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The Continental Shelf—An International Dilemma

HUGH G. MORRIS *

An international scramble is taking place over submerged land which technically is called the "continental shelf".¹ World-wide attention was focused on the continental shelf when the oil industry developed offshore drilling techniques during the 1940's. Since then, numerous international conferences have attempted to define and delimit the shelf, and to assist in ordering the multitude of claims that have been advanced. By unilateral declarations, many states have claimed extensive areas, including continental shelves and superadjacent waters, which traditionally have been regarded as *res communis* and *res nullius*. As Kunz states, these recent developments "give the impression of a triumphant upsurge of national sovereignty and threaten to endanger the long-established principle of the freedom of the high seas."² The importance of the topic is evidenced by the fact that, in conformity with a resolution of the General Assembly of the United Nations,³ an international conference on the law of the sea was convened at Geneva on February 24, 1958. Canada was represented. The purpose of the conference was "to examine the Law of the Sea, taking account not only of the legal, but also the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international Conventions."⁴

This essay will examine general continental shelf problems, with particular reference to the work of the International Law Commission which, since 1949, has been attempting to codify and develop the law of the sea. The continental shelf, of course, represents only one feature of the law of the sea, and it is unrealistic to ignore related aspects, such as the territorial sea, contiguous zone, high seas, and fisheries. For example, the I.L.C. states that the continental shelf begins "outside the area of the territorial sea". Yet it is not always possible to determine where the shelf begins because there are disagreements on the maximum width of the territorial sea.⁵ Similarly, Article 69 of the

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¹ Most of the extensive periodical and treatise literature on the topic is collected in Josef Kunz, *Continental Shelf and International Law: Confusion and Abuse*, (1956), 50 A.J.I.L. 828.

² *Ibid.*, p. 828.

³ Resolution 1105 (xi), February 21, 1957.

⁴ *Ibid.*

⁵ The three mile limit now represents minimum claims. See John Colombos, *The International Law of the Sea*, 3rd ed. (London, 1954), pp. 66-128. The Canadian Government is pressing for recognition of a twelve mile breadth for the territorial sea: House of Commons Debates, Thursday, November 28, 1957, p. 1653.

I.L.C. Draft Code on the Law of the Sea protects "the legal status of the superadjacent waters as High Seas".⁶ But where do the high seas commence? While, therefore, the bulk of this essay is confined to discussing that part of the continental shelf which lies outside territorial waters, reference necessarily will be made to connected problems.

The Problems Involved

What is the continental shelf? Geologically, the land-mass drops seaward at an angle or gradient to an average depth of 200 metres, where (usually) there is a marked increase of slope to the ocean bottom. The isobath of 200 metres forms, in this simplified picture, an edge. The sea bottom between the shore and the edge is called the "continental shelf", and that part of the sea bed between the edge and the sea bottom is the "continental slope". Canada's continental shelf is extensive. On the Atlantic coast, it extends, in some places, as far as 250 miles seaward, varying in depth from 100 to 200 fathoms, before sloping to the sea bottom.⁷ In the Canadian Arctic, the shelf is even more extensive. On the Pacific coast, the marine zones are characterized "by bold, abrupt relief, repetitious of the mountainous landscape, and the submerged shelf is furrowed and deeply ravined."⁸ Despite its irregularity, the Pacific shelf extends seaward to considerable distances—up to 100 miles in some places. The riches of Canada's continental shelf clearly are not as important as those beneath the dry land mass, yet they may prove to be significant. In some measure, oil, sedentary fish and, possibly uranium, are located therein. Further, certain states have participated in the continental shelf race principally to extend their claims over high seas fisheries. Hence Canada cannot afford to be disinterested in shelf problems.

