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1953

Volume II

Documents of the fifth session including the report of the Commission to the General Assembly

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NOTE TO THE READER

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REPORT OF THE INTERNATIONAL LAW COMMISSION TO GENERAL ASSEMBLY

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Report of the International Law Commission covering the work of its fifth session 1 June-14 August 1953

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Chapter I

Introduction

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its fifth session at Geneva, Switzerland, from 1 June to 14 August 1953. The work of the Commission during the session is related in the present report which is submitted to the General Assembly.

I. Membership and attendance

2. The Commission consists of the following members:

Name	*Nationality*
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khouri	Syria
Mr. F. I. Kozhevnikov	Union of Soviet Socialist Republics
Mr. H. Lauterpacht	United Kingdom of Great Britain and Northern Ireland
Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

3. With the exception of Mr. Manley O. Hudson, w for reasons of health was unable to attend, all the me bers of the Commission were present at the fifth sessi Mr. Córdova attended the meetings of the Commis form 22 June, Mr. Spiropoulos from 10 June to 8 A gust. Mr. Pal ceased to attend meetings after 16 Ju and Mr. Hsu after 11 August.

II. Officers

4. At its meeting on 1 June 1953, the Commis elected the following officers:

Chairman: Mr. J. P. A. François;
First Vice-Chairman: Mr. Gilberto Amado;
Second Vice-Chairman: Mr. F. I. Kozhevni
Rapporteur: Mr. H. Lauterpacht.

5. Mr. Yuen-li Liang, Director of the Divisio the Development and Codification of Internati Law, represented the Secretary-General and acte Secretary of the Commission.

III. Agenda

6. The Commission adopted an agenda for the f session consisting of the following items:

(1) Arbitral procedure
(2) Régime of the high seas
(3) Régime of the territorial sea
(4) Law of treaties
(5) Nationality, including statelessness

2. In cases covered by paragraphs (a) and (c) of article 30 the application must be made within sixty days of the rendering of the award and in the case covered by paragraph (b) within six months.

3. The application shall stay execution unless otherwise decided by the Court.

Article 32

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal to be constituted by agreement of the parties, or, failing such agreement, in the manner provided in article 3.

Chapter III

Regime of the high seas

I. Introductory

58. At its first session held in 1949, the International Law Commission elected Mr. J. P. A. François as Special Rapporteur to study the question of the regime of the high seas. At its second session, held in 1950, the Commission considered a report (A/CN. 4/17) by Mr. François on the subject. In the report of the Commission submitted the same year to the General Assembly, at its fifth session,[5] the Commission surveyed the various questions falling within the scope of the general topic of the régime of the high seas such as nationality of ships, safety of life at sea, slave trade, submarine telegraph cables, resources of the high seas, right of pursuit, right of approach, contiguous zones, sedentary fisheries, and the continental shelf. On the basis of a second report of the special rapporteur (A/CN. 4/42) most of these questions were reviewed at the third session in 1951 at which, in addition, the Commission adopted draft articles on the continental shelf and the following subjects relative to the high seas: resources of the sea, sedentary fisheries, and contiguous zones.[6]

59. At its fifth session, the Commission examined once more, in the light of comments of governments, the provisional draft articles adopted at the third session. Final drafts were prepared on the following questions: (1) continental shelf; (ii) fishery resources of the high seas; (iii) contiguous zone. For reasons explained below in paragraph 71, the question of sedentary fisheries has not been covered in a separate article or articles. It is hoped that the other questions relating to the high seas may, in the course of the next few years, receive further study with the view to being embodied in drafts to be finally submitted to the General Assembly. The result will be the codification of the law covering the entire field of the regime of the high seas as well as proposals for the further development of that part of international law.

60. In its work on the subject the Commission derived considerable assistance from a collection, in two volumes, published in 1951 and 1952 by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat and entitled "Laws and Regulations on the Régime of the High Seas."

II. The continental shelf

A

Draft articles on the continental shelf

61. As stated above in paragraph 58, at its third session held in 1951 the Commission adopted draft articles, with accompanying comment, on the continental shelf.[7] Subsequent to the third session the special rapporteur re-examined these articles in the light of observations received from the following governments: Belgium, Brazil, Chile, Denmark, Ecuador, Egypt, France, Iceland, Israel, the Netherlands, Norway, the Philippines, Sweden, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Yugoslavia. The observations of governments are reproduced in Annex II to the present report. In March 1953, the special rapporteur submitted a further report on the subject (A/CN. 4/60). The Commission examined the report in the course of its fifth session at its 195th to 206th, 210th and 215th meetings.

