factors more thans to any inherent discrepancies in the laws governing submarine areas. At the time when these Proclamations were made, the very notion of submarine areas was both vague and undeveloped which explains why one of the most important of these Proclamations, if not the most important, that of the United States, uses arguments drawn from the principles of effectiveness of jurisdiction, contiguity of territory and self protection. For these reasons it is unwise to consider this particular aspect of State practice (proclamations) as proof in favour of one theory or another.

Subsection 3. Contiguity

It is also possible to solve the problem by accepting the view that the submarine areas contiguous to the coasts of a State form an underwater extension of the littoral States land mass and as such either appertain to, or, are open to appropriation by, — to the exclusion of all other States, — the littoral State.

In those cases where two or more States border outside their territorial waters on the same Continental Shelf, authority over the Continental Shelf is shared by those States to the exclusion of all others and each State can, by mutual agreement, (to the exclusion of all other States) decide on the division of such common part of the Continental Shelf.

The adoption of this stand point obviates the necessity of prior occupation and prevents encroachment by more remote States in regions where the coastal State may justly be sensitive about

its interests. Thus this concept presents a number of advantages over other theories both in the political and economic field.

It allows for the fact that resources in submarine areas will ordinarily be best developed from the adjacent shore, and that the processing and use of such resources must be in most cases intimately associated with the economic life of the coastal State. It also takes account of the fact that there is often an economic as well as a geological relationship between offshore resources and similar resources on the contiguous land.

While the notion may be novel as applied to submarine areas, appurtenance and such cognate concepts as dependency and continuity have by no means been unknown in International Law. Although submarine areas and land territory are not to be taken together indiscriminately, some of the same considerations may apply to both.

Thus it seems not inapposite to recall the words of Sir William Scott in 1805 regarding the mud islands off the mouth of the Mississippi [1]. In finding that these uninhabitable mud banks were a "kind of portico to the main land" which ought by common sense to be United States territory, he relied in part on the principle of alluvion and increment. Most of the Proclamations have invoked, in addition to other reasons, the principle — or the fact of contiguity and geographical unity. The United States Proclamation spoke of the Continental Shelf as "an extension of the land mass of the coastal nation and thus naturally appurtenant to it "a unity emphasized by the fact that "these resources frequently form a seaward extension of a pool or deposit lying within the territory".

The Mexican, Argentine, Peruvian and Brazilian declarations follow in the same way in an even more specific fashion. Contiguity [2] is not taken in its accepted sense, i.e. as connoting horizontal

[1] The Anna, 1805, (5 C Rob. 373 at 385).

[2] "Attempts are occasionally made to distinguish between "continuity" as referring to territory directly coterminous, and "contiguity" as referring to islands or other territory separated by water. There is perhaps no warrant for that distinction in accepted usage".
Lauterpacht; in Sovereignty over Submarine Areas. British Year Book 1950. p. 423.

prolongation of the already occupied territory, but a different, and apparently more intense, degree of unity — a unity provided by the fact that the shelf is supposed to constitute the base, the platform, on which the continent rests.

The principle of contiguity as the basis of the title to submarine areas has encountered opposition mainly on two grounds; the first is that the doctrine of contiguity although occasionally enounciated, is claimed never to have become part of International Law and to have been rejected by International Tribunals. The second, is that contiguity represents a theory which, because of its vagueness and comprehensiveness, is full of dangerous implications and ought therefore to be discouraged.

On examining these two objections we are led to finding that to say that the principle of contiguity or continuity has no place in International Law, is to state a proposition of doubtful accuracy. The principle of contiguity played a useful part in the period when some compromise between the fanciful assertions of pure discovery and effective occupation best fulfilled the needs of the time, i.e. the hinterland theory.

Some conception of contiguity underlay the early British Colonial Charters, such as that of Massachusetts Bay of 1628, which purported to operate "from the Atlantick and Western Sea and Ocean on the east parte to the South Sea on the west parte" [1].

In the British Guiana controversy with Venezuela in 1896, there was once more a pointed reference to mere constructive occupation being "kept within bounds by the doctrine of contiguity" [2].

In 1883, Great Britain put forward claims based on contiguity, to what subsequently became German South West Africa [3]. She subsequently abandoned that claim and it is not clear whether the reasons for that step were of a political or legal nature.

Similarly it is difficult to distinguish between the legal and political significance of the recognition of the relevance of geogra-

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[1] Twiss, The Oregon Question Examined (1846) p. 311. Westlake, Collected Papers, p. 73. (Westlake describes the principle as "pseudo-scientific principle of contiguity ......").

[2] Moore, Digest of International Law (1906) p. 269.

[3] Moore, p. 230.

phical propinquity in relation to the hinterland doctrine, in arrangements such as those of the Franco British Agreement of 1904 concerning Morocco and French interests in Syria; the Anglo-Japanese Treaty of 1905 in so far as it concerned Korea; the Anglo-Russian Agreement of 1907 relating to the spheres of influence in Persia [1]; and the Agreement of 1917 between the United States and Japan concerning China [2]. Some aspects of the doctrine of contiguity also underlie the claims to Arctic and Antarctic regions put forward by a number of States, such as Great Britain, Canada, New Zealand, France, Russia and Norway since 1939. In so far as it is based on the so-called sector principle [3], with regard to the Arctic these areas are, in a sense, contiguous to the territories of the States concerned, in the case of the Antarctic the cootiguity is distinctly symbolic.

The relevance — which is of special importance in relation to submarine areas — of the geographical unity of the main and contiguous territory is illustrated by the arbitral award given in 1904 by the King of Italy in the controversy concerning the boundary between British Guiana and Brazil. He held that "effective possession of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*" [4].

Although the award of Professor Huber in the Case of the Island of Palmas has occasionally been cited as proving the assertion that International Law does not recognise the title of contiguity [5], this award and other cases clearly urge that consideration — that effectiveness need not be as complete as appears at first sight and

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[1] Moore, p. 231.
[2] Wright, American Journal of International Law, 1918, pp. 519—522.
[3] By virtue of that principle areas have been claimed which are embraced by the projection northwards or southwards, as the case may be, of the areas bordering the respective maritime territories.
[4] State Papers. Vol. 99 (1905), pp. 930. (Cmd. 2166) 1904.
[5] Waldock, Vol. 36 "Transactions of the Grotius Society, at pp. 138 and 141.

that contiguity is not as theorctical and arbitrary as may appear at first sight.

In the Island of Palmas Arbitration Case [1], the United States' contention, *inter alia*, that, as the Island formed a geographical part of the group of the Philippine Islands, it ought by virtue of the principle of contiguity to belong to the United States, who exercised sovereignty over the Philippines, was rejected by the Arbitrator who on the contrary held that:

> "Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same State have on different occasions maintained contradictory opinions as to its soundness...... The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the parties or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would be especially true in

[1] United States and Holland; Permanent Court of Arbitration, April 4, 1928. Annual Digest 1927—28. Case No. 71. Quotations from pp. 111—112.

a case such as that of the island in question, which is not relatively close to one single continent, but forms a part of a large archipelago in which district delimitations between the different parts are not naturally obvious".

In the Island of Palmas Case like that other case between Switzerland and Italy concerning the Alpe Cravairola [1] — it is clearly shewn that more importance ought to be attached to acts of display of sovereignty than to contiguity of territory. In these cases though, unlike the Continental Shelf areas here treated, inhabited territory was in question, and other conflicting claims simultaneously existed which were based on exercise of sovereignty over a period of years — and it is these other conflicting claims, that counterbalanced the claims based on contiguity and were considered by the Arbitrators, as a sounder source of title.

These decisions, though, cannot be taken to apply by analogy to submarine areas, as the problems encountered in the latter differ considerably and so far at least conflicting claims do not exist.

While effectiveness in the shape of "notional" occupation exhibits a somewhat formal and nebulous complexion, contiguity assumes in comparison, a distinct degree of reality; therefore it is suggested that although contiguity has at times been proved unsatisfactory and insufficient as a claim to islands or parts of the mainland, in the case of submarine areas, the consideration being so totally different, such a claim would be not only adequate but also satisfactory in law.

The conceptions of effective occupation and contiguity, being relative, are but a starting point. It is within the legitimate province of the judicial function — and of statesmanship — to use them with such discretion as the equities of the case and considerations of stability require. As to the second objection — the answer is that no device can prevent the abuse of a rule or principle, however otherwise useful and reasonable, by unilateral claims of States which refuse to submit disputed issues to impartial adjudication.

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[1] Award of December 31, 1873; Lafontaine at pp. 201—209.

In a case such as adjacent submarine areas, contiguity probably presents the only solution consonant with convenience, economic necessities and requirements of International Peace.

While the doctrine — and the fact — of contiguity provide the natural foundation for the principle that the adjacent submarine areas belong to the littoral State, that principle may receive a substantial accession of strength from the view that the relation is not only of contiguity and proximity but also of physical identity. The latter notion is well known, especially to geographers [1], under the name of 'theory of marine transgression' over what was previously part of the continental land mass. According to this theory continents are surrounded by three shelves: the first representing the classic Continental Shelf (from 0 to 100, 200 or 300 metres) the second extending from 200 to 400 or 500 metres, and the third from 400 or 500 to 1000 metres. These three shelves may be regarded as the vestige of three successive continental plains, which were formed in the course of three regressions, and the original slopes of which were steeper the older the shelf or, rather, the older of which were the more distorted [2].

The continental fringe is the edge of the crust of the old continents, which is marked by the ebb and flow of the sea, the present Continental Shelf and the adjacent coastal plains being merely the last remaining ever shrinking part of the fringe which is subject to these endless fluctuations.

There is no doubt that although contiguity as a doctrine has met serious criticism in the past — the objections to it apply but in a small degree to the Continental Shelf doctrine and to that of submarine areas generally.

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[1] Jacques Bourcart, "Geographie du Fond de la Mer, Etude du relief des Oceans" (Payot Paris 1949) at pp. 155 and 160, also, United Nations Doc. A/CN.4/32. 14 July, 1950. "Memorandum on the Regime of the High Seas", pp. 66—70.

[2] "Il existe trois paliers autours des continents: Le premier correspondant au Plateau Continental classique ... L'on peut voir dans ces trois paliers les restes de trois plaines continentales successives, modelées au cours de trois regressions et dont les pentes originelles étaient d'autant plus fortes qu'elles étaient plus anciennes ou, mieux, qu'ont été d'autant plus deformées qu'elles datent d'une époque plus ancienne". op. cit. p. 155.

As a basis for justification of the legal title to submarine areas outside territorial waters contiguity stands alone, and though strong opposition still exists on the part of those who favour "occupation" as the only means of acquiring title, a growing number of jurists [1] are accepting the doctrine of contiguity as the only practicable one capable of meeting and satisfying the requirements that have arisen out of the developing notion of the Continental Shelf.

During the International Law Commission's 68th [2] meeting the question of the legal status of the shelf areas was examined and the members of the Commission attempted to determine the relationship between coastal States and submarine areas. Professor Brierly stated that after having refuted the idea that the Continental Shelf is either *res nullius* or *res communis*, he found it better to say that the Continental Shelf belonged ipso *jure* to the littoral State. In such a case then, there would be no necessity for the latter to make any claim or annexation. Such a proclamation or annexation might of course serve to indicate that such a State had begun to work its zone of control, but legally it was not necessary.

The Commission then proceeded to work on Mr Hudson's four proposals, and after having rejected the *res nullius* and *res communis* conceptions, adopted by 6 votes against 4 the third of these points; namely, that "The Continental Shelf is subject *ipso jure* to the control and jurisdiction of the littoral State".

The fourth possibility which has been worded thus: "The Continental Shelf is subject to the exercise of control and jurisdiction by the littoral State for the limited purpose of exploring and exploiting the natural resources" was not put to vote as the Commission had already accepted the third possibility of *ipso jure* control and jurisdiction.

Mr Hudson considered that the Commission's vote meant that the right to explore and exploit did not depend on any claim

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[1] In the two most recent studies on submarine areas: that of Professor H. Lauterpacht, in the British Year Book for 1950, and that of Richard Young in the American Journal of International Law of 1951 — both these writers come out strongly in favour of contiguity — as the "basis of title over submarine areas".

[2] United Nations Doc. A/CN.4/SR. 68. pp. 5—6, 9—10, 13—14.

to that right by a littoral State; yet the right should be conditional upon such a claim. The situation might arise in various forms. A littoral State might declare that it had no intention of exploring or exploiting the subsoil or sea-bed of its Continental Shelf. It might leave it to others to do so, even without granting them a formal concession. Furthermore the historical development of the question of territorial waters showed that for the last hundred years or so, States had rights over their territorial waters *ipso jure*, i.e. without formally claiming such a right. The situation was somewhat analogous to that of the Continental Shelf. Personally, he thought that the right of littoral States to exercise control and jurisdiction over the Continental Shelf should not be granted to them *ipso jure*, but should be subject to the exercise of the right for the purposes of exploring and exploiting these areas. Hence he would have liked the Commission to reject the *ipso jure* formula and adopt point 4.

Professor Francois too, expressed himself to be in entire agreement with this argument, but the Commission after much discussion rejected it. Finally though when the International Law Commission's draft articles were completed and the Commission submitted these to States members of the United Nations Organisation for comments, the article [1] dealing with the status of the shelf areas and the relationship between these and coastal States was worded as follows:

> Art. 2. "The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring and exploiting its natural resources".

Subsection 4. Certain Geographical theories closely related to accepted legal concepts

A few words ought to be added with regard two geographical theories which could be said to apply to the Continental Shelf.

[1] For complete text of Draft Articles see Appendix at pp. 152—158.

The one is that of marine attrition, the other of marine sedimentation. The former in law would be considered a sort of *"restitutio in integrum"* whilst the latter is clearly a case of "accession".

Neither of these two theories can be said to be very satisfactory but their examination may prove of interest as they are based on geographical facts which find acceptance in the legal sphere.

"Marine attrition cannot by itself, explain the formation of the Continental Shelf" claims Professor Bourcart [1]. The inaccuracy of this theory from the geographical point of view though, does not absolve the jurist from briefly ascertaining to what extent the idea that the Continental Shelf appertains to the contiguous State might be derived from it. The juridical category which at once comes to mind is the category of *restitutio in integrum*, i.e. the restoration of a former state of affairs. The marine attrition platform, constituted by the Continental Shelf, would be restored to the continent because it formerly belonged to the latter before its erosion and its transformation into a shelf by the continuous action of the sea. The territory of the coastal State would be regarded, retrospectively, as having the form it might have had at some more or less remote date and it would be restored to the interest of that State, which would thus regain, but in a submerged form, the territory that once belonged to it, and would, of course, regain it together with its subsoil and sea-bed.

On the other hand, the second geographical theory on the origin of the Continental Shelf, namely the sedimentation theory, falls into the legal category of "accession" which is the precise opposite of the *'restitutio in integrum'* theory. Where one had landslip the other had alluvion — and not merely alluvion from outside or from any extraneous source whatsoever but primarily alluvion from the State with which the shelf is contiguous.

Examining this theory from the appropriate legal standpoint, at first sight it appears that it should be linked with International

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[1] Bourcart J. Geógraphie du Fond des Mers — Etude du relief des Océans at p. 134.

Law concepts regarding accession or accretion. By accession or accretion is meant: "......the enlargement of a territory by some physical agency. Since the physical agency, although normally nature, may be the hand of man, there are two types of accession, the natural and the artificial" [1].

"Accretion is the name for the increase of land through new formation" [2]. "It is a customary rule of the Law of Nations that enlargement of territory, if any, created through new formations, takes place *ipso facto* by the accretion without the State concerned taking any special step for the purpose of extending its territory. Accretion must, therefore, be considered as a mode of acquiring territory" [3].