Although decrees on continental shelves were made as long ago as 1916,⁹ the Truman Proclamation of 1945¹⁰ sparked the majority of currently important shelf claims. This Proclamation reserved to American jurisdiction and control the "natural resources of the sub-soil and sea bed of the continental shelf", but expressly negated any suggestion of interference with "the character as high seas of the waters above the continental shelf". The American position was motivated by the desire to control off-shore petroleum and other mineral resources.¹¹ It was not directed to jurisdictional questions affecting the territorial sea or high seas fisheries

⁶ See (1957), 51 A.J.I.L. 154, at p. 177.

⁷ For charts see (1958), 10 External Affairs 21, at pp. 23-24. For a discussion of relevant Canadian constitutional law, see E. J. Cosford, *The Canadian Constitution and the Tidelands*, (1955), *Obiter Dicta*, 11.

⁸ *The Canada Year Book*, Ottawa, 1946.

⁹ Cf. L. C. Green, *The Continental Shelf* (1951), 4 *Curr. Legal Probs.* 54.

¹⁰ 59 Stat. 884 (1946).

¹¹ Political pressures for the Proclamation are discussed in J. W. Bingham, *Juridical Status of the Continental Shelf* (1952), 26 *So. Calif. Law Rev.* 4, at p. 6. For a review of American state and federal legislation see J. S. Wright, *Jurisdiction in the Tidelands* (1958), 32 *Tulane Law Rev.* 175.

although, obviously, it affected such questions. The progeny of the Truman Proclamation, however, leave much to be desired. Many states, ostensibly following a "rule" that the Proclamation supposedly established, have claimed the sea bed, sub-soil, and superadjacent waters, up to (in some instances) a distance of 200 miles from their coasts.¹² A Mexican proclamation of 1945 claimed not only "each and all of the natural resources of the continental shelf", but also stated that Mexico will proceed "to supervise, utilize and control the zones of fishing protection". In 1948, Iceland claimed the right to establish conservation zones within the limits of the continental shelf wherein all fisheries would be subject to Icelandic control. South Korea has claimed extensive regulatory powers over adjacent seas of 70 miles. The most far-reaching claims have been made by South and Central American states. In 1946 Argentina proclaimed sovereignty over the Argentinian continental shelf and continental seas. Panama issued a similar proclamation in the same year. Chile, a country with practically no shelf, claimed, in 1947, sovereignty over "the whole continental shelf of whatever depth"; the seaward limit for purposes of controlling all natural resources was set at 200 miles. Ecuador and Peru have claimed jurisdiction over natural resources of the adjacent seas to a distance of 200 miles from their coasts.

These and other similar decrees already have led to international incidents. In 1945, Ecuador seized two American vessels which were some 14 miles off the Ecuadorian coast. In the course of seizure, one American seaman was wounded by gunfire, and fines of \$49,000 were levied against the vessels' owners. A more costly adventure occurred in 1954 when five whaling ships, owned by the Greek shipping tycoon A. S. Onassis, were attacked by Peruvian air and naval units. One ship was 364 miles off the coast of Peru. Fines of \$3,000,000 were collected in this instance. Protests have been ineffective in these situations. Further incidents probably will occur if states continue their attempts to enforce unilateral declarations.

It is apparent that the general status of continental shelves is uncertain. This fact was expressed well by Lord Asquith in the Abu Dhabi Arbitration when, referring to the I.L.C. drafts, he said:

Neither the practice of nations nor the pronouncements of learned jurists give any certain or consistent answer to many, perhaps most, of these questions. I am of the 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 be claimed, as yet, to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.¹³

The crucial question is whether unilateral claims have established new rules of international law. To the extent that such claims lead to action that is inconsistent with the freedom of the high seas, they have

¹² All claims mentioned herein are cited and examined in detail in M. W. Mouton, *The Continental Shelf*, The Hague, 1952.