62. The Commission adopted, at its 234th meeting, the following draft articles on the continental shelf:[8]

Article 1

As used in these articles, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

Article 2

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas.

Article 4

The rights of the coastal State over the continental shelf do not affect the legal status of the airspace above the superjacent waters.

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[5] See *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316), Part VI, Chapter III.

[6] See the report of the Commission covering the work of its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), Chapter VII and annex.

[7] *Ibid.*

[8] Mr. Kozhevnikov declared that, in voting for the draft articles on the continental shelf, he wished to enter a reservation in respect of articles 7 and 8, to which he was opposed in principle for the reasons he had stated during the discussion. Mr. Zourek declared that although he had voted for the draft as a whole, he was opposed to articles 7 and 8, for reasons he had explained during the discussion. Mr. Hsu and Mr. Scelle declared that they had voted against the draft articles on the continental shelf for reasons explained during the discussion.

Article 5

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not prevent the establishment or maintenance of submarine cables.

Article 6

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources and to establish safety zones at a reasonable distance around such installations and to take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or on recognized sea lanes essential to international navigation.

Article 7

1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.

Article 8

Any disputes which may arise between States concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties.

63. While adhering to the basic considerations which underlay the articles provisionally adopted in 1951, the Commission has now departed in various respects from its preliminary draft. It did so having regard to replies received from governments; the views enunciated on the subject by writers and learned societies; and its own study and discussion of the problems involved. The nature of these changes is indicated below in connexion with the comments on the articles as finally adopted.*

B

Comments on the draft articles

(i) *The concept of the continental shelf as used in the articles*

64. In defining, for the purpose of the articles adopted, the term "continentil shelf" as referring "to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres", the Commission abandoned the criterion of exploitability adopted in 1951 in favour of that of a depth of two hundred metres as laid down in article 1 of the present draft. The relevant passage of article 1 as adopted in 1951 referred to the area "where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil". Some members of the Commission favoured the retention of the text adopted in 1951 for the reason, *inter alia*, that it is more in accordance with the purpose of the draft not to adopt a fixed limit for the continental shelf but to let the territorial extension of the exercise of the powers given the coastal State depend on the practical possibilities of exploitation. The Commission, following the considerations adduced by the special rapporteur in the light of observations of certain governments, has come to the conclusion that the text previously adopted does not satisfy the requirement of certainty and that it is calculated to give rise to disputes. On the other hand, the limit of two hundred metres — a limit which is at present sufficient for all practical needs — has been fixed because it is at that depth that the continental shelf, in the geological sense, generally comes to an end. It is there that the continental slope begins and falls steeply to a great depth. The text thus adopted is not wholly arbitrary for, as already stated, it takes into account the practical possibilities, so far as they can be foreseen at present, of exploration and exploitation. Such unavoidable element of arbitrariness as is contained in that text is litigated by the rule formulated below in paragraph 66 which covers to a large extent the case of those States whose waters surrounding the coast reach a depth of two hundred metres at a very short distance form the coast.

65. While adopting, to that extent, the geographical test of the continental shelf as the basis of the juridical concept of the term, the Commission in no way holds that the existence of the continental shelf in its geographical configuration as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles. Thus, if, as is the case in the Persian Gulf, the submarine areas never

* Mr. Yepes voted against this paragraph of the report for reasons explained in the summary record of the 233rd meeting.

reach the depth of two hundred metres, that fact is irrelevant for the purposes of article 1. The limit there laid down is the maximum limit. It does not rule out from the operation of the articles shallow submarine areas which are contiguous to the coast and which do not attain the depth of two hundred metres. The Commission considered the possibility of adopting a term other than "continental shelf", seeing that in this respect as well as in the cases referred to in the following paragraph, it departed from the strict geological connotation of the term. However, it was considered that, in particular, the wide acceptance of that term in the literature counselled its retention.

66. Similarly, while adhering in general to the geographical description and characteristics of the continental shelf, the Commission envisages the possibility and the desirability of reasonable modifications, in proper cases, of the text thus adopted. Thus, although the depth of two hundred metres as a limit of the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in special cases in which submerged areas, of a depth less than two hundred metres, situated in considerable proximity to the coast are separated by a narrow channel deeper than two hundred metres from the part of the continental shelf adjacent to the coast. Such shallow areas must, in these cases, be considered as contiguous to that part of the shelf. It would be for the State relying on this exception to the general rule to establish its claim to an equitable modification of the rule. In case of dispute, it must be a matter for arbitral determination whether a shallow submarine area falls within the rule as here formulated. Some such modification of the general rule is necessary in order to meet the objection that the mechanical reliance on the geological notion of the continental shelf may result in an inequality of treatment of some States as compared with others.