An analysis of the accepted definition of accession or accretion in relation to the Continental Shelf concept and to the theory that accretion plays a part in the formation of the Continental Shelf shows that the question now has a completely new element. Accession of accretion is a phenomenon which is characterized, according to accepted legal doctrine, by the emergence of new land, i.e. by the appearance of such land above the surface of the waters. Until such emergence, which would normally be permanent, (except in the case of the formation of sand banks or shoals which must, if need be, be taken into account in the delimitation of territorial waters) has occured, the alluvia do not amount to a case of accession or accretion and do not accrue to the main territory.

But the Continental Shelf raises an entirely different question, namely whether, and if so, in what circumstances a submarine area contiguous to the territory of a given State may be deemed to be part of that territory. Ruelas [4], accepting this view that the Continental Shelf is formed by sedimentation, answers this question in the affirmative and considers it logical that the coastal State should regain as an extension of its maritime territory, what

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[1] Fauchille, vol. 1, part 2, sec. 533 at p. 670.
[2] Oppenheim—Lauterpacht, 7th ed. vol. 1. par. 229 at p. 515.
[3] Oppenheim—Lauterpacht, 7th ed. vol. 1. par. 229 at p. 515.
[4] Bourcart, op. cit., at p. 130. also United Nations Doc. A/CN.4/32 at p. 69.

was presumably removed from its land territory, and that the Continental Shelf belongs by 'natural law' to that State.

Feith's[1] application of the accession or accretion theory to the Continental Shelf is open to certain objections. He begins by quoting from the classic Oppenheim-Lauterpacht treatise[2] to the effect that every State may construct artificial formations as far into the sea beyond the low water mark as it likes and thereby gain considerably in land and also in territory, since the minimum 3 mile limit of its territorial waters must then be measured from the shore thus constructed. He goes on to say: "from an International Law standpoint there are no objections to the making of dykes on the Continental Shelf by the coastal State and to impolder by this means the whole of the adjacent Continental Shelf".

"If owing to an earthquake or a seaquake, the Continental Shelf should make its appearance above water, could it then belong to another State than the coastal State?"

The Continental Shelf theory, though, appears to dispense with a great deal of work in connection with the making of dykes or with the causing of artificial earthquakes, by simply recognising, once and for all, that the coastal State can without taking any special steps assert its rights to the Continental Shelf bordering of its coasts.

But Mr Feith, when advancing this argument, seems to have forgotten that the passage which he quotes from Oppenheim-Lauterpacht refers solely to artificial accretion works carried out within territorial waters, and hence, that these authors do not envisage that a coastal State can undertake such artificial accretion works on that part of the Continental Shelf which is situated outside its territorial waters.

Also assuming that the production of artificial earthquakes could, as Mr Feith contemplates, produce the desired effect of

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[1] Feith, P. R. Rights to the sea bed and its subsoil, International Law Association, report of the 43rd Conference pp. 168—206.
[2] par. 229—231, at pp. 515—516.

causing the Continental Shelf to emerge permanently out of the waters, it is far from certain that current International Law would uphold the adoption of such procedure, even by the coastal State. It does not seem to be an irrefutable argument in favour of the Continental Shelf theory, that its adoption would help to eliminate the need to shape the coastal fringe by means of artificial earthquakes.

It is doubtful whether the accession or the accretion theory, in law is really applicable to the Continental Shelf. And this because accession is a gradual process affecting a certain situation in territorial possession — a slow enlargement of the territority.

The Continental Shelf, on the other hand, is an existing and integral formation. Should this existing formation be considered as part of the territory on account of the process of sedimentation (accession), when that process dates from at least some tens or hundreds of centuries ago?

To link the accession theory with the Continental Shelf theory is to apply to a situation which has existed so long that "since time immemorial" would be a peculiarly feeble description, the theory applicable to a process, the main feature of which is that it is actively in being now.

If any sign of this basic characteristic of slow development, which is the peculiar mark of accession by sedimentation, is to be found in connection with the Continental Shelf, it is only in the gradual and progressive occupation of the Continental Shelf by the coastal State, which has either transformed into polders in successive stages or proceeded to exploit its resources farther and farther towards its seaward limits as technological progress makes it possible to exploit the subsoil at evergrowing depths.

It seems wiser to agree that, even were the fact established, that the Continental Shelf has been formed by sedimentation action, it would not be sufficient ground for concluding — from the accession or accretion theory, — that the Continental Shelf should belong to the State with whose coastline it is contiguous.

CHAPTER IV

Delimitation Problems

Section 1. Delimiting the legal extent of claims

In 1948 in his address to the Grotius Society [1], Sir Cecil Hurst whilst exposing certain of the difficulties attached to the developing notion of the Continental Shelf, found great difficulty in fixing limits to the claims advanced by the various States. In his words was this question one "to be decided on the facts" or, was it "a mere question of distance?"

What at that date appeared to that great international jurist as a serious problem has not ceased to be one of considerable importance to day. While some proclamations and enactments refer to the Continental Shelf, others speak of the sea-bed and its subsoil or only of the sea-bed contiguous to national territory. In some a definition of the area of the shelf is given by references to the depth of the sea or otherwise, but in others no definition what soever is to be found; thus either being silent on the subject or leaving the extent of the areas in question to be determined by future agreement.

Whilst it is true that the term Continental Shelf is a comparatively new one, it has for many years been used by geologists and geographers to describe a world-wide well-defined geomorphological feature. The 200 metres and 100 fathom isobaths are both

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[1] December 1, 1948. The Continental Shelf. Vol. 34. "Transactions of the Grotius Society". pp. 153—169 at p. 157.

used to indicate the approximate line of demarcation of the Continental Shelf, this limitation however is not a fixed concept [1] which is why leading geologists do not consider this depth limit an indispensible element of the conceptioo of the Continental Shelf.

Professor Jaques Bourcart, the author of the most authoritative works [2] on the subject, seeking the 'real' definition of the Continental Shelf states:

> "the only accurate method of defining the Continental Shelf is to consider it as lying between the shore and the first substantial fall off on the seaward side — whatever its depth" [3].

Professor Gidel, during a series of lectures delivered in 1949 [4], at the Institut des Hautes Etudes Internationales of Geneva, explained that:

> "on ne saurait se dissimiler que la définition des limites de la mer du plateau continental par la courbe bathymètrique de 200 mètres, qui est la courbe à côtes rondes de la profondeur de 100 fathom ou brasses, soit 182m.90, n'est pas géographiquement satisfaisante".

This admitted elasticity of the notion of the Continental Shelf as a geographical concept explains the frequent absence of definition which is found in the various proclamations and other official enactments. The geological concept of the Shelf is not one that can be readily into a universal legal formula fixing the boundaries of the individual States once and for all.

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[1] de Martonne in Geographie Physique, p. 262. "La profondeur de 200 metres qu'on lui assigne n'est qu'une grosse moyenne".

[2] Géographie du Fond des Mers. Etudes du relief des Océans. Paris, 1949, at p. 130. Another expert geographer, S. W. Boggs, in American Journal of International Law, 1951, at p. 245, describes the Continental Shelf as "the zone around a continent, extending from the low tide line to a depth of which there is a marked steepening of slope to greater depths".

[3] United Nations Doc. A/CN.4/32, at p. 50.

[4] Between 5th—9th December, 1949. For certain parts of the text, see Ferron O. L'evolution du regime juridique de la Haute Mer. Thèse No. 131, Geneva 1951, at p. 120.

It would appear that so far as most of the relevant proclamations and enactments are concerned, the expression 'Continental Shelf' is no more than a general indication of title to areas of indeterminate extent.

So far jurists have relied on the common concept[1] of the Continental Shelf, as that of a plateau with a fall off at about 200 metres or 100 fathoms depending on which unit of measurement is customarily used for the hydrographic charts of the country concerned, but this solution does not help in the delimitation of claims over areas which according to geographers cannot be considered as true Continental Shelf, such as the Persian Gulf, the Sicilio-Tunisian Plateau, the Northern Adriatic or the Aegean. In such areas the claims advanced by littoral States will have no certain boundaries until agreements have been reached.

No doubt taking a hint from the terms of the Truman Proclamation, it will be said that States abutting on the same shelf are to share it equitably by agreement. This still leaves problems though — such as of a small island's share of sea-bed, with a continental State, abutting on the same shelf.

In the Persian Gulf Proclamations[2] the absence of any reference to the Continental Shelf is explained by the fact that the Shelf extends throughout the Gulf; the depth of whose waters nowhere exceeds 100 fathoms. The geological boundary of the shelf lies at the mouth of the Gulf of Oman and the Arabian sea.

The division of the rich oil-bearing submarine areas of the Gulf of Paria between Great Britain and Venezuela was based essentially on this factor of shallow depth, and the Continental Shelf 'eo *nomine*' was not mentioned[3].

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[1] *Press release of* 28 September 1945. *Department of State Bulletin* 4847. Referred to the common definition of the Continental Shelf, namely, the 100 fathom isobath.

[2] "... the seaward boundaries to be determined on equitable principles in consultation with neighbouring States".
(Bahrain Proclamation of June 5, 1949. No. 37/1368) English translation in American Journal of International Law (1949), vol. 43, suppl. pp. 185—186. Also Appendix of this work, at p. 150.
The texts of the other 8 Sheikhdom Proclamations are substantially similar to the Bahrain one.

[3] See below p. 17—18.

The International Law Commission during their 1950 deliberations did not seem prepared to define the Continental Shelf but preferred leaving any such definition to geologists and geographers, whose knowledge on the subject was more thorough.

When trying, though, to define the extent of the area of the Continental Shelf, the members of the International Law Commission, were faced with serious difficulties. Mr Hudson [1] had wished to eliminate the superjacent water depth limit, thus enabling non-Continental Shelf shallow waters to be included (i.e. The Persian Gulf).

For this reason he estimated that the recognition of special rights as regards the working of the marine subsoil and the protection of marine resources should not be linked with the presence of the Continental Shelf, and to this purpose he suggested the Commission adopt the following article:

> "Control and jurisdiction over the sea-bed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral State for the exploration and exploitation of the natural resources therein contained to the extent to which such areas are located on the continental shelf connected with its territory, including regions which may be assimilated to the continental shelf by reason of the shallowness of their waters".

This proposal was put to vote, the last sentence being left out on Mr Cordovas' wish, and the Commission adopted it by 10 votes to 1 [2]. Professor Brierly [3] then suggested that "control and jurisdiction do not depend on the presence of a continental shelf" ought to be added. This was not found acceptable by the Commission though, so he suggested instead [4]:

"The area for such control and jurisdiction will need definition, but it need not depend on the existence of a continental shelf"

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[1] United Nations Doc. A/CN.4/SR. 67 at p. 7—8.
[2] Ditto at p. 16.
[3] Ditto at p. 17.
[4] Ditto at p. 21.

This formula was accepted by the Commission by 6 votes to 4, with 2 abstentions.

Mr Yepes could not understand what the position would be of coastal States which did not enjoy the advantage of having submarine regions situated off their coast, where the depth did not exeed 200 metres. In Chile, the depth of the sea, close in shore, was considerably more than 200 metres. "Would a State in that position have a right to compensation because it did not possess a continental shelf?" he demanded [1]. The other members of the the Commission did not agree to this attitude, but Mr Yepes argued [2] that the Commission was taking certain steps so as to include into the Continental Shelf conception areas of shallow waters which were not strictly speaking Continental Shelf, therefore he considered it unjust that the Commission was not taking some similar steps to ensure that those other States, which only possessed deep waters off their coasts, could enjoy certain rights as a sort of compensation.

Mr el Khoury [3] made two proposals; one concerning the fixing of a maximum distance that the shelf areas could attain out at sea, and one fixing a minimum distance. The first of these proposals was rejected by 7 votes to 1, and the second by 7 votes to 2. These proposals were made with the intention of providing some legal justification for the claims advanced by Chile, Costa Rica and Peru, these States having respectively claimed an area lying 200 miles off their coasts.

In support of this argument, Mr Yepes [4] even referred to a decision of the French branch of the International Law Association, according to which rights of control and jurisdiction had been accorded to coastal States up to a distance of 20 miles. The Commission, though, refused to take this as evidence, and, with the exception of those two members that had advanced these proposals, in a body turned against the very idea.

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[1] United Nations Doc. A/CN.4/SR. 113 at p. 13.
[2] United Nations Doc. A/CN.4/SR. 117 at p. 7.
[3] United Nations Doc. A/CN.4/SR. 113 at p. 24.
[4] Ditto at p. 22.

Later, though, Mr Yepes made a new suggestion, which, after being amended by Mr el Khoury and Mr Hsu, resulted in the following [1]:

> "the rights of control and jurisdiction referred to ...... belong up to a distance of 20 miles beyond territorial waters to all coastal States which do not possess a continental shelf as defined.........".

This proposal was accepted by 6 votes to 5 and much discussion followed as it was felt that the adoption of such a text deprived the notion of a Continental Shelf of all meaning. Finally the matter was referred to a special committee and the final article [2] adopted clearly shows that those extreme views voiced during the Sessions, had been entirely disregarded.

> "As here used, the term 'continental shelf' refers to the seabed 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".

By not fixing a rigid depth limit of the superjacent waters, the Commission not only allows for future developments in extended areas, but also includes into the Continental Shelf concept, areas that are either too shallow or too deep to form a real shelf, but which, notwithstanding this, are exploitable and this without discrimination, round islands or continents.

The 100 fathom depth limit itself is not mentioned in the United States Proclamation [3] or in the degree whereby the Continental Shelf is placed under the control of the State Department. By not prematurely binding herself down to the 100 fathoms line,

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[1] United Nations Doc. A/CN.4/SR. 117 at p. 15.

[2] Draft Articles of the Continental Shelf and Related Subjects, Article 1. for entire text, see Appendix at pp. 152—158. — in especial 152.

[3] It *is mentioned*, however, *in an official* explanation *to the* Press, *in which* the area reserved to the United States by the Proclamation was estimated at 750.000 square miles, whilst the width of the Continental Shelf of America at some points was estimated at 250 miles.

America has fully allowed for the possibility that the Continental Shelf of North America may at various places prove to be situated at a greater depth than is indicated by the 100 fathom isobath. Thus America will be free to exercise rights over oilfields found under the sea-bed in places where there is more than 200 metres depth of water if the sea-bed in these places forms part of the Continental Shelf of America.

Scientific progress does not as yet permit the exploitation of submarine areas that lie at a greater depth to 40—60 metres at the very most and though in the Gulf of Mexico drilling takes place at a distance of 28 miles from the shore, this is only possible during periods of good weather and the exploitation is far from being of a full scale.

For these reasons more than any other, it is obvious that to try and fix rigid outer limits to claims, at this period, is mere speculation.

Any depth decided would be provisional, the 200 metres limit conforming only to existing technical limitations and prospects.

In 10 years time, what today is considered unexploitable, may well become exploitable, and then States will be fully justified in advancing claims to new areas deeper under sea and lying further out from land [1].

If one had to enumerate the various possible cases for defining the legal edge of the Shelf, one would encouter difficulties which even appear great to oceanographers. Certain suggestions, though, can tentatively be put forward as possible standards for defining this hypothetical edge.

1. Cases where the fall off takes place at the 100 fathom or 200 metres depth, as a general rule.
2. Cases where the submarine terrain creates more than one such line (i.e. falling abruptly to greater depths but then coming up again to form a continuation of the first Shelf). The

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[1] The Oceanographical Institute, in California, which had been surveying the sea-bed of the Pacific for the last three years, has recently summarized its findings in a mountain of magnesium in the Pacific at a depth of 2000 feet, and that was only one of its discoveries. Un. Nations Doc. A/CN.4/SR. 113 at p. 12.

outermost 100 fathom contour should be regarded as the limit of the Shelf.