¹³ *Petroleum Development Ltd. v. Sheik of Abu Dhabi*, (1952). 1 Int. & Comp. Law Quart. 247.

no legal basis. The high seas belong to no nation. They can be used by all states, either for navigation or fishing. This traditional principle still represents a fundamental rule of customary international law,¹⁴ even though American-imposed restrictions for hydrogen bomb tests recently have raised the question of its efficacy. Theoretically, the erection of off-shore derricks may infringe the freedom by hindering navigation, but if shelf claims are valid, there seems to be no reason why satisfactory adjustments on such secondary problems cannot be agreed upon. Unilateral claims have not escaped criticism. As early as 1950, Lauterpacht spoke of "the abuse of the doctrine of the continental shelf for pretensions to sovereignty over the high seas or exclusive exploitations of its resources."¹⁵ He wrote of the "inconsistency of the claims of Chile with international law" and stated that "claims to sovereignty or exclusive rights over the High Seas are unlawful". In 1955 he stated that the "claims of Argentina, Chile, Peru, and other Latin American states, have no foundation in international law". The present writer agrees with Lauterpacht's objections. Many claimants purposely have confused shelf problems with the rather different questions of territorial seas, contiguous zones, and high sea fisheries, to facilitate unwarranted extensions of jurisdiction over the latter.

Mouton suggests that, to assess the nature of these claims, attention must be paid to their contents as well as to their nationalistic characteristics. He classifies them as: (a) those claiming parts of the high seas; (b) those claiming sovereignty over the continental shelf and, (c) those claiming minerals only. The South American claims fit into category (a) and, generally the international community does not recognize them. However, as Kunz points out, existing rights are endangered when "such states . . . insist constantly and everywhere upon their unlawful claims and enforce them by forceful action and in their own courts . . . protests must be repeated. But even repeated protests may be insufficient in law, may become mere 'paper' protests unable to bar title by prescriptions".¹⁶ Yet an examination of American and British protests¹⁷ to South American states indicates that prescriptive titles¹⁸ to high seas areas are unlikely possibilities at the present time.

Mouton also suggests that category (b) claims are not based on existing international law. He states that even a uniform practice by, in this case, 15 countries, does not create an international rule. On balance, this probably is an accurate assessment of the situation. State practice has not jelled sufficiently to justify saying that what may be a trend, especially in Latin American state practice, has become a rule.

¹⁴ Cf. G. Schwarzenberger, *The Fundamental Principles of International Law*, *Recueil des Cours*, 1955, pp. 358-371.

¹⁵ H. Lauterpacht, *Sovereignty over Submarine Areas* (1950), 27 *B.Y.I.L.* 376.

¹⁶ Kunz, *op. cit.*, at p. 852.

¹⁷ See, for instance, U.S. protests to Chile and Peru (1948), Argentina, Ecuador and El Salvador (1950); British protests to Peru and Chile (1948), to Costa Rica and El Salvador (1950), to Honduras and Ecuador (1951).

¹⁸ Cf. D. H. N. Johnson, *Acquisitive Prescription in International Law* (1950), 27 *B.Y.I.L.*, 332.

The proceedings of the International Law Commission evidence a strong desire by the majority of members to oppose the recognition of sovereignty over the shelf, as well as to safeguard the freedom of the superadjacent waters. There may be isolated instances to the contrary, but the great powers appear to have recognized no generally applicable customary rules. Finally, there is category (c). The claims of the United States, the Philippines and Guatemala, to control and jurisdiction, fall within this category. Their claims have earned the approval of the International Law Commission.

What are the legal requirements for acquiring control, jurisdiction or sovereignty over continental shelves? A statement by the British Government on the positions adopted by various states indicates that, from a legal point of view, four arguments exist in which to base claims. They are: (a) the continental shelf is *res communis* and not susceptible to occupation by any state. Only exploitation by an international body is permissible; (b) the continental shelf is *res nullius* and capable of occupation when there is effective occupation, i.e., when there is physical exploitation; (c) the continental shelf is *res nullius* and capable of occupation simply by means of proclamations; (d) the continental shelf is not *res nullius*; title to it vests *ipso jure* in the coastal state. Sir Gerald Fitzmaurice speaks for many when he states that:

It now seems settled law that the continental shelf near to any piece of land, up to a certain depth, is to be regarded as a natural appurtenance or extension of the land, the right to which is automatically vested in the coastal state.¹⁹