67. The expression "continental shelf" does not imply that it refers exclusively to continents in the current connotation of that term. It covers also the submarine areas contiguous to islands.

(ii) *The nature of the rights of the coastal State*

68. While article 2, as provisionally formulated in 1951, referred to the continental shelf as "subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources", the article as now formulated lays down that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiding its natural resources". The formulation thus adopted takes into account the views of those members of the Commission who attached importance to maintaining the language of the original draft and those who considered that the expression "rights of sovereignty" should be adopted. In adopting the article in its present formulation the Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, safeguarding the principle of the full freedom of the superjacent sea and the airspace above it.

69. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and the exploitation of the natural resources of the continental shelf. These rights comprise full control and jurisdiction and the right to reserve exploitation and exploration for the coastal State or its nationals. Such rights include jurisdiction in connexion with suppression of crime.

70. The Commission decided, after considerable discussion, to retain the term "natural resources" as distinguished from the more limited term "mineral resources". In its previous draft the Commission only considered mineral resources, and certain members proposed adhering to that course. The Commission, however, came to the conclusion that the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term "natural resources". It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there. Nor do these rights cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the subsoil.

71. Neither, in the view of the Commission, can the exclusive rights of the coastal State be exercised in a manner inconsistent with existing rights of nationals of other States with regard to sedentary fisheries. Any interference with such rights, when unavoidably necessitated by the requirements of exploration and exploitation of natural resources, is subject to rules of international law ensuring respect of the rights of aliens. However, apart from the case of such existing rights, the sovereign rights of the coastal State over its continental shelf cover also sedentary fisheries. It may be added that this was the reason why the Commission did not think it necessary to retain, among the articles devoted to the resources of the sea, an article in sedentary fisheries. The Commission envisaged the possibility that shallow areas rendering possible the exploitation of sedentary fisheries may exist outside the continental shelf. However, that possibility was considered to be at present too theoretical to necessitate separate treatment.

72. The rights of the coastal State over the continental shelf are independent of occupation, actual or fictional, and of any formal assertion of those rights.

73. The Commission does not deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State. The considerations relevant to this matter cannot be reduced to a single factor. In particular, it is not possible to base the principle of the sovereign rights of the coastal State exclusively on recent practice for there is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned. However, that practice itself is considered by the Commission to be supported by considerations of legal

principle and convenience. In particular, once the sea-bed and the subsoil have become the object of active interest to States with the view to the exploration and exploitation of their resources, it is not practicable to treat them as *res nullius*, i.e., capable of being acquired by the first occupier. It is natural that coastal States should resist any such solution. Moreover, in most cases the effective exploitation of natural resources must depend on the existence of installations on the territory of the coastal State. Neither is it possible to disregard the phenomenon of geography, whether that phenomenon is described as propinquity, contiguity, geographical continuity, appurtenance or identity of the submarine areas in question with the non-submerged contiguous land. All these considerations of general utility provide a sufficient basis for the principle of sovereign rights of the coastal State as now formulated by the Commission. As already stated, that principle is in no way incompatible with the principle of the freedom of the sea.

74. While, for the reasons stated, as well as having regard to practical considerations, the Commission has been unable to countenance the idea of the internationalization of the submarine areas comprised in the concept of the continental shelf, it has not discarded the possibility of the creation of an international agency charged with scientific research and guidance with the view to promoting, in the general interest, the most efficient use of submarine areas. It is possible that some such body may be set up within the framework of an existing international organization.

(iii) *The sovereign rights of the coastal State and the freedom of the seas and of the airspace above them*

75. Some of the principal articles on the continental shelf as formulated by the Commission are devoted to the provision of safeguards for the freedom of the seas in relation to the sovereign rights of the coastal State over the continental shelf. Thus, articles 3 and 4 lay down that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters. These articles, which are couched in categorical terms, are self-explanatory. For the articles on the continental shelf are intended as laying down the régime of the continental shelf only as subject to and within the orbit of the paramount principle of the freedom of the seas and of the airspace above them. No modification of or exceptions from that principle are admissible unless expressly provided for in the various articles.