3. Cases of sudden great depths, but existence of a shelf at a great depth.

4. Cases where the fall off does not take place at the 100 fathom or 200 metres depth, but gradually shelves till 200—300 fathoms.

Cases belonging to the first group would create no difficulties as exploitation of such shelves is already developing rapidly. This type of Shelf being considered the normal or ideal one.

Cases of the second, and fourth group are at present exploitable only to a limited extent, therefore presenting no problems, and as for cases in the third group no exploitation at all is possible.

One last group ought to be added to the above, that of cases where no Shelf exists at all — by which is meant no sudden or even gradual fall off. The best example of such a case would be the Persian Gulf, where the depth of the waters in no place exeeds the 100 fathom limit.

In this last group it would be more appropriate to refer to these areas as 'submarine areas' rather than 'Continental Shelf'.

Section 2. Delimitation Problems when many States border upon the same Shelf

In regard to the delimitation of submarine areas of concern to more than one State, a number of questions of considerable practical importance may be — and in fact already have been — raised.

The Proclamation of the President of the United States refers to the problem as a whole in the following terms: "in cases where the continental shelf extends to the shores of another State or Island with an adjacent State the boundary shall be determined by the United States and the State concerned, in accordance with equitable principles".

This general formula has been reproduced, for instance in the legislation of Iran, Saudi Arabia and the Persian Gulf Sheikhdoms relating to their respective adjacent submarine areas.

Endeavours have already been made to render this formula more precise by investigating these "equitable principles" in question.

The matter, though, is no easy one and technical problems such as those encountered in the delimitation of territorial waters, easily arise, not to mention those even more complicated problems deriving from what is known as the "essential unity" of a deposit.

Unfortunately much guidance cannot be sought from that subject, the closest related to Submarine Areas, namely that of territorial waters

Members of the International Law Commission when faced with this problem during the summer of 1951 [1], had to admit that "there is no rule of International Law at present covering the subject". Very few cases actually exist, where demarcation [2] of territorial waters was ever made.

Apparently a partial demarcation line had been fixed between the United States and Mexico (Treaty of Peace, Friendship, etc., signed at Guadeloupe Hidalgo on February 2, 1948 [3]). Also the case of sea frontiers between Norway and Sweden, (The Grisbadarna Case, 1909 [4]).

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[1] United Nations Doc. A/CN.4/SR. 115 at p. 22.

[2] Delimitation is the determination of a boundary line by Treaty or otherwise, and its definition in written verbal terms, whilst demarcation, is the actual laying down of a boundary line on the ground, and its definition by boundary pillars or other similar physical means.

[3] De Martens, Recueil General des Traités. vol. 1 at p. 7.

[4] The Permanent Court had adopted as demarcation line, a line perpendicular to the general coastline, but that did not constitute a prolongation of land frontiers; L'Arbitrage entre la Norvège et la Suède, Bureau International de la Cour Permanente d'Arbitrage. Recueil 1909.
Further instances of maritime boundaries are to be found in:
a) The Convention of July 6, 1932, between Great Britain and the United States, which dealt with the regulation of a maritime boundary lying between the Philippine Archipelago and the State of North Borneo, Treaty Series, No. 2 (1932) Cmd. 4241.
b) 18 and 19 Geo. 5, c. 23, To approve an agreement with the Sultan of Johore determining the boundary in the territorial waters between the Straights Settlement and the State and Territory of Johore.

A more recent case on matters appertaining to territorial waters and sea frontiers, is that of the 18th December 1951, between the United Kingdom and Norway [1].

It has been suggested that this decision may have been influenced by the fact that recent developments in international practice have paved the way for a measure of adaptation of a rigidly conceived notion of the freedom of the sea to the requirements of the legitimate interests of the littoral State. Such developments include the proclamation, on the part of a number of States (including the United Kingdom and some of its dependencies in the Persian Gulf), of exclusive control and jurisdiction over submarine areas adjacent to their coasts [2].

The question which the Court was called upon to decide was whether the Norwegian decree of July 12, 1935, which delimited the Norwegian fisheries zone, was in accordance with International Law [3].

The Court found, by a majority of ten votes to two, that the method which the decree employed for the delimitation of the fisheries zone was not contrary to International Law. It also held by eight votes to four, that the lines fixed by the decree in application of that method were not contrary to International Law [4].

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[1] "Fisheries Case, Judgment of December 18th, 1951" I. C. J. Reports 1951, p. 116.

[2] Professor H. Lauterpacht, in the Times of January 8, 1952. "Freedom of the Seas".

[3] That decree which purported to be in accordance with earlier Norwegian decrees dating back to 1812, laid down that the outer limit of Norwegian territorial waters "shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks". In International Law, as understood to the majority of States prior to the judgment of the Court, the "base-line" — i.e. the line at which the territorial waters of a State begin — runs along the low-water mark, following generally the sinuosities of the coast. In the case of bays (other than so-called historic bays which may cover vast stretches of the sea) the general, though not universal, consensus of opinion and practice has been that the base-line is formed by a straight line drawn across the bay at a point at which it is not more than 10 miles wide. The decree of 1935 departed from that principle. It selected 48 fixed points either on the mainland or on islands or rocks, some of which are at a considerable distance from the mainland.

[4] at p. 143.

It is understandable that the judgment of the Court, especially in so far as the express judical recognition of straight base-lines is concerned, gave cause to much anxiety.

It appears, however, probable that, essentially the judgment amounts to no more that an affirmation that in view of the absence of general agreement on the subject of base-lines their selection is in the first instance within the province of the littoral State; that such selection is a matter of Law and not of arbitrary discretion; that in case of dispute it is for an international tribunal to determine the reasonableness and justification of the principle and of the method of selection adopted by the State concerned; and that such a determination must be made in the light of various relevant factors, including prescriptive title, acquiescence by other — and particularly the complaining States — geographical realities and economic and social equities of the situation.

During the International Law Commission deliberations, Mr Hudson[1] stated that he had been studying the question for upwards of three years, and he was convinced that there were very few works on International Law that dealt with it. "The problem had been tackled mainly by geographers. The general tendency was to fix the limits by drawing a line perpendicular to the general coast-line. There was no international law text that required States to accept a line constituting a prolongation of the line of demarcation of territorial waters. In any case no such line existed either in law or in fact".

To his knowledge, the sea frontiers between States had not given rise to any dispute with the exception of that between Norway and Sweden. Agreeing with Professor Spiropoulos, Mr Hudson was inclined to think that for the time being it was impossible to find a solution to the problem.

Later he proposed the following text be adopted by the Commission:

> "Two or more neighbouring States to whose territory the same continental shelf is contiguous should (or may) establish

[1] United Nations Doc. A/CN.4/SR. 115 at p. 23.

boundaries in areas of the continental shelf by agreement between them".

Mr Yepes agreed to this and even Professor Francois who had previously suggested that the course adopted by the Permanent Court of Arbitration in the Grisbadarna Case, namely a demarcation formed of a line perpendicular to the general coastline, could be used as a basis in International Law, now claimed that unless his proposition be followed, it was certain

> "that it would be impossible to fix a boundary between two continental shelves unless agreement were forthcoming as to the demarcation of territorial waters".

Mr Cordova [1] pointed out that the United States and Mexico had settled satisfactorily the question of demarcation of their territorial waters, and the demarcation of the Coninental Shelf should be effected in the same way as the demarcation of territorial waters. "Possibly no such line existed in the physical sense, but it unquestionably existed in a legal sense". He was furthermore in favour of the idea previously put forward by the Rapporteur (Professor Francois), that the prolongation of the demarcation line of territorial waters should be adopted in delimiting the Continental Shelf.

Mr Hudson could not agree to this argument and in his turn favoured the concept put forward in the Secretariat Memorandum [2], of a protective perimeter as "an indispensable adjunct to the idea of a demarcation of the continental shelf or of a demarcation of the areas allotted to the various States interested in the same shelf".

Notwithstanding general disagreement on this topic, it was thought desirable to submit to the various governments a report on the question, accompanied by fairly lenthy comments [3].

The result of the Commission's work on this subject cannot be said to be very great help. All the members could agree to, was

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[1] United Nations Doc. A/CN.4/SR. 115 at p. 24—25.
[2] United Nations Doc. A/CN.4/32 at p. 109.
[3] Article 7 of the Draft Articles. For text see Appendix at p. 158.

that States sharing a common shelf should come to some agreement with respect to the delimitation of the area concerned, or failing this, have resource to compulsory arbitration. This decision tends to shelve all difficulties until later, the only advantage being that thus in each case the arbitration award will depend on the given geographical or other facts, thus providing a solution for each individual case.

The Persian Gulf gives us a perfect example of the difficulties and complications which will have to be faced in the near future; numerous independent States, all possessing a coastline and territorial waters of their own, (it must not be forgotten that in no place does the depth of the waters in the Gulf exceed that of 200 metres) and all having made declarations claiming their adjacent submarine areas.

These constitute claims which will have to be reconciled with other claims put forward by other independent States in the form of Islands that exist in the Gulf, and which are surrounded by territorial waters of their own.

It would perhaps be advisable to divide the cases which appear likely to exist or arise, into two groups, the first one to include those cases which seem more simple due to the fact that not more than two States are concerned. Here the existing rules of International Law can be made to apply with comparatively small difficulties. This leaves to the second group all those cases of a more complex nature, where, the issues being more involved, a solution satisfactory in all respects is less easily obtainable.

Subsection 1. Submarine Areas of concern to two States

In this group will belong cases of States lying on opposite sides of straits and also cases of adjacent littoral States.

A. Straits. Should the water space separating the two States be narrow or wide, two alternatives immediately come to mind; that of the thalweg, and that of the median line.

The thalweg solution is most common in navigable waters and especially in rivers or channels. It is the mid-channel of the waters,

or its principle channel, should there be more than one. The reasons underlying the adoption of the thalweg in cases of rivers or straits, do not exist in the case of Submarine Areas — therefore it is from the median line principle that a more satisfactory solution must be sought.

The best definition of the median line is — "the line every point of which is equidistant from the nearest point or points on opposite shores" [1].

The median line thus constitutes a series of straight lines, each turning point being equidistant from two or more points on the same shore, as well as from one or more points on the opposite shore.

If islands exist within the straits, this may complicate the determination of the base line employed in laying down the median line. Some of the islands will have to be treated as if they were part of the mainland. In this the size alone cannot serve as a criterion, it must be considered in relation to shape, orientation and distance from the mainland.

Professor Boggs [2], an eminent geographer, describes the following rule as the most reasonable one to be applied in the case of islands:

> "to draw a pair of parallel lines tangent to opposite ends or sides of the island which encloses the least area of water between island and mainland. Then, if the land area of the island (properly planimetered from the low tide line) exceeds the water area bounded by the parallel lines, the island and mainland, the island should be reckoned as if part of the mainland base line, in laying down the median line".

For the purposes of this system, islands will be treated as such only in those cases where a stretch of water lies between the island

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[1] The Supreme Court made use of this technique when preparing its decree of March 16, 1936 (297. U.S. 547—52) which corrected the boundary description in the Green Bay section as given in its decree of November 22, 1926. (272. U.S. 398).

[2] (Special Adviser on Geography to the Department of State) Delimitation of seaward areas; in American Journal of International Law, 1951. at p. 258.

and mainland at all times — including low-tide. For should the island be merely lying off very shallow waters which at low-tide emerge above the surface of the sea, then it would be considered as part of the mainland.

Cases, though, may likewise arise, where such an island becomes wholly submerged at high-tide [1].

A. In this case, the water area between mainland and island, does not exceed the land area of the island behind it so the island is considered mainland, and will be used as part of the base-line. (Fig. A).

B. Should the water area between the mainland and the island have exceeded the area of the island, this island would have been ignored in fixing the base-line. (Fig. B).

Fig. A

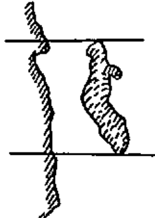

Fig. B

Fig. C

C. This diagram illustrates an island separated from the mainland by a relatively large area of very shallow water — the low-water shore line not ordinarily being shown on hydrographic charts. The low-water shoreline must be ascertained, and here the area exposed at low tide is shaded. Unless the "island" proves to be part of a peninsular at low tide "as here", the method used above would be used. (Fig. C).

[1] See below p. 98.

The same technique may be employed, he continues later, with reference to a second island adjacent to an island thus found to be regarded as if mainland. But its parallel lines must be drawn independently.

Professor Boggs' method of dealing with islands in theory seems satisfactory enough, whether such methods will be used or not in the future though, will depend mainly on the interested States and their acceptance of this method. Much will depend on the size and importance of such islands, as well as the quantity, should they be numerous.

Agreement as between the two States concerned will therefore be necessary in determining the base line to be employed.

Should a median line be established according to this principle, or some other arrived at by negotiation, a further point may arise, namely that this line passes very near to islands [1] in the middle of the straits, or even traverses some islands.

If any such islands be found to be "on the wrong side of the median line boundary" (that is if an island of clearly established sovereignty is in the waters of another State), the alternatives appear to be:

1. agree to shift the jurisdictional line from the exact median line, to accomodate the islands in question, or
2. agree that the State which has sovereignty over the island shall exercise jurisdiction over it (presumably including its normal belt of territorial waters) without regard to the median line.

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[1] This may well have been the case with the Island of Patos, and the reason for the Treaty between the United Kingdom and Venezuela, concerning the Status of the Island of Patos of February 26, 1942 (Cmd. 6401).
Article 1. "His Majesty the King renounces in favour of the United States of Venezuela all sovereign rights and title over the Island of Patos and transfers to the United States of Venezuela all sovereign rights and title over the said Island which shall thereafter be considered as part of the territory of Venezuela.
(The Island of Patos is the most westerly lying island of a group of isles that exist in the Gulf). See p. 159 for map.

B. Adjacent littoral States. Instead of terminating where land meets sea, the boundary between the two littoral States will continue out through territorial waters into the High Seas, till the outer limits of the Continental Shelf are reached.

Possible ways of achieving this could be either a simple extension seawards of the land frontiers or a line drawn at right angles to the coast at the point where the land boundary meets the sea. Neither, though, of these two methods would prove satisfactory in the majority of possible cases, as both tend to be arbitrary.

The only reasonable and at the same time fair to both States boundary, would appear to be a single straight line starting from the low tide terminus of the land boundary and ending at the presumed edge of the Continental Shelf; this line must be one, every point of which is equidistant from the nearest point on the coasts of both States. This jurisdictional boundary is developed by joining the points of intersection of the envelopes of arcs of circles described at certain intervals of 1, 2, or 3 or more miles, drawn from the nearest points on the shores of the two States.

Where there are several islands, the most reasonable boundary is a line similar to the one above with the difference that those of the islands that are not wholly submerged at high tide whether within territorial [1] waters or not, will be taken into account the same way as if they were part of the littoral State; the boundary line will be continued by median line techniques between the islands of different sovereignty, till the desired point out in the High Seas is reached [2].

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[1] Sub-Committee No. II (The Technical Sub-Committee) during the 1930 Hague Codification Conference adopted that "elevations of the sea bed "situated within the territorial sea" though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea". Report of the Second Commission (Territorial Sea). L. of N. Doc. C. 230. M. 117. 1930. V. at p. 2.
Boggs in American Journal of International Law, 1951 at p. 253, claims that if such problematic islands lie outside the territorial waters delimited from the mainland or from a never covered island, they ought to be disregarded.