In reality, the effective development of shelf resources will, in most instances, depend upon the co-operation of the country which is appurtenant to the shelf in question. This point is implicit in Article 68 of the I.L.C. Draft Code, which states that "the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources". The American commentator Bingham, in supporting this view, attaches importance to the "intense belief of coastal populations that such coastal economic resources should belong to them and that unlicensed exploitation by foreigners should not be permitted".²⁰ The internationalization of continental shelves for exploitation in the general interests of international society is desirable but, at present, impractical. Like ideas to internationalize "danger spots", it cannot be realized effectively without a supporting community consciousness which is lacking in contemporary international society. While, therefore, contiguity may be an acceptable preliminary base for a somewhat new problem, it is worth recalling that the World Court disapproved of it as a title to territory.²¹ Further, it seems clear that the title to sedentary fisheries has long been based on effective occupa-

¹⁹ G. F. Fitzmaurice, *The General Principles of International Law*, *Recueil des Cours*, 1957, pp. 59-60.

²⁰ Bingham, *op. cit.*, at p. 18.

²¹ *The Island of Palmas Case* (1928), 2 U.N.R.I.A.A. 829.

tion²²—a fact that can and does lead to conflict with states that insist upon the contiguity principle.

Work of the International Law Commission

The most promising aspect of the problems touched on above is the work of the International Law Commission. Under the chairmanship of Professor Francois of The Hague, an international code has been drafted covering all features of the law of the sea. For present purposes, the most important and controversial article is Article 67. In 1951 this Article read as follows:

As here used, the term "continental shelf" refers to the sea bed and sub-soil of the submarine areas contiguous to the coast but outside the area of territorial water, where the depth of the superadjacent waters admits of the exploitation of the natural resources of the sea bed and sub-soil.²³

This definition excludes areas in which exploitation technically is impossible because of the depth of the superadjacent waters. The I.L.C. previously had considered recommending a fixed shelf limit in terms of the depth of the superadjacent waters, but in the earlier drafts this idea was discarded in favour of the "exploitability theory". The main objection to a fixed limit was that technology might, in the near future, permit exploitation of the sea bed and the sub-soil at a depth greater than 200 metres. Moreover, physically continental shelves may be found to include submarine areas which, though below 200 metres, are exploitable through installations erected in neighbouring areas where depths do not exceed this limit.

At its 5th Session in 1953, the I.L.C. reconsidered the draft. It abandoned "exploitability" in favour of a definite depth test. The 1953 draft article read:

As used in these articles, the term "continental shelf" refers to the sea bed and sub-soil of the submarine areas contiguous to the coast but outside the area of the territorial seas, to a depth of 200 metres. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.²⁴

It is significant that the phrase "sovereign rights" is used here for the first time. The writer will comment on the point below. The Commission was motivated by the belief that more precise definitions were needed to prevent uncertainties and disputes, especially between nations in proximity to each other. The rapporteur stated that:

The Commission considered that the limit of 200 metres would be sufficient for all practical purposes at present and probably for a long time to come. It took the view that the adoption of the fixed limit would have considerable advantages, in particular with regard to the delimitation of the continental shelf between adjacent states or states opposite each other.

The latest draft articles were presented in 1956. In its commentary, the I.L.C. indicated that since 1953 the only basic change related to the

²² See, for example, L. F. Goldie, *The Occupation of the Sedentary Fisheries off the Australian Coasts* (1953), 1 Sydney Law Rev. 84.

²³ U.N. Doc. A/1858 (1951).

²⁴ U.N. Doc. A/2456 (1953).

continental shelf. To facilitate discussion, certain articles are reproduced below.

Article 67—For the purpose of these articles, the term “continental shelf” is used as referring to the sea bed and sub-soil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms), or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas.

Article 68—The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

Article 69—The rights of the coastal state over the continental shelf do not affect the legal status of the superadjacent waters as high seas, or that of the air space above those waters.

Article 70—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 impede the laying or maintenance of submarine cables on the continental shelf.