76. The same considerations apply to the sea-bed. Although the sea-bed is subject to the sovereign rights of the coastal State, for the purpose of the exploration and exploitation of its natural resources, the principle of the freedom of the seas and its legal status must be respected in that sphere, inasmuch as the coastal State must not prevent the establishment or maintenance of submarine cables by nationals of other States. That provision is designed to prevent either arbitrary prohibition or discrimination against foreign nationals. It is not otherwise intended to impair the right of the coastal State to take measures reasonably necessary for the exploration of the continental shelf and the exploitation of its natural resources. At a previous session the Commission considered whether this provision ought to be extended to pipelines on the continental shelf. Such pipelines might necessitate the installation of pumping stations which might interfere with the exploitation of the subsoil even more than cables. However, the question was considered too remote to require regulation for the time being.

77. While articles 3 and 4 lay down in general terms the basic rule of the unaltered legal status of the superjacent sea and the air above it, article 6 applies that basic rule to the main manifestations of the freedom of the seas, namely, the freedom of navigation and fishing. Paragraph 1 of that article lays down that the exploration of the continental shelf must not result in any unjustifiable interference with navigation, fishing or fish production. It will be noted, however, that what the article prohibits is not any kind of interference but only unjustifiable interference. The manner and the significance of that qualification were the subject of prolonged discussion in the Commission. The progressive development of international law, which takes place against the background of established rules, must often result in the modification of those rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved. To lay down, therefore, that the exploration and exploitation of the continental shelf must never result in any interference whatsoever with navigation and fishing might result in many cases in rendering somewhat nominal both the sovereign rights of exploration and exploitation and the very purpose of the articles as adopted. The case is clearly one of assessment of the relative importance of the interests involved. Interference, even if substantial, with navigation and fishing might, in some cases, be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf. While, in the first instance, the coastal State must be the judge of the reasonableness — of the justification — of the measures adopted, in case of dispute the matter must be settled on the basis of article 8 which governs the settlement of all disputes regarding the interpretation of application of the articles.

78. The same considerations apply and explain the provisions of article 6, in paragraphs 2 to 5, relating to installations necessary for the exploration and exploitation of the continental shelf as well as of safety zones around such installations and the measures necessary to protect them. They, too, are subject to the overriding prohibition of unjustified interference with freedom of fishing and navigation. Although the Commission did not consider it essential to specify the size of the safety zones, it believes that, generally speaking, a radius of five hundred metres is sufficient for the purpose. With regard to notice to be given, in accordance with paragraph 4 of article 6, of "installations constructed", the obligation in question refers primarily to installations already completed. There is in principle no duty to disclose in advance plans relating to contemplated construction of installations. However, in cases in which the actual construction of provisional installa-

tions is likely to interfere with navigation, due means of warning must be maintained in the same way as in the case of installations already completed and, as far as possible, due notice must be given.

79. With regard to the general status of installations it has been thought useful to lay down expressly, in paragraph 3 of article 6, that they do not possess the status of islands and that the coastal State is not entitled to claim for the installations any territorial waters of their own or to treat them as relevant for the delimitation of territorial waters. In particular, they cannot be taken into consideration for the purpose of determining the base-line. On the other hand, the installations are under the jurisdiction of the coastal State for the purpose of maintaining order and of the civil and criminal competence of its courts.

80. While generally the Commission, by formulating the test of unjustifiable interference, thought it advisable to eliminate any semblance of rigidity in adapting the existing principle of the freedom of the sea to what is an essentially novel situation, it thought it desirable to rule out expressly any right of interference with navigation in certain areas of the sea. These areas are defined in paragraph 5 of article 6 as narrow channels or recognized sea lanes essential to international navigation. They are understood to include straits in the ordinary sense of the word. The importance of these areas for the purpose of international navigation is such as to preclude, in conformity with the tests of equivalence and relative importance of the interests involved, the construction therein of installations or the maintenance of safety zones even if such installations or zones are necessary for the exploration or exploitation of the continental shelf.

(iv) *Delimitation of the boundaries of the continental shelf*

81. In the matter of the delimitation of the boundaries of the continental shelf the Commission was in the position to derive some guidance from proposals made by the committee of experts on the delimitation of territorial waters.[10] In its provisional draft, the Commission, which at that time was not in possession of requisite technical and expert information on the matter, merely proposed that the boundaries of the continental shelf contiguous to the territories of adjacent States should be settled by agreement of the parties and that, in the absence of such agreement, the boundary must be determined by arbitration *ex aequo et bono*. With regard to the boundaries of the continental shelf of States whose coasts are opposite to each other, the Commission proposed the median line — subject to reference to arbitration in cases in which the configuration of the coast might give rise to difficulties in drawing the median line.