[2] It appears that fairely similar principles were adopted when fixing the boundary between the Canal Zone and Panama. The boundary problem in this area was studied because of the collision between the S. S. David (Panama) and the S.S. Yorba Linda (U.S.) on May 11, 1923. The decision

In both the case where islands exist and that where none exist, as the boundary line extends progressively from the coast greater and greater strelches of the coasts of lhe two adjacent States are taken into consideration, thus taking into account all the sinuosities of the coast, including gulfs and peninsulars large and small. In this manner the resulting lateral jurisdictional boundary is the more sensitive to the vagaries of the coastlines of both States.

Subsection 2. Submarine Areas of concern to more than two States

The main type of case that belongs to this group is that of a gulf or bay, where there are several littoral States.

Vallat[1] who was probably one of the first writers to attempt working out a solution for such cases, suggests:

> "Perhaps the most equitable solution would be to divide the submarine area outside territorial waters among the contiguous states in proportion to the length of their coast lines".

Later, though, he admits that this may well not provide a satisfactory answer and advocates negotiation as between the interested parties.

This system of 'coast line length' is open to criticism and has been severely criticized by J. M. Py[2]; in his words the main reasons against are:

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of the U.S. Panama General Claims Commission stated "... while the Treaties undoubtedly fix the boundary between Panamanian territorial waters and the territorial waters of the Canal Zone, it is clear that they do not purport to fix the seaward limit of the territorial waters of the Canal Zone. That is left to the rules of International Law". U.S. Dept. of State, Arbitration Series No. 6 (1934) pp. 765—820, and American Journal of International Law (1934) p. 596.

An International water boundary defined in accordance with the principles set forth above is found in the Treaty of Peace with Italy, signed at Paris, February 10, 1947. Art. 22 par. IV. "Thence the line follows the main improved channel of the Quieto to its mouth, passing through Porto del Quieto to the high seas by following a line placed equidistant from the coastlines of the Free Territory of Trieste and Yugoslavia".

[1] British Year Book (1946) pp. 335—336.

[2] United Nations Doc. A/CN.4/32 (14 July 1950) Memorandum sur le Regime de la Haute Mer (préparé par le Secrétariat) at p. 119. (in English text at p. 108).

"a) favouring unduly States with a long coastline, b) seperating some points of the continent from the continental shelf, although they might be dependent on one and form an organic whole, and c) not providing the boundary line of the frontiers in accordance with which the division would be made".

The same writer continues in favour of the median line principle, and ends up by admitting that even this, if applied, would not prove satisfactory, the main disadvantage being that of attaching enormous importance to the submarine frontiers of islands.

Probably though, median line techniques could be made to apply if no islands exist, but even this is problematic. It is obvious that in such cases as are being treated here, the principles used in the preceding subsection are of little help; median line techniques tend to exaggerate the importance of island shelves. A division based on the length of the coastline taken alone, would not prove much more satisfactory. The results would be too arbitrary to meet and satisfy the demands of all the States concerned. On the basis of this it is perhaps safe to say that it is well-nigh impossible to formulate one general principle [1], as was done in cases treated in subsection 1.

Each case will have to be decided according to the particular geographical conditions existing in that particular region and furthermore will have to be taken into account the "where" and "how" these resources are situated under the subsoil of the sea bed and from where they are best exploitable. It is impossible to exaggerate the importance of this latter question, as the actual exploitation of these resources will depend mostly on this — and not on rigid rules set up without thorough knowledge of exploitation techniques and necessities.

For this reason the only general solution that can be suggested, capable of meeting and satisfying the requirements, and which recommends itself by its very practicability, is that of delimitation by

[1] United Nations Doc. A/CN.4/SR. 69 (17 July 1950) Concerning the delimitation of areas where more than one State is on the same Shelf, the Commission was of the opinion that nothing could be decided, as geographical differences prevented the promulgation of a general rule.

negotation both advocated in President Trumans Proclamation and put into effect by the Anglo-Venezuelan Treaty on the Gulf of Paria [1].

A possible way of achieving this in an area such as that of the Persian Gulf, would be for the littoral States to:

1. Come to an agreement between themselves as to the exact extent of their territorial waters — and delimit these clearly.
2. To internationalize (to bring under the joint control) as between themselves — the submarine areas and their resources outside the limits thus set of the agglomeration of their territorial waters.
3. The resources thus pooled together — would be shared as among the States concerned after agreement had been reached as to the exact share of each State.
4. The share of each State would be based on a number of factors agreed to in advance. Such factors could be: the area in square miles of a State's territorial waters, the exploitation facilities or expenses provided on its territory, length of coast line, unity of a deposit, particular abundance of oil just outside a States territorial waters and pre-estimated richness of resources in areas bordering a States territorial belt. A number of other factors can be found and agreed to apart from those enumerated above which are but examples.

This system would be practicable only after the States concerned have received expert advice as to the approximate quantities of oil to be found, and the approximate position of the deposits.

On the basis of such expert reports and advice, even though the evaluations made are but approximate — the States acting together would be able to avoid rush and grab tactics which otherwise seem unavoidable and furthermore exploitation expenses would be reduced in this manner, as the Oil Companies would be free to

[1] See below p. 17—18.

choose the exact spot from any part of Gulf, which they may consider more profitable to exploit from.

If such a system is not adopted, it is more than likely that each State will try to exploit the resources within its own particular area and at the same time will endeavour to drain from its area deposits which lie in the areas assigned to other States. It will be very difficult to check such manoeuvres which may easily lead to friction if undertaken on a large scale.

No State will easily admit another States' drilling for oil just outside the limits of its own territory, especially if such drilling is liable to react on the exploitation of substances within the limit [1]. The concept of a protective perimeter is an indispensable adjunct to the idea of demarcation of areas allotted to the various States interested in the same Shelf. The argument advanced by the President of the United States in support of the Continental Shelf doctrine, namely, that marine subsoil resources frequently form part of a deposit also to be found on terrestrial territory [2], can *mutatis mutandis* likewise be applied to deposits contained in the submarine areas, but which are in danger of being divided up among different sections of that Shelf. By internationalizing the whole area outside territorial waters, the States concerned simplify exploitation and minimize the chances of encroachment, and, as protective perimeters are no longer necessary, these areas also are open to exploitation.

If States that border upon the waters of a gulf are recognised as having certain rights over the submarine areas of this gulf outside their territorial waters, then there is no infringement of International Law in pooling these rights together and proceeding to make use of these rights collectively instead of singly.

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[1] The area which may be tapped from a particular point varies largely according to the geological formation. In general the rule of oil mining is understood to be a right of capture: — a right to drain whatever can be obtained from a particular well.

[2] The resources under the Shelf frequently form a seaward extension of a pool or deposit within the territory of a State.

CHAPTER V

Relation between the Continental Shelf and other accepted and established principles

Section 1. Relation between the Continental Shelf and the 3-mile limit

To this day there is no agreed rule of International Law as to the width of territorial waters, beyond tidewaters or low water mark, from the coast. The territorial waters themselves, whatever their width, are a compromise between the ancient expansive claims of certain countries to a wide control of portions of the sea and the more modern demands for a free sea. Bynkershoek in 1702 and Galiani in 1782 proposed and lent support to the principle that the criterion of jurisdiction was the extent of physical control from the land, which in Bynkershoek's time was measured by the shot of a cannon from the shore. This later became arbitrarily identified in England and some other countries with a marine league, at which it became ostensibly fixed in spite of the increase in the range of a cannon.

The justification for territorial waters and sovereignty [1] over that area was, first, the necessity for protecting the adjacent land; second, the necessity for exercising some control over ships passing through; and third, the economic needs of the riparian population. The prestige of Great Britain gave considerable currency to the one

[1] Sovereignty, limited only by the fixed prescriptions of International Law.

league or three mile rule, as it was called, and while this rule received support for certain purposes from the United States when that country became an independant nation, it never was accepted in Northern or Southern Europe, or, for that matter, in Russia.

As late as 1930, at the Hague Conference on Codification, — one of the many efforts public and private to achieve unanimity on this highly controversial subject — thirteen states, including the Scandinavian and Mediterranean, denied the international validity of the three mile rule and insisted either on their four, six, or twelve mile rule, respectively, or on a rule that would vary for different purposes, namely, control of fisheries, innocent passage, revenue protection, and neutrality, or on a zone of jurisdiction contiguous to the territorial marginal sea.

Having in mind the work at the Hague, one may say that International Law permits the exercise of full sovereignty over a belt of territorial waters extending from the shore at least 3 nautical miles [1], but not more than 12 (more likely 6) and that many favour an adjacent zone [2] or zones, in which jurisdiction may be exercised for special purposes, although such zones would remain part of the High Seas rather than becoming territorial waters [3].

Professor Bingham insists [4] that no decision of any tribunal, not even the Bering Sea Arbitral Award [5], has established the three mile rule, outmoded, he concluded, as a rule of International Law. In ten of the sixteen so-called liquor treaties concluded by the

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[1] Gidel maintains that any claim to a belt in excess of 3 miles, is subject to the acquiescence of other States.
Le Droit International de la Mer, vol. III. (1934), p. 133 and 135.

[2] Gidel: "... l'espace maritime qui s'étend au delà de la limite exterieure de la mer territoriale jusqu'à une certaine distance en direction du large et dans lequel l'Etat reverain possède à l'égard des navires étrangèrs des competences rigoureusement limitées à certains objets". op. cit. vol. III (1934) p. 361.

[3] Gidel: "La zone contiguë ne fait pas partie de la mer territoriale. Elle est, par rapport à la mer territoriale, ce que l'Institut de Droit International a appelé, une zone supplementaire, mais une zone de haute mer ... La mer territorial est la zone de l'integralité des compétences de l'Etat riverain. La zone contiguë est la zone des competences fragmentaires et specialisées de l'Etat riverain". op. cit. vol. III (1934) p. 364.

[4] E. Borchard: Resources of the Continental Shelf; American Journal of International Law, (1946) p. 57.

[5] Fur Seal Arbitration, vol. 1, p. 54.

United States between 1924 and 1930 there was included a clause reading: "The High contracting parties respectively retain their rights and claims without prejudice by reason of this agreement with respect to the extent of the territorial jurisdiction [1]".

Even Great Britain, supposed to be, by reason of its economic interest in foreign fishing through the trawler trade, the firmest adherent of the three mile rule, manages to make numerous exceptions to the rule in English waters. These are concerned mainly with the exclusion of foreign fishing in the broad bays around the British Isles [2] and in the claim to control either as King's property or occupied territory the natural resources in the bed under the sea both within and outside the three mile limit.

As a matter of common law, as well as under the more restricted regime of the modern rule, Great Britain lays claim to the coal mines under the Sea of England, to the pearl fisheries around Ceylon, to the oyster beds around Ireland (when Ireland was an integral part of Great Britain), and other natural resources of the submarine soil [3].

With regard to the sea-bed and its subsoil inside the boundaries of territorial waters, it is generally accepted in International Law as a rule of customary law that control and jurisdiction over these areas vest *ipso jure* [4], without proclamation or effective occupation being necessary, in the coastal State [5].

After the 1930 Codification Conference, no doubt whatsoever was left that it was fairly universally acknowledged that a coastal

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1 States which insisted on the inclusion of this clause were: Belgium, Chile, Denmark, France, Greece, Italy, Norway, Poland, Spain and Sweden. The three-mile rule was included in the treaties with Cuba, Germany, Great Britain, Japan, The Netherlands and Panama.

2 Bingham; Report on the International Law of Pacific Coastal Fisheries (1938), p. 50.

3 Sir Cecil Hurst; Whose is the Bed of the Sea? Sedentary fisheries outside the three-mile limit. British Year Book 1923/24, pp. 34, and 40—43.

4 Fauchille; Traité de Droit International Public, 1925, vol. 1, 2nd Part § 494. pp. 204—206. He does not agree that since the maritime belt is the property of the littoral State, the surface and subsoil of the sea-bed under the belt is also the property of the littoral State. Later on he states that through occupation of these areas this would be possible.

5 United Nations Doc. A/CN.4/32. 14 July, 1950. Memorandum on the regime of the High Seas. p. 72 and 75.

State does possess sovereignty over the sea-bed and subsoil under its maritime belt[1]. Furthermore the sea-bed and subsoil of the maritime belt came to be accepted as within the sovereignty of the coastal State, not because of its geological connection with dry land but because it was regarded as part of the territorial waters[2].

In 1927, Professor Suarez, rapporteur of the Subcommittee of the Committee of Experts on the topic of exploitation of the resources of the sea — a topic which did not get on the agenda of the 1930 Conference — proposed that the usual 3-mile limit, or the exceptional 4, 6, 10 or 30 mile limit, of the territorial waters should be replaced by the fall off of the Continental Shelf. He stated: "There is no stable, permanent and convenient solution except to adopt the rule of the continental shelf with some modifications according to circumstances". He justified his proposal by the necessity of adopting International Law to the needs of maritime industries.

The United States Proclamation and the later official enactments of other States lay no connection whatsoever between the Continental Shelf and the 3-mile limit. These enactments maintain that the sea-bed and the subsoil of the Continental Shelf are under the sway of the littoral — the coastal — States, but this does not necessarily include that the sea above this shelf, the epicontinental waters outside the maritime belt of the littoral States, are also under the sway of the coastal States. According to the Continental Shelf theory as developed since 1945, it is unnecessary to concede to the coastal State the State property, the sovereignty of the waters above the Continental Shelf outside the maritime belt. This new doctrine does not purport to change or modify any of the existing rules of International Law that concern territorial waters, it merely seeks to extend the coastal States' exclusive rights to

[1] Oppenheim—Lauterpacht; International Law, 7th ed. § 173 and 185 at p. 417 and 442. Gidel, op. cit. vol. 1, p. 510, Report of the Second Committee Draft Articles 1 and 2, Act of the Conference, vol. III, 126.

[2] Professor Waldock; The Legal basis of claims to the Continental Shelf. To appear in vol. 36 "Transactions" Grotius Society. (This paper was also published as an annex to the Report of the Committee of the International Law Association, in 1950.

jurisdiction and control over the sea-bed surface and the subsoil of the whole of the Continental Shelf instead of only within the 3-mile limit. "The character as high seas of the waters above the continental shelf...... is no way thus affected" (conclusion of the Truman Proclamation).

Section 2. Sedentary fisheries [1] and the Continental Shelf

Vattel's statement [2]... "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property? [3]" ceased to cause any difficulty even to the stoutest upholders of the principle that the limits of the territorial belt are not more than three miles, when it was realised that the exclusive right to the pearl to be obtained from the banks flowed from the ownership of the bed of the sea where the banks were situated, and not from any claim to maritime jurisdiction over the waters.

Wherever it can be shewn that particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three mile limit, have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil. Ownership of the soil by the Sovereign of the country under such circumstances

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[1] Gidel, l. c. at p. 31. "Fisheries may be described as sedentary, either by reason of the species with which they are concerned, that is to say species attached to the soil or irregular surfaces of the sea bed, or by reason of the equipment employed, for example stakes driven into the sea bed.

[2] Vattel, Le Droit des Gens (1758) sec. 287.

[3] This was later followed up by Sir Cecil Hurst in his much quoted article in the British Year Book for 1923/24, at pp. 34—43.
He urged that claims to exclusive control ought to be recognised to submarine banks outside the limits of territorial waters where there were valuable pearl fisheries, or beds of edible oysters which required watching and protecting, or sponge fisheries, or chank sedentary fisheries which could be subject of a valid occupation of the sea bed without the least interference with fisheries rights in the open sea, i.e. the fishing for swimming fish — or with general rights of navigation.

must carry with it the right to legislate for the soil so owned and for the protection of the wealth to be derived from it, and no doubt need be felt as to the binding force of the various enactments which have been issued for the protection of these sedentary fisheries outside the three mile limit. States near whose coasts were located natural valuable resources, have found no difficulty, whatever their views as to the width of territorial waters, and met with no foreign objection, in putting to their own use these resources [1].