Article 71—Subsection (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 the conservation of the living resources of the sea.

Obviously, many claims do not meet these requirements. It will be noted that, in Article 67, the I.L.C. abandoned the fixed depth criterion in favour of a combined exploitability and fixed depth test. Commission commentary indicates that this decision was not reached without considerable disagreement. Nevertheless, the uncertainties that were inherent in earlier drafts emerge again with the re-introduction of the “exploitability concept”. On the other hand, some members felt that this addition had the advantage of discouraging beliefs that at the 200 metres depth there are fixed zones where rights other than those stated in Article 68 can be exercised. The writer agrees with the observation of the Canadian Government:

This additional provision [exploitability] reintroduces the uncertainty which led the commission to favour a fixed limit in terms of the depth of superadjacent waters for determining the legal boundary of the shelf. It is considered that the foreseeable possibilities of exploitation at greater depth than 200 metres might be provided for without sacrificing the element of certainty concerning the extent of states' rights to exploit the resources of the sea bed. It is understood that in 90% of instances, excluding polar regions, the edge of the continental shelf is well defined geographically. It is suggested, therefore, that in these cases the boundary of the shelf should be its actual edge. Where, however, the edge of the shelf is ill-defined or where there is no shelf in a geographical sense, the boundary might be set at such a depth as might satisfy foreseeable practical prospects of exploitation.²⁵

Norway also criticized the exploitability test on the ground that, owing to scientific progress, the effect of the addition would be to parcel out entire ocean areas among coastal states. However, in the words of the Commission:

It is not its intention . . . to allow the coastal states to establish a monopoly of exploitation of the sea bed and sub-soil of the ocean throughout their extent. At the present time, the fear of such a monopoly does not appear to be justified. If that situation did materialize, as a result of technical developments, it would no doubt be possible to take whatever action seemed opportune to consider how its unexpected consequences should be remedied.²⁶

²⁵ House of Commons Debates, *op. cit.*, at p. 1654.

²⁶ U.N. Doc. A/13/19. December 3, 1957.

This appears to be just another way of saying that, because states cannot agree on either method of delimitation, resort has been had to the dual test. The writer is critical of the double test. The 200 metre criterion appears to be preferable because of the certainty that it affords. Its use would reduce potential conflicts to a minimum and, if a state is able to exploit adjacent coastal areas at a depth greater than 200 metres, fisheries and other important rights can be protected by agreement between interested parties.

Turning now to the phrase "sovereign rights" in Article 68, it should be noted that Canada has not commented on the point, nor has she referred to the problem of defining "natural resources". [In earlier I.L.C. drafts, "natural resources" were referred to as "mineral resources".] The desirability of including the phrase "sovereign rights" is questionable. It has facilitated some outrageous South American claims, which confuse the term "sovereign rights" with the more general and extensive word "sovereignty". Had the Commission more clearly defined rights of the sea bed and sub-soil, some of the extravagant claims to fishing rights in superadjacent waters might never have arisen. To illustrate the confusion that has arisen through the use of the phrase "sovereign rights", comments on Article 68 may be noted. Norway stated:

The Norwegian Government has some difficulty for its part in seeing the necessity of granting the coastal state "sovereign rights" for the purpose of exploiting the natural resources of the continental shelf. Whether and to what extent it will be necessary or reasonable to grant special privileges of the proposed kind to the coastal state seems to be a question which is intimately dependent on the solution which is given to the problem of the breadth of the territorial sea. If such rights are to be granted to the coastal state it would seem to be an indispensable condition that the zone within which they will be exercised should be far more clearly defined than in the present wording of Article 67. In view of the uncertainty of geological criteria, and in view of the fact that the reasons advanced in favour of these special privileges for the coastal state apply only in the neighbourhood of its coast, it might seem preferable to define the zone by a fixed maximum distance from the coast. The problem of reconciling normal geological interpretations given by the Commission in its commentary, with the text of the Article would then not arise.²⁷

By contrast, the Cuban Government stated that it had noted,

... with special satisfaction the Commission's recognition of the fact that the coastal state enjoys sovereign rights solely for the purpose of exploring and exploiting the natural resources of those areas and that consequently, those rights do not affect the legal status of the superadjacent waters as High Seas or that of the air space above those waters. Certain states have claimed that those rights extend to the so-called "Epicontinental waters" but the great majority of states has shown itself opposed to that claim and considers that such waters are part of the high seas and are subject to the legal rules applicable thereto.