82. Having regard to the conclusions of the committee of experts referred to above, the Commission now felt in the position to formulate a general rule, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity. In view of the general arbitration clause of article 8, referred to below in paragraphs 86 *et seq.*, no special provision was considered necessary for submitting any resulting disputes to arbitration. Such arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration *ex aequo et bono*. That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case.

83. Without prejudice to the element of elasticity implied in article 7, the Commission was of the opinion that, where the same continental shelf is contiguous to the territories of two adjacent States, the delimitation of the continental shelf between them should be carried out in accordance with the same principles as govern the delimitation of the territorial waters between the two States in question.

84. It should, however, be noted that certain members of the Commission considered that it would be premature to apply for the purposes of delimiting the continental shelf the principles drawn up by the committee of experts on the delimitation of territorial waters, since those principles have not yet been discussed by the Commission. In their opinion, the proper course would be to provide that the boundaries of the continental shelf contiguous to the territories of two or more States should be determined by agreement between the States concerned; and that in the absence of such agreement, the resultant dispute between them should be settled by one of the appropriate procedures for the peaceful settlement of disputes.

85. It is understood that the use of the term " territorial sea ", as distinguished from " territorial waters ", in article 7 is provisional and that the question of the terminology to be used in this and other cases in the drafts prepared by the Commission will be determined when the Commission adopts its final draft on the régime of territorial waters. Reference may also be made in this connexion to paragraph 108 below regarding the provisional use of the term " base line ".

(v) *Arbitral settlement of disputes*

86. Unlike the preliminary draft, the final draft as now proposed contains a general arbitration clause providing that any disputes which may arise between States concerning the interpretation or application of the articles should be submitted to arbitration at the request of any of the parties. The clause thus adopted covers, in addition to any boundary disputes connected with article 7, all disputes arising out of the exploration or the exploitation of the continental shelf.

[10] See A/CN. 4/61/Add.1.

87. In the view of the Commission, there are compelling reasons which render essential a clause of this nature. As already stated (see above, paragraph 68 *et seq.*) the articles on the continental shelf represent an attempt to reconcile the established principles of international law governing the régime of the high seas with the recognition of the rights of the coastal State over the continental shelf. Any such reconciliation, based as it must be on the continuous necessity of assessing the relative importance of the interests involved, must leave room for a measure of elasticity and discretion. Thus, it must often remain a question for subjective appreciation, with the consequent possibility of disputes, whether — in the words of paragraph 1 of article 6 — the measures taken by the coastal State for the exploration and exploitation of the continental shelf constitute "unjustifiable" interference with navigation or fishing; whether, according to paragraph 2 of that article, the safety zones established by the coastal State are at a "reasonable" distance around the installations; whether, in the words of paragraph 5 of that article, a sealane is a "recognized" sea lane and whether it is "essential to international navigation"; or whether the coastal State, in preventing the establishment of submarine cables, is, in fact, acting within the spirit of article 5 which makes such action permissible only if necessitated by "reasonable" measures for the exploration and exploitation of the continental shelf. The new régime of the continental shelf, unless kept within the confines of legality and of impartial determination of its operation, may constitute a threat to the overriding principle of the freedom of the seas and to peaceful relations between States. For these reasons, it seems essential that States which are in dispute concerning the exploration or exploitation of the continental shelf should be under a duty to submit to arbitration any disputes arising in this connexion. It is for this reason that the Commission, although it does not propose the adoption of a convention on the continental shelf, thought it essential to establish the principle of arbitration.

88. Certain members of the Commission were opposed to the insertion in the draft of a clause on compulsory arbitration on the grounds that there was no reason for imposing on States one only of the various measures laid down in current international law, and particularly in Article 33 of the Charter of the United Nations, for the pacific settlement of international disputes. They also pointed out that the insertion of such a clause would make the draft unacceptable to a great many States. Certain members raised the further objection that such a clause would give any contracting State the right to take action on any pretext against the other contracting States by a unilateral request to international tribunals, thus increasing the possibility in present circumstances of putting pressure on the weaker States and in effect curtailing their independence.

89. The provision for arbitration as laid down in article 8 does not exclude any other procedure agreed upon by the parties as a means for the formal settlement of the dispute. In particular, they may agree, in matters of general importance, to refer the dispute to the International Court of Justice.