This is not surprising as with the increase of the value of sea products, International Law [2] has recognised that jurisdiction over the coastal belt of water and ownership of the soil beneath carries with it control and ownership of all the products that exist therein.

Writers do not discuss the doubtful question of the title to the waters above the soil, where riparian rights are limited only by the well-known qualifications attached to the territorial waters. Here there is both *imperium* and *dominium*, but beyond that, a separation of soil and surface was made by custom, practice and authority.

The soil and subsoil wealth within reach of the shore was uniformly claimed by the littoral State and where resources were discovered, the rights of ownership exercised.

Only when it concerned the great fishing banks far out in the open sea and the supply of free swimming fish was in danger of depletion by modern fishing methods, did international convention among the interested powers recognise the necessity for joint regulation [3].

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[1] Bingham in "Report on the International Law of Pacific Coastal Fisheries" (1938) pp. 57—62.

[2] League of Nations Pub. C. 351 (b). M. 145 (b) 1930. V.

[3] North Sea Fisheries Convention of May 6, 1882. — Bering Sea Fur Seal Convention of July 7, 1911.
Leonard in "International Regulation of Fisheries" (1944) Washington. at pp. 35 and 55. For halibut treaties at p. 110.
Tomasevich in "International Agreements on Conservation of Marine Resources", Stanford (1943) at p. 107.
League of Nations Doc. C. 196. M. 70. 1927. V. at p. 160.
Daggett in "The Regulation of Maritime Fisheries by Treaty", American Journal of International Law. (1934) vol. 28. at pp. 693, 702.
Jessup in "Exploitation des Richesses de la Mer. Académie de Droit International — Recueil des Cours (1929) vol. IV pp. 405—508.

But as to the contiguous subsoil minerals under the sea and the sedentary resources attached to the bottom of the sea both statute and decision have claimed and States have recognised the propriety of riparian control if not ownership [1].

The Columbia Law Review, in a study on the subject [2], lists judicial and legislative instances which have supported the littoral states' jurisdiction, or control, of such riches as submarine oil, gold, and coal as well as oysters, pearls and chanks.

Whether this jurisdiction or control be claimed as public property under the sovereign right over territorial waters, in International Law and the common law or because the Continental Shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question. Property by prescription would alone have sustained the right to a resource already exploited.

Assertion of jurisdiction and acquiescence therein — without entering upon the abstruse question of title — must explain the coastal states' jurisdiction over unexploited resources in the continental shelf.

Ownership of the riches of the sea has become one of the most jealously guarded rights coastal States possess and nowhere

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[1] Jessup op. cit., pp. 419—424.
League of Nations Pub. C. 351 (b) M. 145 (b) 1930. V.

[2] Columbia Law Review (1939. vol. 39) at pp. 317—326.
The judicial instances consist mostly of cases in the United States where exploitation licenses were applied for by private individuals or concerns. An example of legislative instance is: Louisiana General Statutes 1938, No. 55.
Section 1. "Be it enacted by the Legislative of Louisiana, That the gulfward boundary of the State of Louisiana is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three mile limit as determined according to ... ancient principles of international law, which gulfward boundary is located twenty-four marine miles further out in the Gulf of Mexico, than the ... three mile limit".
Also, Western Australian Pearl and Bêche-de-mer Fishery Extraterritorial Act of 1889. And Orders-in-Council, Ceylon Regulation No. 3, 1811, for the protection of H.M. Pearl banks in Ceylon. And Orders-in-Council of Ceylon, Regulation No. 18 (1890) for protection of chanks.

along civilized coasts within territorial waters, and often outside these [1], can an alien take these products without the permission of the bordering State.

In an attempt to find legal principles justifying the doctrine of the Continental Shelf, one may he tempted to liken it to that of sedentary fisheries and thus find justification in those principles which bind the latter.

It has been suggested, though, that this would not be possible since fundamentally the difference between these two doctrines is too great.

The main arguments used for this purpose, may be summarised as:

a. The magnitude of the areas of the Continental Shelf as compared with the small extent of the banks or beds where these sedentary fisheries exist, for if we adopt the 100 fathoms line as the limit of the claims to jurisdiction and control over the Continental Shelf we realize that the area to which the claims extend is enormous.

It has been stated that the submarine area affected by President Truman's Proclamation was of 750,000 square miles: and that the width of the United States' Continental Shelf was estimated at 250 miles. As regards Great Britain, the 100 fathom line to the west of Scotland and Ireland passes far to the west of the Shetlands, the Hebrides and Achill Head, well out in the Atlantic; practically the whole of the North Sea lies above the Continental Shelf of the countries bordering upon it — so does the English Channel, *in toto*.

b. The variety of the resources capable of being obtained from these submarine areas. Though it is the known existence of petroleum which has led to this new policy as regards the resources of the Continental Shelf being put forward, there is nothing

[1] In the case of deep sea fishing, this applies to those areas of the High Seas regulated by convention. And in the case of sedentary fisheries; to those limited areas where the coastal state, through general acquiescence, has acquired rights of prescriptive user (based on actual enjoyment from time immemorial) i.e. the pearl fisheries of Ceylon.

in many of the Proclamations which limits their operation to petroleum.

The first sentence of the preamble of the United States' Proclamation says "petroleum and other minerals", and the operative part of the Proclamation covers all the resources of the Continental Shelf. It is difficult to foretell the scientific discoveries of tomorrow but it may very well be that they should result in finding that some use of great importance to the world may be made of some other product of the sea bed, such as chalk which forms the subsoil of the sea bed of the English Channel. For this reason perhaps more than any other, the developing notion of the Continental Shelf is of interest to other countries than those alone where oil deposits exist.

The arguments which may justify sovereignty being recognised over the small banks where oysters or sponges may be gathered on the surface of the sea bed can scarcely apply to the works and installations necessary for the extraction of minerals on a large scale from vast areas of the High Seas.

c. The impossibility of obtaining certain of the resources from these submarine areas without the erection of installations which would be a serious hindrance to navigation. These areas may very well be situated under great highways of maritime traffic, such as the English Channel; where the erection of the stagings or derricks necessary for the extraction of anything from the sea bottom are bound to constitute a serious obstacle to shipping.

It is more than likely that if the policy with regard to the resources of the Continental Shelf were limited to the winning of petroleum, no great inconvenience would be caused to navigation. Neither the Gulf of Paria nor the Gulf of Mexico, nor the coasts of California are likely within the near future to become so crowded with shipping that the works erected to obtain the petroleum would impede maritime traffic.

But it is difficult to see how in law it could be legitimate for a State to insist on special rights of jurisdiction and control off

its coasts for the working of petroleum which were not actually to apply to the working of bauxite or uranium.

It is equally difficult to see how in law the special rights of control over the resources of the Continental Shelf could depend on the volume of shipping passing over it.

There is little doubt that these arguments convincingly prove that to liken the Continental Shelf to sedentary fisheries, would be highly unsatisfactory in theory as well as well-nigh impossible in practice. The latter doctrine is justified on legal principles which if stretched to cover the Continental Shelf would but prove a serious hindrance to the development of this new doctrine.

CHAPTER VI

The Continental Shelf and the freedom of the High Seas

The rationale of the open sea being free and for ever excluded from occupation on the part of any State [1] is that it is an international highway, which connects distant lands, and thereby secures freedom of communication, and especially of commerce, between States separated by the sea [2]. Clearly, a great deal of the historic arguments on which it was founded are no longer applicable. However, the principle has now become part of International Law irrespective of the legal arguments which assisted at its birth.

In the past, the exploitation of mines and the digging of galleries under the sea-bed, was tolerated if not authorized, as long as these were but the continuation of mines situated on dry land, and therefore consisted purely of an underwater continuation of these latter. Once this requirement was established, the extent of these galleries was in no way limited, as long as they did not penetrate into the subsoil of some other States' territorial waters.

This doctrine, of what could be called the classical school, underwent a severe strain with the inauguration of new development tactics in the 1940's.

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[1] Following Grotius (II. c. 3, sec. 13) and Bynkershoek (De Dominio Maris, c. 3), some writers as for instance Phillimore, Commentaries upon International Law, 3rd ed. vol. I sec. 203, maintain that any part of the open sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State.

[2] Oppenheim—Lauterpacht, 7th ed. 1947, sec. 287c at p. 577.

If to this date throughout the years, navigation on the high seas has benefited of certain far reaching privileges, the ignorance of the wealth underlying these waters can be said to be the main reason. For this reason the duty of international lawyers today is to achieve a reconciliation between the principle of the freedom of the open sea and the justifiable claims inherent in the new developments connected with the Continental Shelf and submarine areas generally. Such a reconciliation alone can prevent abuse, as the world wide need of the resources contained in these areas is such that development and exploitation will undoubtedly continue and increase with or even without the sanction of law.

Views of writers on the question of occupation and appropriation of the bed of the sea and its subsoil, prior to the 1945 Proclamations and later declarations in the matter of submarine areas, must be regarded as being of limited importance, as they were based on the old cases of sedentary fisheries of Ceylon, Madras, Tunis, Bahrein and others.

Sir Cecil Hurst already in 1923 [1] had stated: "The claim to the exclusive ownership of a portion of the bed of the sea and the wealth which it produces in the form of pearl oysters, chanks, corals, 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".

This view, though, was not shared by other writers such as Gidel, whose definition of the freedom of the seas is by far less flexible [2].

> "Quelle que soit la proportion dans laquelle ces installations utilisent respectivement le sol de la haute mer ou les eaux elles mêmes de la haute mer, peu importe: elles, restreignent d'une manière plus ou moins considerable la possibilité d'user de la haute mer et par suite elles entrainent des conséquences en contradiction plus ou moins graves avec le principe de l'égale

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[1] British Year Book of International Law, 1923—4, pp. 34—43 at p. 43.
[2] Gidel, l.c. at p. 502.

utilisation de la baute mer: gêne à la navigation, gêne à la pêche. La question se pose donc de savoir s'il convient de tenir ces installations pour licites. La réponse n'est pas douteuse. Leur création doit être subordonnée à l'agrément, exprès ou tacite, des autres Etats".

Several other writers such as Oppenheim-Lauterpacht [1], Oppenbeim [2], and Landsay [3] are more or less in agreement with this standpoint in that they expressly acknowledge the possibility of making use of the subsoil of the open sea when this is done by piercing the sea-bed within territorial waters or by carrying out submarine operations from the land as starting point, for instance by the construction of mine galleries, but do not pay any attention to the possibility of legitimate occupation of the undersea subsoil by piercing the sea-bed directly from the surface of the sea.

Fauchille's opinion on the other band is far more flexible and appears more reasonable [4].

"Les seuls travaux et les seules installations qu'un Etat peut être admis à réaliser au fond de la mer sont ceux qui ne doivent pas nuire à l'usage de la mer par les autres Etats, c'est à dire géner leur libre navigation à la surface ou troubler d'une ma-
sea-bed will conform to his description:

He considers it possible that in certain cases operations on the sea bed will conform to his description:

"Il n'est pas, d'autre part, exact d'affirmer que tous établissements sur le lit de la mer doivent constituer un obstacle à la libertée des mers"

which is elucidated further on [5]

"La règle de la liberté des mers forme-t-elle un obstacle juridique à l'appropriation du lit de la mer et du sous-sol de ce lit?

[1] Vol. I, at p. 577.
[2] Zeitschrift für Völkerrecht. L.c.
[3] "The Acquisition and Government of Backward Territory in International Law". 1921, at p. 71.
[4] Fauchille, l.c. at pp. 18—19. Sec. 483 (6)—483 (7).
[5] Fauchille, at p. 61. Sec. 483 (35).

La haute mer étant libre, il est tout d'abord certain que tous les peuples peuvent y pénétrer afin de se livrer à des travaux sur le lit et dans le sous-sol de l'océan. Mais les travaux qu'ils veulent ainsi faire ne constituent — ils pas une apropriation de la mer? A cette question, il ne faut pas hésiter à reponder négativement. Ces travaux sont seulement une apropriation de son lit ou de son sous-sol. Or, on le sait, le fond et le tréfonds de la mer peuvent, à la difference de ses eaux, faire l'object d'une occupation permanente, constitutive, d'un droit exclusif de souveraineté. Les travaux ainsi réalisés ne seront-ils pas toutefois, de nature à apporter une gêne au libre usage des mers? On ne peux pas ici faire une réponse absolue. Ce qu'on doit dire, c'est qu'en général de pareils travaux ne sont pas susceptibles d'entraver la navigation et de nuire à la libre communication des peuples, principale raison d'être de la liberté des mers: ils sont plutôt une aide au rapprochement des nations".

Maybe the standpoints of the different writers on this question are not so divergent as they appear at first sight. It is quite possible that Gidel et al. have paid somewhat too much attention to the erection of installations in places where there is busy shipping traffic. They express opinions on the building of a bridge across the Channel, auxiliary works to be set up in the Channel for building a Channel tunnel, installations for the salvage of wrecks, stations for wireless telegraphy and telephony, deep sea research stations, cable stations, rescue stations and airports anchored in the sea [1]. All these projects were intended to be carried out at places where there has been from time immemorial an extensive shipping traffic.

In view of this fact one is justified in assuming that the establishment of oil wells in the open sea in places where there is little or no shipping traffic would not violate the principle of the freedom of the seas, provided adequate safety precautions were taken.

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[1] Gidel, L.c. at p. 486.

In any case the conditions reigning in each separate instance would be decisive as to whether a given drilling installation caused danger to shipping. While, therefore, the sinking of oil wells under the conditions indicated is not to be considered as contrary to present day International Law, it is to be foreseen that in the future development of International Law a wider place will have to be conceded to the interests engaged in the working of submarine regions.

The freedom of the seas doctrine grew and found universal acceptance at a time when the only economic interests which the open sea had for the various States were navigation and fisheries. With the rise of new economic interests and the discovery of new potentialities for exploitation in the open sea, the interests of the old and the new potentialities will need to be taken into account together, thus producing a compromise arrangement which will enable mankind to derive from the high seas all the benefits and usefulness therein existent. Even those writers who in the past were inclined to look with disapproval on any tendency to encroach upon the freedom of the sea are now empathic in warning against the exaggeration of the "tyranny" of the traditional occupation [1].

When dealing with this subject, the International Law Commission concluded that "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" [2].

This entails that the right of free navigation as well as the right of free fishing in principle has remained unaffected. No objections to this were voiced by any of the members of the Commission [3]. Naturally with the erection of such works and

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[1] Gidel. "La platforma continental ante del derecho" (lectures delivered in the University of Valladolid. 1951 at p. 161).
"The concept of freedom of the high sea has now lost the absolute and tyrannical character imposed upon it by its origin as a reaction against claims to territorial sovereignty over the high seas".
Published by the University of Valladolid and translated from the unpublished French original by Dr A. Herrero. Reviewed in American Journal of International Law, 1952 at p. 167.

[2] Article 3 of the International Law Commission's final draft articles. United Nations Doc. A/CN.4/L. 31 Add. 1. Also see Appendix at p. 156.

[3] United Nations Doc. A/CN.4/SR. 67.

installations as are necessary for the extraction of petrol and other minerals, certain problems before non-existent — will now arise — and it will fall to International Law to regulate these new problems either on the basis of existing rules extended to cover new ground, or by creating new ones capable of meeting the requirements.

Of these problems the more important at the moment appear to be the case of safety zones round installations and the creation of artificial islands.