On the same point, Sir Gerald Fitzmaurice says:

Note that this provision does not speak of "sovereignty" as such, but of "sovereign rights for the purpose of exploring and exploiting the natural resources" of the shelf. It is made clear in the Commission's accompanying commentary, that the term "sovereignty" was deliberately avoided with the

²⁷ U.N. Doc. A/13/5. November 7, 1957. Norway's position is influenced by the fact that her continental shelf is uniquely irregular.

object of "safeguarding the principle of the full freedom of the superadjacent seas and the air space above it".²⁸

It will be remembered that nowhere in the Truman Proclamation is the word "sovereignty" used. Indeed, the United States has protested to states that have purported to claim sovereignty. One wonders, however, if these debates really are meaningful. Surely "jurisdiction and control" is the equivalent of limited sovereignty. On the other hand, certain South American states which in fact have no continental shelf appear to have confused the use of the terms and their objects. Thus, in December 1957, some states seriously questioned why countries without a shelf should not be given sovereign rights over adjoining seas to a distance of 200 miles. This represents a complete confusion of separate topics. It could lead, moreover, to gross inequalities. Article 69 states that nations which have no shelves have no rights over the superadjacent waters. States concerned would be wise to accept this guide, and concentrate on working out mutually beneficial agreements on such matters as the contiguous zone, territorial sea and high seas fisheries.

There are many opinions on what the term "natural resources" includes. Some countries have claimed everything in the sea. Mouton, in his 1954 Hague lectures,²⁹ divides natural shelf resources into three categories, two of which include such fish as cod, haddock, halibut and oysters—"deep sea fish" and "bottom fish"; the third category includes minerals. The use of the phrase "natural resources" has contributed to prevailing uncertainties. The I.L.C. comments on Article 68 indicate 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 left outside the scope of the regime adopted, and that this aim could be achieved by using the term "natural resources".³⁰

The Commission further states that "it is clearly understood 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". In the writer's opinion, the I.L.C. could have assured greater certainty if it had restricted the scope of Article 68 to "mineral resources" and, perhaps, specifically identified such sedentary fish as are generally agreed to be included in the regime of the continental shelf.

Article 69 safeguards freedom of the seas against the coastal state's exercise of rights over the continental shelf. It provides that shelf rights of the coastal state do not affect the legal status of the superadjacent waters as high seas or the air space above the superadjacent waters. In the words of the I.L.C.:

The Articles on the continental shelf are intended as laying down the regime 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 air space above them. No modification of or exceptions to that principle are admissible unless expressly provided for in the various articles.³¹

²⁸ Fitzmaurice, *op. cit.*, pp. 50-51.

²⁹ Hague Academy of International Law, *Recueil des Cours*, 1954.

³⁰ U.N. Doc. A/3159.

³¹ *Ibid.*

Conclusion

Despite their vagueness, the draft articles, and commentaries, focus attention on the difficulties involved, articulate some of the reasons for conflicting claims, and provide basic materials for possible conventional solutions. That the drafts can provide the basis for agreements is evidenced by the fact that some nations have accepted them already. There must be "give and take" before wide-spread agreements are achieved. With law running second to power in current international politics, there probably will be more "taking" than "giving" in the immediate future. Hence, Canada must beware that other nations do not acquire rights over super-adjacent waters that will impair our historic fishing interests. The extensiveness of Canada's continental shelf make the subject one of peculiar importance to her, and it is not too much to hope that Canadian lawyers will contribute meaningfully to relevant international debates.