90. Inasmuch as the articles on the continental shelf cover generally its exploration and exploitation, arbitration referred to in article 8 must be regarded as applying to all disputes arising out of the exploration or exploitation of the continental shelf and affecting the international relations of the State concerned. This will cover, for instance, disputes arising in connexion with the existence of common deposits situated across the surface boundaries of the submarine areas, a problem which has arisen in some countries in the relations of owners of adjoining oil deposits.

C

Action recommended in respect of the draft articles on the continental shelf

91. The Commission recommends to the General Assembly the adoption by resolution of this part of the present report and the draft articles on the continental shelf incorporated therein.

III. Fisheries

92. The question of fisheries, under the title of "Ressources of the sea", has been under consideration by the Commission as part of the general topic of the régime of the high seas. Reference is made to the introductory paragraphs of the present chapter for a survey of the treatment of the subject by the Commission.

93. At its third session in 1951, the Commission adopted provisionally the articles on resources of the sea.[11] During its fifth session, the Commission reconsidered these articles in the light of observations sent by the following countries: Belgium, Brazil, Chile, Denmark, Ecuador, France, Iceland, the Netherlands, Norway, the Philippines, Sweden, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, Yugoslavia. The observations are reproduced in Annex II to the present report. The Commission discussed the revision of the articles at its 206th to 210th meetings.

94. The Commission adopted, at its 210th meeting, the following three draft articles covering the basic aspects of the international regulation of fisheries:

Article 1

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 3.

[11] See *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), page 19.

Article 2

In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area.

Article 3

States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State.

95. In adopting these articles the Commission adhered in substance to the provisional draft of the articles formulated at its third session in 1951. In their main aspect both drafts go beyond the existing law and must be regarded to a large extent as falling within the category of progressive development of international law. The existing position of international law is, in general, that regulations issued by a State for the conservation of fisheries in any area of the high seas outside its territorial waters are binding only upon the nationals of that State. Secondly, if two or more States agree upon regulations affecting a particular area, the regulations are binding only upon the nationals of the States concerned. Thirdly, in treaties concluded by States for the joint regulation of fisheries for the purpose of their protection against waste and extermination, the authority created for the purpose has been, as a rule, entrusted merely with the power to make recommendations, as distinguished from the power to issue regulations binding upon the contracting parties and their nationals.

96. It is generally recognized that the existing law on the subject, including the existing international agreements, provides no adequate protection of marine fauna against extermination. The resulting position constitutes, in the first instance, a danger to the food supply of the world. Also, in so far as it renders the coastal State or the States directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it is productive of friction and constitutes an inducement to States to take unilateral action, which at present is probably illegal, of self-protection. Such inducement is particularly strong in the case of the coastal State. Once such measures of self-protection, in disregard of the law as it stands at present, have been resorted to, there is a tendency to aggravate the position by measures aiming at or resulting in the total exclusion of foreign nationals.

97. The articles as now adopted by the Commission are intended to provide the basis for a solution of the difficulties inherent in the existing situation. Article 3 imposes upon States the " duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination ". Moreover, it is provided there that " such international authority shall act at the request of any interested State ", i.e., whether a coastal or any other State. Certain members of the Commission were opposed to the adoption of the text of article 3, on the ground that there was no real need for the creation of an international authority, since fisheries could be regulated, as in the past, by means of agreements between States. They contended that the proposal to give an international authority power to issue regulations binding on the nationals of States was in conflict with the basic principles of international law.

98. The system proposed by the Commission protects in the first instance, the interest of the coastal State which is often most directly concerned in the preservation of the marine resources in the areas of the sea contiguous to its coast. Obviously, if only the nationals of that State are engaged in fishing in these areas, it can fully achieve the desired object by legislating in respect of its nationals and enforcing the legislation thus enacted. If nationals of other States are engaged in fishing in a given area — whether coastal or otherwise — it is clear that the concurrence of those States is essential for the effective adoption and enforcement of the regulations in question. Article 1 provides therefore that in such cases " the States concerned shall prescribe the necessary measures by agreement ". Article 3 is intended to provide effectively for the contingency of the interested States being unable to reach agreement. In such cases, the regulations are to be issued, with binding effect, by the international authority envisaged in that article. Similarly, if subsequent to the adoption of measures of protection by the agreement of the interested States, nationals of other States engage in fishing in the area in question and if their States are unwilling to accept or respect the regulations thus issued, the international authority provided for in article 3 is empowered to declare the regulations to be binding upon the States in question and upon their nationals.