With regard to safety zones, the question of territorial waters round artificial islands and lighthouses is far from settled in International Law, but whatever may be the existing or future law on the subject, it is clear that such works and installations as are erected on the surface of the sea in connection with the exploitation and exploration of the sea-bed and subsoil, are not entitled — and probably ought not to be entitled — to territorial waters and/or submarine areas of their own. They are on the high seas as licensees, as it were, by dint of a liberal interpretation of a hitherto rigid principle.

The attitude adopted by the International Law Commission in this respect, corresponds closely to this opinion. During the deliberations, it was suggested that "the works and installations established in the waters in question for working the soil do not have territorial waters, special safety zones can be claimed for them though" [1].

In the final draft articles submitted to States for comments, it was stated:

> "Such installations shall not have the status of islands for the purpose of delimiting territorial waters, but to reasonable

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[1] United Nations Doc. A/CN.4/SR. 69 at pp. 4—11. Mr Hudson expressed the belief that as installations established in the waters were temporary they should not have territorial waters. (at p. 11).
Vallat, in British Year Book 1946 at p. 338 states: "Claims may be made to new belts of territorial waters surrounding works established in the open sea. It is thought that, as in the case of lighthouses, there would be no foundation for such claims".

distances safety zones may be established around such installations, where measures necessary for their protection may be taken"[1].

It was further submitted[2] that a radius of 500 metres would be sufficient though it was not considered advisable to specify any definite figure.

The necessity for the creation of such zones is obvious as otherwise floating or anchored installations could easily prove a serious danger to navigation — all the more reason that this safety zone should be considered solely as a measure of protection and preserving order, and nothing more.

With regard to artificial islands, the coastal State will presumably be entitled to exercise what rights of control it exercises over other installations. Whether these rights would amount to sovereignty, it is not easy to say, though it appears highly improbable. In principle, as such an island would be likened to temporary fixtures, the coastal State could not claim sovereignty. As regards lighthouses this, though disputed, seems to be the more general tendency. Whatever the rights exercised over the island may be, it appears quite clear, at least at present, that it is entitled to neither territorial waters of its own nor adjoining submarine areas. So far no example of such an island being created seems to exist, though at one time in 1918 there had been question of creating one on reefs off the coasts of the United States[3].

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[1] Article 6 (2) United Nations Doc. A/CN.4/L. 31 Add. 1.
Also Article 6 (1)
"The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing. Due notice must be given of any installations constructed, and due means of warning of the presence of such installations must be maintained".

[2] Point 4 of the International Law Commission's comments on Art. 6 of their draft articles. See Appendix at p. 156.

[3] Letter addressed to Mr Frank R. Newton by the Second Secretary of State (Adee) dated September 10, 1918. M. S. Department of State, file 312.II/8645. Also Hackworth, Digest of International Law, vol. II, p. 679.
"The Department is in receipt of your letter of August 20, 1918, concerning the alleged discovery of a large oil pool in the Gulf of Mexico about 40 miles from land on a reef where the water is less than 100 feet deep. With regard to this matter, you ask on behalf of yourself and other interested

Perhaps a few words ought to be added with regard that other problem of considerable practical importance, namely that of pollution. Strictly speaking, this subject does not appertain to the freedom of the high seas but notwithstanding this it is through pollution mainly that the freedom of the open sea stands to suffer the most with regard to fisheries.

The danger of pollution of the sea through the exploitation of natural resources of submarine areas is a matter of great practical importance due to the fact that the waters above these areas have been proved to be the favorite resort of marine species used for human food, and furthermore their main place of reproduction.

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parties whether it would be possible to acquire property or leasehold rights to this tract of ocean bottom so as to be protected in an effort to obtain oil from this pool. You suggest that an artificial island, might be erected and inquire whether such island could be brought under the jurisdiction of the United States and whether it could protect your rights by giving you a lease to the property. You further suggest that, if protective rights could be acquired by individuals, you would be willing to turn your discovery over to the Government for a consideration and allow the United States to operate the oil well.

In reply the Department informs you that the United States has no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast. Therefore, it does not appear possible for the United States to grant you the leasehold or other property rights in the ocean bottom which you desire.

The Department further informs you that, unless the erection of an artificial island interfered with rights of the United States or of its citizens, or formed the subject of a complaint made upon apparently good grounds by a foreign government, it is not likely that this Government would object to the creation by American citizens of such an island as you suggest. The Department is not in a position to procure information from other nations as to their attitude toward such a project, but it would seem that no foreign government could interfere with the erection of an artificial island in the Gulf of Mexico unless its interests or the rights of its citizens were injuriously affected thereby.

It may also be observed, although the Department can give no assurances on the subject, that it would seem possible that, if an island were constructed 40 miles from the coast of the United States by the efforts of American citizens and inhabited and controlled by them in the name of the United States, this Government would assume some sort of control over the island. However, it would seem that some special action by the President and Congress would be necessary to this end. If the island were erected and if the United States assume control over it, it would be possible to take such steps as were necessary to protect the rights of the occupants.

Any accidental or negligent escape of petroleum in or around places where wells have been sunk, may easily result in a complete destruction of the vegetable growth existent on the sea-bed, with the result that fish could no longer subsist in such areas. Even in the case of no leakage or spilling, considerable damage can be caused merely through toxic matters being carried far from the actual area of exploitation by currents.

For these reasons it is considered advisable that certain precautions of an obligatory nature should be taken by the exploiting State.

Special attention to this problem was paid in the agreements concluded between the United Kingdom and Venezuela on the Gulf of Paria, which shows clearly that should States interested themselves, either individually or collectively by treaty, take the necessary precautions, damage to edible fish need not necessarily result.

There is no excuse, or reason, why the exploitation of a given resource existing in areas appertaining to the high seas, should result in the destruction of one other resource.

The International Law Commission only dealt with this subject in a brief and unsatisfactory manner. Article 6 (f) [1] of their draft articles deals with it. It was probably felt that as the State exploiting the mineral resources off its coasts is the same State interested in the fisheries existent in the same area, that same State in its own interest would take all necessary precautions to protect and preserve such fisheries. This, though, is not always the case, as underwater currents may carry poisonous substances far from the actual area of exploitation and thereby cause damage to the fishery resources lying off some other States' coasts or existing far out in areas of the high seas.

For this reason, amongst others, it is considered preferable that States benefiting from the mineral resources deriving from adjoining submarine areas, ought to be obliged to accept and put into effect a certain minimum standard of precautions agreed to beforehand

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[1] For text see footnote [1], under p. 119.

by all other nations interested in the preservation and protection of the natural wealth existant in the high seas.

This is thought a necessary step, as with the passing of years and gradual development of the technical ability of man, ever-increasing resources necessary to mankind are sought from the vast areas appertaining to the open sea. Some coordination, therefore, must exist with respect to the exploitation of these various resources, which, though as yet not too numerous, in years to come will most certainly augment, and it is considered a criminal waste, should the exploitation of every new product discovered entail unjustifiable damage and destruction to some other product equally useful though of a different nature.

CHAPTER VII

Judicial decisions and Arbitrations

So far two arbitral awards exist on the subject of Submarine Areas outside territorial waters.

In both these cases States [1] in the Persian Gulf were involved and this is not surprising as the shallow depth of the waters throughout the Gulf makes exploitation possible beyond the three mile limit even at this early stage, and furthermore rich oil deposits have been reported to exist in these areas.

These two decisions deal mainly with the problems arising out of pre-existing concessionary agreements between Sheikhdoms and Oil Companies, the rulers of the former authorising the latter to exploit certain resources existing on their territories.

This particular problem is but one of many, but these decisions go much further than just "laying the law" in a matter of conflicting interests. In themselves these awards constitute a proof of the very existence and acceptance of a legal basis to claims over the sea bed and its subsoil adjacent to a State's marginal belt.

Section 1. General Facts

The various Sheikhdoms in the Persian Gulf have been in special treaty relations for a century or more with the British Government, which, as the protecting Power, exercises extra-territorial jurisdiction by Orders in Council over British nationals

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[1] Qatar, in February 1950 and Abu Dhabi in March 1951.

in these States, controls the Sheikhs foreign relations and approves both their concessions and their concessionaries.

As the whole area had been found to be rich with oil, the rulers of these small States had by contract given concessions to Oil Companies well before the war for exploitation of what resources could be found on their respective territories.

The ruler of Qatar had already signed such a concessionary agreement with a British Oil Company in 1935, the ruler of Abu Dhabi and others followed in 1939.

The majority of these agreements contain a similar clause as to that which is to be found in the Abu Dhabi agreement, namely, that the concession covers the whole of the signatory rulers' land territories as well as the coastal waters appertaining to such land. Some, though, of these agreements did not go into such detail, but merely stated "within the area of the Sheikh's rule as marked on the map". This was the case in the Qatar concession.

Soon after President Truman's Proclamation, on the advice of the British Government, the Sheikhs advanced claims to the submarine areas adjacent to their territorial waters [1]. These claims followed a pattern similar to that of other British inspired declarations and are practically indentical as between themselves [2] in language.

Following this action the Sheikhs, in an effort to exclude these newly acquired areas from the old agreements, sought to make new agreements with other Oil Companies, preferably American ones.

The Oil Companies which were parties to the older agreements objected to the Sheikhs alienating thus rights to exclusive exploitation over the Submarine Areas, for they considered that these new areas came under the old agreements and therefore the Sheikhs could not claim themselves free to dispose of what they actually had disposed of years ago.

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[1] See pp. 32—34.
[2] See pp. 31—33 and for text see Appendix at p. 150.

In all the old agreements a certain clause exists which obliges the signatory parties, in the case of a dispute arising as to the interpretation of the agreement or any matter arising therefrom, to refer the dispute to Arbitrators.

Accordingly this was done when the first dispute arose in 1949 between the ruler of Qatar and Petroleum Development (Qatar) Ltd. The Arbitration was held at Doha in the State of Qatar in the presence of three Arbitrators during the month of February 1950.

Each party chose one Arbitrator and the Arbitrators agreed as to the Third [1].

Section 2. The Qatar Arbitration

The main question in dispute was the extent of the area that was subject to the rights granted by the 1935 Concession.

Various questions immediately arose in connection with this Concession, the main ones being as to whether the Concession would be considered a treaty, or analogous to one, or just a simple commercial agreement. Also whether it ought to be construed in accordance with International or Municipal Law, and if by municipal law, by what municipal law, Islamic or English.

These questions were left unanswered to the greater extent, though from the Award one could perhaps conclude that a compromise was reached.

During the course of the hearings, it was agreed that the precise questions in dispute as to the extent of the area which is subject to the rights granted to the Company by the Concession should be stated as follows, subject to two points which are mentioned below:

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[1] The Company appointed as its Arbitrator Sir Walter Turner Monckton. K.C.M.G., K.C.V.C., K.C., M.C., and the Sheikh appointed as his Arbitrator Norman Fox-Andrews, K.C.
The two Arbitrators appointed as third Arbitrator the Right Honourable. The Lord Radcliffe, G.B.E., a Member of His Majesty's Privy Council.

1. Whether the Concession includes islands over which the Sheikh rules and which are shewn on the map attached to the concession.
2. Whether the Concession includes islands over which the Sheikh rules and which are not shewn on the map.
3. Whether the Concession includes the bed and subsoil of all the inland or national waters of the mainland of Qatar and its islands.
4. Whether the Concession includes the sea-bed and subsoil beneath the territorial waters of the mainland and its islands.
5. Whether the Concession includes the sea-bed and subsoil beneath the high seas of the Persian Gulf contiguous with such territorial waters, which sea-bed and subsoil are more particularly mentioned in the Proclamation issued on June 8th, 1949, by the Sheikh.

Though at the beginning this had not been the Sheikh's Arbitrators attitude, during the hearings he placed on record that he did not dispute:

a. that the Concession includes islands over which the Sheikh rules which are shewn on the map attached to the Concession if and as far as any such island lies to the north of the line drawn on the map,

b. that the Concession includes any lakes and rivers of Qatar, whether shewn on the map or not, if so and so far as any such lake or river lies to the north of the aforesaid line.

Concerning the five points enumerated above, the Sheikhs Arbitrator and the Company's Arbitrator maintained conflicting views.

The main arguments employed by the Sheikh's Arbitrator were:

That the Concession was worded to cover the whole of the State and therefore is applicable only to dry land. This is so because the Concession did not operate as a treaty in International Law but merely as a contract, and therefore is only applicable to what is specifically mentioned.

As regards the value as evidence of the map attached to the Concession, the Sheikh's Arbitrator seemed to consider that the Company could have no claim to any islands or other parts of the mainland that did not figure there on.

The Company's Arbitrator on the other hand argued that the Concession was not a contract pure and simple, for although it was not a treaty in the technical sense of the word, it was more than a contract, as a private contract may be of greater importance to a State than a treaty, especially when it touches, as here, the State's vital interests. Furthermore, when, even in a private contract, an expression is used which is taken from International Law and has a special meaning in International Law, it must be decided with that particular meaning. The Concession was worded to cover the territory over which the Sheikh rules, therefore islands and territorial waters being considered in International Law to be part of State territory, come under the Concession.

Furthermore, although at the time of the signature of the Concession neither Party thought of submarine areas, the wording of the 1949 Proclamation does cover them and is declarative, as these areas existed already in 1935, even though only proclaimed part of the State territory in 1949.

Even should the Proclamation be considered as not declarative but constitutive, then again the Company was entitled to the submarine areas because of the rule of International Law that when a State acquires new territory, pre-existing treaties covering the whole of the State's territory, will apply and cover the new parts too.

To this the Sheikh's Arbitrator answered that in 1935 it would have been considered contrary to International Law to proclaim sovereignty without actual occupation. He also went on to say that it would be absurd to consider the Concession applicable to any land Qatar obtained in the future.

Due to this obvious divergence of opinion between the Company's and be Sheikh's Arbitrators on these five points, it became the duty of the Third Arbitrator, to decide in each case what was to be the award of the majority of Arbitrators.

It is obvious that in so doing he considered the evidential value of maps, in International Arbitrations, to be very poor.

The reasons underlying his decisions are not known, it may be he considered the Company Arbitrator's arguments more consistent with International Law, or it may be he found them more consistent with accepted usages, or again it is possible that he disagreed with the arguments evoked by both parties [1].

His final decision which was that of the majority was that the 1935 Concession must be understood to include:

1 & 2. All islands over which the Sheikh ruled at the date of the Concession, whether shewn on the attached map or not.

3. The bed and subsoil of all the inland or national waters of the mainland of the State of Qatar insofar as it lies to the north of the line drawn on the map, and of all the islands mentioned in 1 & 2 above.

4. The sea-bed and subsoil beneath the territorial waters of the mainland insofar as it lies to the north of the aforesaid line, and of the islands already mentioned.

5. Concerning submarine areas contiguous to Qatars' territorial waters, the Third Arbitrator was of the opinion that these areas were obviously not meant to be included in the Concession at the time of *its* signature, and therefore could not be considered as included — and he so decided [2].

Section 3. The Abu Dhabi Arbitration

The hearings of this case took place in Paris during the month of August 1951 [3], with Lord Asquith of Bishopstone acting as sole Arbitrator. The main issues were:

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[1] Lord Radcliffe appears to have been instructed whilst acting as umpire, to apply principles of law recognised by civilised States.

[2] *It is possible this decision was based on the principle of restrictive interpretation of treaties "in dubio mitius".*

[3] The Economist, September 1, 1951 at p. 512 and Stephenson, in International Law Quarterly, 1951 at pp. 503—506.

1. At the time of the agreement of January 11, 1939, (written contract in the Arabic language) did the Sheikh own the right to win mineral oil from the subsoil of the sea-bed subjacent to the territorial waters of Abu Dhabi?
2. If so, did he by that agreement transfer such right to the Petroleum Development Company?
3. At the time of the agreement did the Sheikh own (or as the result of a proclamation of 1949 did he acquire) the right to win mineral oil from the subsoil of any, and if so, what, submarine area lying outside territorial waters?
4. If so, was the effect of the agreement to transfer such original or acquired rights to the claimant company? (The Sheikh in 1949 — 10 years after this agreement — purported to transfer these last rights to an American Company, the Superior Corporation, which the Petroleum Development Company claim he could not do, since he has already 10 years earlier parted with these same rights to themselves.

Furthermore the Arbitrator had been requested by both parties, to express a view both on question 3 and on question 4, even if, owing to the answer given to one of these questions, the other should become academic, and the view expressed upon it at best an *obiter dictum*.

The 1939 Contract

The terms of this agreement which are relevant to the determination of these questions are:

"Art. 2 (*a*) The area included in this Agreement is the whole territory subject to the rule of the Ruler of Abu Dhabi and its dependencies, and all the islands and territorial waters. And if in the future there should be carried out a delimitation of the territory belonging to Abu Dhabi, by arrangement with other governments, then the area (of this Agreement) shall coincide with the boundaries provided in such delimitation,

(*b*) If in the future a Neutral Zone should be formed adjacent to the territories of Abu Dhabi and the rights of rule over such Neutral Zone be shared between the Ruler of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include all the mineral oil rights which belong to him in such Zone,

(c) The Company shall not undertake any works in areas used and set apart for places of worship or sacred buildings or burial grounds".

"Art. 3 The Ruler by this Agreement grants to the Company the sole right, for a period of 75 solar years from the date of signature, to search for, discover, drill for and produce mineral oils and their derivatives and allied substances within the area, and the sole right to the ownership of all substances produced, and free disposal thereof both inside and outside the territory: provided that the export of oil shall be from the territory of the Concession direct without passing across any adjacent territory. And it is understood that this Agreement is a grant of rights over oil and cannot be considered an occupation in any manner whatsoever".

"Art. 12 (*a*) The Ruler shall have right at any time to grant to a third party a Concession for any substances other than those specified in Art. 3, on condition that this shall have no adverse effect on the operations and rights of the Company".

"Art. 17 The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner ..." [1].

During the hearings the Arbitrator successively examined the following 7 points, and on the basis of his findings on each of these questions, he delivered his final award.

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[1] Award of Lord Asquith of Bishopstone in the matter of an Arbitration between Pertroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi; International Law Quarterly, 1952 at pp. 248—250.

a. *what was the true translation of the Agreement in question?*

Certain differences were found to exist in the translations presented by the two parties. Such discrepancies, however, as did exist between the two translations were fortunately not of a serious nature, and the claimants were willing for purposes of argument to accept the translation put forward on behalf of the respondent.

b. *what could be considered the "Proper Law"?*

By which is meant the law applicable in interpreting the Agreement. It was considered a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But the Arbitrator considered that no such law could be reasonably said to exist, and this because the Sheikh administers a purely discretionary justice with the assistance of the Koran, and no permanent body of laws can be claimed to be in existence.

Article 17 of the Agreement, repels the notion that the municipal law of any country, as such, could be appropriate. The terms of the clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations. On the basis of this, the Arbitrator stated:

> "I do not think that on this point there is any conflict between the parties ... The English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere indiosyncrasy of our system, but a principle of ecumenical validity".

c. *what construction ought to be placed on those provisions of the Agreement which are the subject matter of the dispute should no regard be paid either 1) to the so-called doctrine of the Continental Shelf or, 2) to the negotiations leading up to its signature?*

The point here is to consider what construction the words of the contract (in particular those of articles 2 and 3, which are crucial) would bear if:

1. no regard were had to the doctrine of the Continental Shelf, and
2. no regard were had to the negotiations preceeding the Agreement or to the correspondence, accompanying it.

Article 3 refers to "the sole right", which is a right to win petroleum from the "area" in question. Article 2 describes the area and it includes "... and all islands and sea waters which belong to that area".

> The Arbitrator then proceeded: "I should have thought this expression could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three-mile belt; together with its bed and subsoil, since oil is not won from salt waters. ... That is the meaning the claimant company were asserting for the expression as late as March 1949, ten whole years after the contract. I therefore hold or find that the subsoil of the territorial belt is included in the Concession. Neither the ambiguity, if any, of the word "and" nor any of the considerations dealt with hereafter affect this conclusion.
> In particular I cannot accept the argument put forward for the respondent that sea waters are merely "included" as a means of access to dry land, whether mainland or insular" [1].

Later whilst still dealing with this point the Arbitrator maintained:

> "The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the words of Bynkershoek or not".

This was in answer to the plea advanced on behalf of the Sheikh, that 12 years ago when signing the contract it was not common knowledge that States possessed a belt of territorial waters

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[1] Loc. cit., at p. 252.

over which they could exercise sovereignty. The Arbitrator then continued:

"... I should certainly in 1939 have read the expression "the sea waters which belong to that area "not only as including, but as limited to, the territorial belt and its subsoil. At that time neither contracting party had ever heard of the Doctrine of the Continental Shelf, which as a legal doctrine did not then exist.
Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even today admitted to the canon of international law" [1].

d. what is the substance and history of the doctrine of the Continental Shelf?

Here the Arbitrator gave a brief exposure of the developments achieved since 1945, summarising State action and stressing the fact that no protests were registered by other members of the family of Nations.

e. is it an established rule of International Law?

The Arbitrator appeared reluctant to admit this, he argued that "Neither the practice of nations nor the pronouncements of learned jurists give any certain or consistent answer to many (the various uncertainties attached to the Shelf conception) — perhaps most of these questions. I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of International Law".

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[1] Loc. cit., at p. 253.

He then continued to state himself in favour of the "*ipso jure*" variant of the doctrine and referred to the International Law Commission's work on the subject and in particular their Draft Articles 1, 2, and 3. On these the Arbitrator finally stated:

> "I therefore cannot accept these Articles as recording, or even purporting to record, established rules, and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939".

f. if it were, would it operate in any, and if so, what way to modify the construction of the contract which would prevail in its absence?

The claimants' primary contention was that the doctrine of the Continental Shelf has become settled law, and that it always was so. Therefore concluding that it was so in 1939 also. To this purpose the meanings of certain expressions in the Agreement were enlarged by the inclusion therein of the Shelf. For instance, in Art. 2 either the expression "the whole of the lands which belong to the rule of the Ruler ..." or the expression "and the sea waters which belong to that area", are so enlarged by the inclusion of an area in this case measuring over 10.000 square miles of extra-territorial marine subsoil.

In answer to these contentions, the Arbitrator answered:
"The argument falls to the ground if I am right in rejecting the premise on which it rests, namely, that the doctrine of the Shelf has become and, indeed, was already in 1939, part of the corpus of international law".

The claimants, though, had also relied on another argument, namely, on the proviso to Art. 2 which says that "if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area ... (of the Concession) "shall coincide with the limits specified in this definition". The

claimants argued that the Concession is, by these words, expressly to extend to any after-acquired area of Abu Dhabi, and that the effect of the proclamations of 1949, if not retrospective, cannot be less than to add the Shelf to the area originally covered as from the date when the proclamations were promulgated. This argument also failed as in the opinion of the Arbitrator:

> "... the premises on which it rests is invalid; but I think it would fail independently of that since there had been no definition of anything" by agreement with other States "and I should have thought in any case that the definition referred to was limited to one affecting dry land, whether epirot or insular".

g. *if not, did the negotiations leading up to the execution of the contract have any such modifying operation?*

Here the conversations held prior to the signature of the 1939 contract between the Sheikh and the Company, were examined and finally the Arbitrator held:

> "... I am of opinion that the *prima facie* construction of the Agreement, which in my view excludes from the Concession the Shelf, is not modified so as to include it by the (in my view incompletely established) doctrine of the Shelf itself".

Conclusion

The final award was to the effect that the claimants (the Company) succeeded as to the subsoil of the territorial waters, including such waters appertaining to islands, whilst the Sheikh succeeded as to the subsoil of the Continental Shelf; the former being considered as included in the Concession whilst the latter was not.

Though the result reached in the Abu Dhabi case closely corresponds with that reached by Lord Radcliffe in the Qatar case, on other facts and a different agreement, it is understood that the Abu Dhabi Award is more likely to be considered a precedent

in future cases, and this because the remaining agreements in existence between other Sheikhs of the Persian Gulf and Oil Companies are reputed likewise to contain clauses with specific reference to "sea waters".

It is regrettable that in the Qatar case, the Arbitrator bad been requested merely to record his conclusions instead of expounding the principles on which he had reached them as had later been the case in the Abu Dhabi Arbitration, from which invaluable and authoritative guidance can be derived due to the very clear exposition made by Lord Asquith.

CHAPTER VIII

Sovereignty over the Continental Shelf and adjacent submarine areas generally - as part of Customary International Law

To this date more than thirty States have put forward claims to jurisdiction and control, or sovereignty, over submarine areas lying beyond the traditional limits of their territorial waters. It is clear from these various State enactments, that to a great extent the later proclamations and declarations relied on — and most of them referred to — the earlier ones as proof that their claims were based on a right already established in international practice by the previously taken action of those first States.

Examples of this are to be found in almost all the South American enactments. The same with regard to the Saudi Arabia declaration, though here in a somewhat milder form — "various other States now exercise jurisdiction over the subsoil and sea bed of areas contiguous to their coasts" — and the British-Protected Sheikhdoms of the Persian Gulf, — "Whereas the right of a littoral State to exercise its control over the natural resources of the sea-bed and subsoil adjacent to its coasts has been established in international practice by the action of other States".

It appears evident that many States interpreted the first claims to Continental Shelf areas, as establishing a clear and continuous habit of doing certain actions, and this, coupled with the tacit consent of other States, was taken to create the Continental Shelf concept as a Customary rule of International Law. How far this

assumption was, and is correct, is the question with which today we are faced.

As it stands at present, the Shelf doctrine is the result of a series of unilateral acts, admittedly of some importance though, as these can be said to belong to the category of declarations, the applicability of which is not exclusively for internal use, and therefore capable of producing an effect in the international sphere and notably in International Law. The only example of a bilateral act in which submarine areas are concerned, is that of the Anglo-Venezuelan Treaty of 1942, on the Gulf of Paria.

On the basis therefore of the existing practice with regard the Continental Shelf, it is essential to determine whether a positive rule has been established, and if so whether this rule could be classified as one of Customary International Law.

For this purpose, the following facts must be kept in mind:

a. that the principle maritime Powers inaugurated the development, and their initiative was treated as authoritative almost as a matter of course from the outset.

b. that although the question has only recently arisen and has only been the subject of contemporaneous study, the large number of proclamations that exist constitute a starting point for the formulation of positive law. Certain rules have already been established and the practice followed is becoming a custom.

c. that no protest has yet been lodged against the Proclamations — at least not in so far as they relate to the legal status of the subsoil and sea-bed of the Continental Shelf.

There is no doubt that in a matter of creation of new rules of Customary International Law the relative importance, in any particular sphere, of States inaugurating the change is of the greatest importance. Here the principle maritime Powers inaugurated the development. These States have traditionally been attached to the principle of the freedom of the seas and the customary limit of territorial waters.

Unilateral declarations by traditionally law abiding States within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other States, may properly be regarded as providing such proof of conformity with law as is both creative and constituting evidence of it.

It may be argued that sufficient time has not yet lapsed from the date when the Continental Shelf doctrine was first formulated to justify it being considered today as Customary International Law.

This is not so, though, as the length of time within which the customary rule of International Law comes into fruition is irrelevant.

In the language of the International Court of Justice in the Asylum Case [1] — "a consistent and uniform usage practised by the States in question" the „international custom as evidence of a general practice accepted as law" (art. 38 of the Statute) — need not be spread over decades [2].

Any tendency to exact a prolonged period for the crystallisation of custom must be proportionate to the degree and the intensity of the change that it purports, or is asserted to affect.

In the doctrine of submarine areas, absence of protest may be considered as a relevant factor. It may be interpreted as meaning that States "accepted as Law" — i.e. as being in conformity with the existing law — the practice of those States interested, relating to submarine areas. Furthermore the absence of protest may, in itself, become a source of legal right inasmuch as it is related to — or forms a constituent element of — estoppel or prescription. It is of course true to say that the absence of protest is irrelevant if

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[1] Reports 1950. p. 276.

[2] During the International Law Commissions' 67th meeting, Mr. Yepes expressed the opinion "that proclamation (U.S.) and those measures (later Proclamations) could be considered, if not as a veritable customary law in the sense already given, to that expression by the Commission, at least as an embryonic customary law. There was, as the Commission had decided, no need at all for the practice to date back a long time. It was sufficient for States to recognize it as constituting law and for it to have aroused no protests from other States". United Nations Doc. A/CN.4/SR. 67.

the action of the State claiming to acquire title is so wrongful in relation to any particular State or so patently at variance with general International Law, as to render it wholly incapable of becoming the source of a legal right — ab injuria jus non oritur. There are acts which are so tainted with nullity — ab initio — that no mere negligence of the interested State will cure them [1].

Concerning the Continental Shelf and adjacent submarine areas generally, the absence of protest is expressive of the fact that, in the view both of the States declaring the title and the States which have acquiesced in it, that action was not inconsistent with existing law, and although it may have inaugurated a new practice it did not inaugurate new law.

Apart from this, certain unilateral acts on the part of sovereign States, far from being inconsistent with International Law, tend often to develop into rules of customary International Law through gradual acceptance by other members of the family of Nations.

This subject belongs to the technical field of International Law, and has been very little studied [2]. Jurists so far have been inclined to examine and draw conclusions from bilateral or multilateral acts, and it has been but rarely that works appeared on the significance and value of unilateral acts in the international sphere.

J. W. Garner is among these few, and the "Wörterbuch" of Strupp in Germany in which appears an article by Rödiger on the subject [3], Pflüger [4] in Switzerland and Biscottini [5] and de Cansacchi [6] in Italy, have also approached the subject. With the exception, though, of these works, which constitute the only manifestation of juridical research on this question, general works on International Law only mention this subject in a passing manner, if at all.

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[1] Guggenheim, in Hague Recueil, 74, 1949 (I) at pp. 195—263.
[2] J. W. Garner, in American Journal of International Law 1933; "The international binding force of unilateral oral declarations". at pp. 493—497.
[3] Völkerrechtliche Notification, III, at p. 195.
[4] Die einzeitigen Rechtsgeschäfte im Völkerrecht. Zürich, 1936.
[5] La manifestazioni unilaterali di volontà nell'ordinamento internazionale, 1946.
[6] La notificazione internazionale, 1943.

In 1871, the Supreme Court of the United States, declared in the famous case [1] of collision between the Scotia (British) and the Berkshire (American):

> "Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which when generally accepted became of universal obligation".

In point of fact, declarations like those of the President of the United States or later declarations, are such as can have force of law in the international sphere since they do not come under the head of declarations of purely domestic application [2].