99. As stated, the system thus formulated by the Commission does not differ substantially from that provisionally adopted by the Commission at its third session. Thus, it was laid down, in article 2, that a permanent international body competent to conduct investigations of the world's fisheries and the methods employed in exploiting them " should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves ". It is significant of the present state of opinion and of the widely felt need for the removal of what is considered by many to be a condition approaching anarchy that, in the replies sent by governments, no opposition was voiced against the proposal then advanced by the Commission.

100. The Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A

State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized States, provides to a considerable extent a satisfactory legal basis for the general rule as formulated in article 3. To that extent it may be held that that article is not altogether in the nature of a drastic departure from the principles of international law. In fact, the Commission deems it desirable that, pending the general acceptance of the system proposed in article 3, enlightened States should consider themselves bound, even if by way of a mere imperfect legal obligation, to act on the view that it may be contrary to the very principle of the freedom of the seas to encourage or permit action which amounts to an abuse of a right and which is apt to destroy the natural resources whose preservation and common use have been one of the main objects of the doctrine of the freedom of the sea. This is so although the Commission is of the opinion that the articles adopted fall generally within the category of development of international law.

101. Reference may be made in this connexion to article 2, which lays down that, in any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area. This provision is considered to safeguard sufficiently the position of the coastal State. Such protection of its interests is equitable and necessary even if, for the time being, its nationals do not engage in fishing in the area. On the other hand, the right to participate, on a footing of equality, in any system of regulation agreed upon by other States does not imply a right to prevent or hinder its operation. The same applies to any system of regulation which may be decided upon by the international authority in conformity with article 3. In view of the wide powers conferred upon the latter, the Commission considered it unnecessary to entertain in detail the proposal, put forward at its third session and advanced once more at its present session, to entrust the coastal State itself with the right to issue regulations of a non-discriminatory character binding upon foreign nationals in areas contiguous to its coast.

102. With respect to the action which may appropriately be taken by the General Assembly in the matter of the part of the present report incorporating the final draft of articles on fisheries, the Commission recommends: (*a*) that the General Assembly should by resolution adopt that part of the report and the draft articles; and (*b*) that it should enter into consultation with the United Nations Food and Agriculture Organization with a view to the preparation of a draft convention incorporating the principles adopted by the Commission.

103. The Commission believes that the general importance and the recognized urgency of the subject matter of the articles in question warrant their endorsement by a formal act of approval on the part of the General Assembly. Considerable time must elapse before a convention on the lines here proposed can be adopted and widely ratified. In the meantime, it seems advisable that the General Assembly should lend its authority to the principles underlying the articles. In particular, endorsement should be given to the view that, where a number of interested States have agreed on a system of protection of fisheries, any regulations thus agreed upon should not, without good reason, be rendered nugatory by the action or inaction of a single State. The problem underlying the articles is one of general interest and the Commission believes that an authoritative statement of the legal position on the subject, both *de lege lata* and *de lege ferenda*, by the General Assembly is indicated as a basis of any future regulations which may be adopted.

104. While the articles adopted by the Commission contain the general principles for the protection of fisheries, it is clear that only a detailed convention or conventions can translate these principles into a system of working rules. It is probable that that object may be achieved on a regional basis rather than by way of a general convention. Conventions concluded in the past for the protection of fisheries have been, as a rule, on a regional basis. The International Convention for the North West Atlantic Fisheries of 6 February 1949, which establishes an International Commission for the North Atlantic Fisheries assisted by panels for subareas and national advisory committees, and the proposed International Convention for the High Sea Fisheries of the North Pacific Ocean, approved in draft by the Tripartite Fisheries Conference at Tokyo on 14 December 1951, provide recent instructive examples of such regulations. Account would also have to be taken of the existence and experience of regional bodies such as the Indo-Pacific Fisheries Council, the General Fisheries Council for the Mediterranean and the Latin-American Fisheries Council. The matter is of a technical character; as such it is outside the competence of the Commission. A specialized body, such as the United Nations Food and Agriculture Organization would seem to be most suitable for the purpose. Accordingly, the Commission recommends that, concurrently with its approval of the articles on fisheries, the General Assembly should enter into consultation with FAO with a view to investigating the matter and preparing drafts of a convention or conventions on the subject in conformity with the general principles embodied in the articles.