Furthermore, though jurists tend to disagree amongst themselves as to which elements are traditionally accepted as constitutive of Customary International Law, one derives from their writings the impression that such elements as are present in the claims to shelf areas, and the manner in which these claims were advanced, meet and satisfy the requirements elaborated by the greater number of these writers. For instance, Professor Strupp [3] maintains that customary law is essentially a relative type of law, "La coutume ne derive que des actes accomplis par un organe d'Etat ayant compétence Internationale". This definition strictly of a positivist character, is very narrow in scope, but in reaction against it, a further definition was developed by other writers; of these the better known are, Professor Scelle [4] and L. Kopelmanas [5]. This latter concept goes to the other extreme and is dangerously extensive; "tout sujet de droit dans une collectivité quelconque, et notamment le simple particulier a competence pour élaborer la règle coutumière". Consequently customary law could be produced according to these writers, "par le comportement

[1] 14 Wall. 170.20 L. Ed. 822 (Hudson Cases 2nd ed. at p. 672).
[2] Lazare Kopelmanas, British Year Book 1937; Customs as a means of creation of International Law, pp. 127—151.
[3] Eléments du Droit International Public, trad. fr. 1927 at p. 12.
[4] "Précis", Tome II, at p. 306, and "Manuel" at p. 397.
[5] Customs as a means of the creation of international law (see footnote 2 above) and Essai sur les sources formelles du droit international, R.D.I., 1938 at p. 116.

effectif des individus, lorsque ces derniers peuvent prendre en main la défense de leurs intérets internationaux".

State practice conforms to neither of these two attitudes, *a priori*,

> "on peut resumer sur ce point l'état du droit en observant que les seuls actes générateurs de la coutume internationale, sont les actes émanés des organes juridiques ayant compétence dans l'ordre international et provénant selon les cas, d'organes étatiques ou d'organes interétatiques" [1].

Completely excluded, are certain unilateral declarations, which from their very nature and incapable of producing any legal effects in the international sphere. Such are declarations made by the head of a State for exclusive use within the State boundaries. But those legislative acts, which do bear on matters appertaining to the international sphere, are to be taken into consideration as they are capable of producing effects outside the promulgating State's boundaries, and, according to Triepel [2], it makes no difference whether these acts consist of laws, by-laws, enactments, decrees or regulations. These acts indicate the attitude adopted by one State with regard to other States, and in Rousseau's words [3]:

> "si la même attitude est adoptée par les lois, reglements ou ordonnances des autres Etats, on pourra en conclure qu'il existe sur le point consideré une coutume internationale, pourvu qu'il soit demontré qu'en prenant cette mésure l'Etat ait estimé qu'elle devrait être prise en vue l'établissement ou de la reconnaissance d'une règle de droit internationale".

In other words, "the legislative acts of a certain number of States can constitute proof as to the existence of a general practice, but this is only possible if it is established that these legislative acts conform with International Law" [4].

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[1] Rousseau, Tome I, at p. 845—846.
[2] Rousseau, Tome I, at p. 850.
[3] Rousseau, Tome I, at p. 850.
[4] H. O. Hudson, La Cour Permanente de Justice Internationale. Trad. fr. 1936 at pp. 617 in fine 618.

From the above study one comes to the conclusion that there exists no reason to exclude the Continental Shelf declarations and proclamations from that type of State activity, which produces effects in the international sphere and is regarded as creative of Customary International Law. Furthermore the conclusion of the above study is that there exists no principle nor rule of International Law, which is opposed to the doctrine and practice of the Continental Shelf and that of adjacent submarine areas generally. Concerning the practice, it has now, in any case, become part of International Law by unequivocal positive acts of some States, including the leading maritime Powers, and general acquiescence on the part of others.

Oppenheim-Lauterpacht [1], describes custom as a source of law as existing when "a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right".

All jurists are not in agreement with this definition but even should the entire writings of jurists be read, and the different schools of thought examined [2] and analysed, the conclusion would

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[1] 7th ed. vol. 1. at p. 25 sec. 17.

[2] ... According to older writers such as Grotius (De jure belli ac pacis, book 1. chap. 1, sect. XIV), custom is based upon the tacit and presumed consent of States. It is an integral part of the Law of Nations, and is created either through the will (volonté) of many States, (general customary law) or that of few States. (special customary law).
This theory was developed by Rachel (Dissertationes de jure naturae et gentium, Kiel 1676), for whom only the consent of a few States sufficed, provided these States were of the civilised world. Grotius' conviction was later shared by Bynkershoek (De foro legatorum, Chap. 18, sect. VI), Wolff (Jus Gentium, Prolog., sect. 25), Vattel (Le droit des Gens, Préliminaires, sect. 25—26) and in recent times Phillimore (Commentaries upon International Law, 2nd ed. London 1871, vol. 1, sect. 40—42), Westlake (Traité de Droit International, trad. de Lapradelle, Oxford 1921, sect. 15), and Lauterpacht—Oppenheim (International Law 7th ed. vol. 1 1948, at p. 24).
Other writers, such as Professor Triepel (Droit International et Droit Interne, Trad. fr. René Brunet, Paris 1920 at p. 89; Les rapports entre le Droit Interne et le Droit International, Rec. Cours Ac. D.I., 1923, at p. 82—83). Strupp (Elements de Droit International Public, 2nd ed. Paris 1930 vol. I, at p. 13), Anzilotti (Cours, at pp. 73—76), Cavaglieri (Corse di diritto Internazionale, 1st ed., Naples 1925 at p. 56), favour the positivist conception that custom is exclusively based upon the will of States manifested in a tacit manner. Thus, States adopt a certain attitude towards one another, and

be the same, namely that the Continental Shelf doctrine is based on a clear and continuous habit of doing certain actions. This habit, though only of recent origin, appears to have grown steadily, and States tend to express their conviction that these actions are in conformity with International Law.

Furthermore, the two Arbitration awards examined in the previous Chapter, notwithstanding the fact that of the parties involved only one in each case was a Sovereign Power and therefore a subject of the Law of Nations, in themselves constitute a proof as to the existence of a legal basis in claims to Submarine Areas and a precedent which will not pass unnoticed in international jurisprudence.

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to this certain attitude they attach the meaning of a promise, engaging themselves implicitly towards each other. And it is upon this tacit consent that resides the obligatory force of customary International Law. For these writers, custom thus founded, is better analysed, as a manner of expressing the common will of States (Vereinbarung).

Other writers again, such as Rivier (Principes du Droit des Gens, Paris 1896, vol. 1 at p. 36), Professor Scelle (Précis, vol. II at p. 298) and Règlade (Prospectives ... Rec. Gen. Dr. Int. Pub. 1930, at pp. 388—394), Le Fur (Précis, 4th ed., 1939 at p. 205) and N. Politis (L'influence de la doctrine de L. Duguit sur le developpement du Droit International, Archives de philos. du droit, 1932 at p. 73), consider that custom is supported by the social conscience of the group which it rules, and that therefore customary International Law corresponds rather to a common conviction than to an unformulated consent.

Lastly, for Professors Maury (Règles générales des conflits de loi, Rec. Cours Ac. D.I., 1936, III, at pp. 347—349 and 356), Basdevant (Règles générales du droit de la paix, ibid, 1936, IV, at pp. 513—514 and 516—520) and Balladore Pallieri, the basis of customary law can only be sought "dans les necessités de la vie sociale internationale — née des éxigences de la vie en commun des Etats".

Appendix

1. Text of the President's Proclamation of Sept. 28, 1945 as to the Natural Resources of the Continental Shelf

Whereas the Government of the United States of America aware of the long range world wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged;

and

Whereas its competent experts are of the opinion that such resources underlie many parts of the Continental Shelf off the coasts of the U.S.A., and that with modern technological progress their utilization is already practicable, or will become so at an early date;

and

Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken;

and

Whereas it is the view of the Government of the U.S.A. that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the Continental Shelf by the *contiguous nation* is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon co-operation

and protection from the shore, since the Continental Shelf may be regorded as an extension of the land mass nf the coastal nation and thus naturally appertenant to it, since these resources frequently from a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for the utilization of these resources;

Now, therefore, I, Harry S. Truman, President of the U.S.A., do hereby proclaim the following policy of the U.S.A. with respect to the natural resources of the subsoil and sea bed of the Continental Shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the U.S.A. regards the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas, but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

In cases where the Continental Shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles.

The character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected.

In witness whereof,

H. S. TRUMAN.

By the President, Dean Acheson, Acting S. S.

2. Executive Order of the President reserving and placing certain resources of the Continental Shelf under the control and jurisdiction of the Secretary of the Interior

September 28, 1945.

By virtue of and pursuant to the authority vested in me as President of the United States, it is ordered that the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes pending the enactment of legislation in regard thereto. Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the Continental Shelf within or outside of the 3 mile limit.

HARRY S. TRUMAN.

The White House,
September 28, 1945.

3. Declaration proclaiming sovereignty over the Epicontinental Sea and the Continental Shelf

October 9, 1946.

Whereas:

The submarine platform, known also as the submarine plateau or continental shelf, is closely united to the mainland both in a morphological and in a geological sense;

The waters covering the submarine platform constitute the epicontinental seas, characterized by extraordinary biological activity, owing to the influence of the sunlight, which stimulates plant life (as exemplified in algae, mosses, etc.) and the life of innumerable species of animals, both susceptible of industrial utilization;

The Executive Power, in Article 2 of Decree No. 1,386, dated January 24, 1944, issued a categorical proclamation of sovereignty over the "Argentine Continental Shelf" and the "Argentine Epicontinental Sea", declaring them to be "transitory zone of mineral reserves";

The State, through the medium of the Yacimientos Petroliferos Fiscales (Public Petroleum Deposits Administration), is exploiting the petroleum deposits discovered along the "Argentine Continental Shelf", thereby confirming the Argentine nation's right of ownership over all deposits situated in the aforesaid continental shelf;

It is the purpose of the Executive Power to continue, more and more intensively, its scientific and technical investigations relative to all phases of the exploration and exploitation of the animal, vegetable and mineral wealth, which offer such vast potentialities, contained in the Argentine continental shelf and in the corresponding epicontinental sea;

In the international sphere conditional recognition is accorded to the right of every nation to consider as national territory the

entire extent of its epicontinental sea and of the adjacent continental shelf.

Relying upon this principle, the Governments of the United States of America and of Mexico have issued declarations asserting the sovereignty of each of the two countries over the respective peripheral epicontinental seas and continental shelves (Proclamation of President Truman, dated September 28, 1945, and Declaration of President Avila Camacho, dated October 29, 1945);

The doctrine in question, aside from the fact that it is implicitly accepted in modern international law, is now deriving support from the realm of science in the form of serious and valuable contributions, according to the testimony offered by numerous national and foreign publications and even by official educational programs; and

The manifest validity of the thesis invoked above, as well as the determination of the Argentine Government to perfect and preserve all the attributes inherently bound up with the exercise of national sovereignty, make it advisable to formulate the declaration pertinent to this matter, thereby amplifying the effects of the aforesaid Decree No. 1,386.

The President of the Argentine Nation,
supported by a General Accord of the Ministers

Decrees:

Article 1. — It is hereby declared that the Argentine Epicontinental Sea and Continental Shelf are subject to the sovereign power of the Nation;

Article 2. — For purposes of free navigation, the character of the waters situated in the Argentine Epicontinental Sea and above the Argentine Continental Shelf, remains unaffected by the present Declaration;

Article 3. — The said Declaration shall be brought to the attention of the Honorable Congress, published, transmitted to the National Registry and filed.

BAHRAIN GOVERNMENT

4. Proclamation No. 37/1368, June 5, 1949

To whom it may concern:

Whereas it is desirable to encourage any efforts to facilitate the derivation of greater benefit from the natural resources of the earth, and

Whereas valuable resources exist beneath parts of the Persian Gulf near the shores of Bahrain, and it has become possible to derive increasing benefit from these submarine resources, and

Whereas it is desirable, for the purpose of conservation, preservation and orderly development, that extraction of these resources shall be regulated as necessity dictates, and

Whereas it is just that the sea bed and the subsoil extending a reasonable distance from the shore should belong to and be administered by the government of the adjacent coast, and

Whereas the right of any coastal government to exercise its sovereignty over the natural resources of the sea bed and the subsoil in the vicinity of its shores has been established by international practice through the action taken by other governments,

Accordingly, We, Salman Ibn Hamad al Khalifah, Ruler of Bahrain, by virtue of the powers vested in us in this respect, are pleased to issue hereby the following proclamation:

We, Salman Ibn Hamad al Khalifah, Ruler of Bahrain, hereby declare that the sea bed and the subsoil of the high seas of the Persian Gulf bordering on the territorial waters of Bahrain and extending seaward as far as limits that we, after consultation with the neighboring governments, shall determine more accurately in accordance with the principles of justice, when the occasion so requires, belong to the country of Bahrain and are subject to its absolute authority and jurisdiction.

There is nothing in this proclamation that may be interpreted as affecting dominion over the islands or the status of the sea bed and the subsoil underlying any territorial waters.

There is nothing in this proclamation that may be interpreted as affecting the character of the high seas in the waters of the Persian Gulf overlying the sea bed and beyond the limits of the territorial waters, or the status of the air space above the waters of the Persian Gulf beyond the territorial waters, or fishing, or the traditional rights of pearling in these waters.

SALMAN IBN HAMAD AL KHALIFAH
Ruler of Bahrain.

8 Sha'ban 1368
June 5, 1949.

5. The International Law Commission and the Continental Shelf

At the end of its third session, held in Geneva during the summer of 1951, the International Law Commission adopted a series of draft articles on the continental shelf and related subjects. The Commission decided that the drafts should be given publicity in accordance with the terms of its Statute and that they should be communicated to governments for comment.

While the articles of course have no binding force, they are of interest as being the first attempts by an official international body of jurists to formulate systematic principles in this field of growing importance.

The drafts reflect, indeed, a substantial measure of agreement among the members of the Commission with the exception of Professor Scelle who abstained from voting on the topic because of his expressed belief that the entire doctrine of the continental shelf was an unjustifiable infringement on traditional principles relating to the freedom of the seas.

The Commission sought to follow a middle way, sharing neither the views of Professor Scelle nor the enthusiasm of some others for radical innovations. It seems to have been moved by the feeling that, as a result of technological progress, a situation in fact existed which had to be dealt with, and that the best solution would be one which, while not going too far or too fast, would yet afford opportunity for future growth.

Draft articles on the continental shelf and related subjects[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 territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and subsoil.

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

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

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

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

[1] United Nations Doc. A/CN.4/L. 27 and A/CN.4/L. 31 9dd. 1.

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

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

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

8. It was noted that claims have been made up to as much as 200 miles; but as a general rule the depth of the waters at that distance from the coast does not admit of the exploitation of the natural resources of the subsoil. In the opinion of the Commission,

fishing activities and the conservation of the resources of the sea should be dealt with separately from the continental shelf.

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

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

Article 2

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

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

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

3. The Commission is aware that exploration and exploitation of the sea bed and subsoil, which involve the exercise of control

and jurisdiction by the coastal State, may to a limited extent affect the freedom of the seas, particularly in respect of navigation. Exploration and exploitation are permitted because they meet the needs of the international community. Nevertheless, it is evident that the interests of shipping must be safeguard, and it is to that end that the Commission has formulated Article 6.

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

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

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

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

Article 3

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

Article 4

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

The object of Article 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.

Article 5

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

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

2. The Commission considered whether this provision should be extended to pipelines. If it were decided to lay pipelines on the continental shelf of another country, the question would be complicated by the fact that pumping stations would have to be

installed at certain points, and these might hamper the exploitation of the subsoil more than cables. Since the question does not appear to have any practical importance at the present time, and there is no certainty that it will ever arise, it was not thought necessary to insert a special provision to this effect.

Article 6

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

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

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

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

3. The responsibility for giving notification and warning, referred to in the last sentence of paragraph (1) of this article, is

not restricted to installations set up on regular sea lanes. It is a general duty devolving on States regardless of the place where such installations are situated.

4. While an installation could not be regarded as an island or elevation of the sea bed with territorial waters of its own, the coastal State might establish narrow safety zones encircling it. The Commission felt that a radius of 500 metres would generally be sufficient, though it was not considered advisable to specify any definite figure.

Article 7

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

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

2. Where the territories of the 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.

Gulf of Paria.

Side view of the Continental Shelf.

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