IV. Contiguous zone

105. As part of the work on the régime of the high seas the Commission adopted, at its 210th meeting, the following single article on contiguous zone:

On the high seas adjacent to its *territorial sea*, the coastal State may exercise the control necessary to prevent and *punish* the infringement, within its territory or *territorial sea*, of its customs, *immigration*, fiscal or sanitary regulations. Such control may not be exercised *at a distance beyond* twelve miles from the *base line from which the width of the territorial sea is measured.*

106. The article thus adopted is identical, but for the words reproduced in italics, with that formulated by the Commission at its third session.[13] Apart from some qualifications and reservations, the principle underlying that article has encountered no opposition on the part of the governments which have since made observations on the subject (see Annex II to the present report). The Commission believes that principle to be in accordance with a widely adopted practice. International law does not forbid States to exercise a measure of protective, preventive, or punitive jurisdiction for certain purposes over a belt of water contiguous to its territorial sea. States have shown no disposition to challenge the exercise by other States of a limited jurisdiction of that nature. Certain members of the Commission were, however, opposed to the inclusion of this article, on the ground that it had no direct connexion with the régime of the high seas and, moreover, that several governments in their observations had also put forward the view that the article in question should be examined in connexion with the discussion of territorial waters.

107. There has been no general agreement as to the extent of the contiguous zone for the purposes as defined above. The Preparatory Committee of The Hague Codification Conference of 1930 proposed that the breadth of the contiguous zone should be fixed at twelve nautical miles measured from the coast. While it is possible that in some cases that limit may be insufficient, having regard to technical developments in the speed of vessels and otherwise, the Commission believes that, on the whole, that limit approximates most closely to general practice as acquiesced in by States.

108. It must be noted that, in the article as now formulated, the contiguous zone of twelve miles is described as measured from the base line from which the width of the territorial sea is measured. In the article as proposed in 1951, the Commission referred to twelve miles as measured "from the coast". This change of formulation is not intended as an expression of view as to the nature of the base line forming the inner limit of the territorial sea. However, as in the case of the territorial sea, it is convenient to refer to the base line as being the more precise indication.

109. In adopting the limit of twelve miles for the exercise of the protective rights of States within the contiguous zone, the Commission does not intend to prejudice, in any direction, the results of its examination of the question of the territorial sea and of its limits.

110. Certain members of the Commission opposed the inclusion of the article on the contiguous zone, on the ground that it prejudged the question of the outer limit of territorial waters. They pointed out that by taking as the base line the inner limit of the territorial waters, the article tended to restrict the width of these waters — a point on which the Commission had not yet taken any decision.

111. It is understood that the term "customs regulations" as used in the article refers not only to regulations concerning import and export duties but also other regulations concerning the exportation and importation of goods. In addition, the Commission thought it necessary to amplify the formulation previously adopted by referring expressly to immigration — a term which is also intended to include emigration.

112. The rights of the coastal State within the contiguous zone do not include rights in connexion with security or fishing rights. With regard to the latter the Preparatory Committee of the Codification Conference of 1930 found that the replies of governments disclosed no sufficient measure of agreement on the subject. The Commission considers that in that respect there has been no change in the position. The question may become less urgent and more amenable to a solution if the proposals of the Commission relating to fisheries and contained in paragraphs 94 *et seq.* of the present report are adopted by States.

113. The exercise of the rights of the coastal State, as here formulated, within the contiguous zone does not affect the legal status of the sea outside the territorial sea or of the airspace above the contiguous zone. Air traffic may necessitate the establishment of an air zone over which the coastal State may exercise control. However, this question is outside the subject of the régime of the high seas.

114. As the Commission has not yet adopted draft articles on the territorial sea, it recommends the General Assembly to take no action with regard to the article on the contiguous zone, since the present report is already published (article 23, paragraph 1 (*a*), of the Commission's Statute).

Chapter IV

Nationality, including statelessness

I. Introductory

115. At its first session in 1949, the International Law Commission selected "nationality, including statelessness" as a topic for codification without, however, including it in the list of topics to which it gave priority.[14]

116. During its third session in 1951, the Commission was notified of resolution 319 B III (XI) adopted by the Economic and Social Council on 11 August 1950, in which the Council requested the Commission to "... prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness". In response to this request, the Commission, at the same session decided to initiate work on the topic of nationality including statelessness, and appointed Mr. Manley O. Hudson Special Rapporteur on the subject.[14]

[13] See *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), page 20.

[13] See the report of the Commission covering the work of its first session, *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), paragraphs 16 and 20.

[14] See the report of the Commission covering the work of its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), paragraph 85.