If the drafts prepared by the International Law Commission continue to serve as bases of discussion at practical international conferences, and if they are frankly drafted for that purpose, it is quite possible that significant progress can be made along many lines through the same type of procedure as that followed at the Geneva Conference on the Law of the Sea. But the proof of this pudding is in the ratifications of the several conventions and in the implementation of the recommendations.

PHILIP C. JESSUP

THE GENEVA CONVENTION ON THE CONTINENTAL SHELF: A FIRST IMPRESSION

The Convention on the Continental Shelf, adopted at Geneva on April 26, 1958, by the United Nations Conference on the Law of the Sea, represents the first great effort to determine by an act of international legislation the scope of the continental shelf doctrine in international law.[1] The fact that the Convention was finally approved by a vote of 57 to three, with only eight abstentions, is evidence both that a need for rules on the subject was generally felt and that the rules embodied in the Convention were considered on the whole acceptable. In view of the wide disagreement at the Conference on other aspects of the law of the sea, this consensus regarding the shelf is not a negligible achievement. The Convention is not law, of course, and according to its terms will not be binding even on the parties until 22 ratifications or accessions have been received; but it is in any case highly significant as an agreed statement of principles.

The Convention itself reflects in general a moderate approach, and this also is an achievement in which its framers may take satisfaction. Extravagant claims of the kind which in recent years have threatened to reduce the shelf doctrine to absurdity will gain from it little support. It notably rejects the view that the doctrine justifies claims to vast offshore areas regardless of depth or exploitability, or that it entitles a coastal state to exercise unlimited jurisdiction over the waters above the shelf. On the contrary, the general principle is explicitly affirmed that the shelf doctrine does not affect the established legal order of the high seas. Nevertheless, despite these substantial merits, the Convention cannot be regarded as a wholly satisfactory instrument. It is quite good, but not quite good enough. It leaves many serious uncertainties unresolved, more perhaps than should be permitted to pass even in a first attempt. This does not mean that it should be repudiated, but rather that its inadequacies should be promptly recognized for what they are. Some, no doubt, can be the objects of later improvement; others, it must be feared, are now irreparable and must be viewed as part of the price paid for any agreement at all.

The Convention as a whole closely follows the draft articles on the

[1] The final text of the Convention appears in U.N. Doc. A/CONF.13/L.58 (the Final Act of the Conference), and also separately in Doc. A/CONF.13/L.55, printed below, p. 858. It consists of versions in English, French, Russian, Chinese, and Spanish, each version being declared equally authentic. See article by Marjorie M. Whiteman, above, p. 629, for full documentation on the Conference discussion of the subject.

continental shelf prepared by the International Law Commission. These constituted Articles 67–73 of the Commission's comprehensive 1956 Draft on the Law of the Sea, which formed the basic working paper of the Geneva Conference.[2] All but one of the seven articles, plus a certain amount of additional matter obtained largely from the Commission's commentary, are included in the Convention. The exception is Article 73, which provided for the settlement of shelf disputes by the International Court of Justice or other peaceful means. This provision was suppressed in its entirety, but the Conference adopted instead an Optional Protocol on the Settlement of Disputes, applicable to all the instruments it prepared. In its final form, the text consists of fifteen articles, seven devoted to substantive principles and eight relating to procedural and formal matters. The principal shortcomings in the document center around Articles 1 and 2, relating to the definition of the shelf and to the nature and scope of the rights attributed to the coastal state, and it is to these articles that the following comments are chiefly directed.

Article 1 of the Convention defines the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"; and the definition is expressly said to include "the seabed and subsoil of similar submarine areas adjacent to the coasts of islands." This language, although not particularly felicitous in style, closely follows the final International Law Commission draft in providing alternative criteria for determining the outer limit of the shelf. The first of these, the line at which the coastal waters attain a depth of 200 meters, is the familiar rule derived from the geological concept of the average shelf edge, although in any particular instance the edge of the geological shelf may actually occur at either a greater or a lesser depth. The second alternative appears to fix as a limit the line, at a depth greater than 200 meters, beyond which deep water makes it in fact impossible to exploit the resources of the seabed and subsoil.

The first paragraph of Article 2 repeats almost verbatim the Commission's draft Article 68, declaring the "sovereign rights" of the coastal state over its continental shelf. Three additional paragraphs transfer to the text of the Convention principles which the International Law Commission had mentioned only in its commentary. Paragraph 2 affirms that the sovereign rights are exclusive, whether or not they are actually exercised by the coastal state, and paragraph 3 asserts that their validity is not dependent on any concept of occupation or on any express claim by proclamation. The Convention thus adopts the view that rights over the shelf arise *ipso jure* in favor of the coastal state, presumably in much the same manner as a belt of territorial sea is automatically attributed by the law to every coastal state. While this approach is doubtless the soundest and

[2] The text of Arts. 67–73, together with a commentary, is printed in the Commission's Report of its 8th Session, 1956 (U.N. Doc. A/3159), pp. 41–45; 51 A.J.I.L. 242–253 (1957).

simplest, these paragraphs cause some difficulty when read in conjunction with Article 1.

Under the terms of Article 1, the sovereign rights recognized by Article 2 extend at the minimum to the 200-meter-depth line offshore. But under the alternative rule in Article 1, they may extend still further—to the outer limit of possible exploitation. The inclusion of some such provision is probably necessary, for the technical progress made in the last decade alone indicates that exploitation at depths greater than 200 meters may well be commercially feasible in the near future. Yet the criterion proposed in the present text introduces a continuing uncertainty about the precise extent of offshore claims, for the possibility of exploitation is a variable factor dependent on the state of technology at any given time. The uncertainty would be less if the rule required, as the basis of rights, actual exploitation of the resources beyond the 200-meter line; but this is not the case. Under paragraphs 2 and 3 of Article 2, a coastal state's rights over its shelf exist irrespective of any actual activity or occupation. Hence every coastal state would seem entitled to assert rights off its shores out to the maximum depth for exploitation reached anywhere in the world, regardless of its own capabilities or of local conditions, other than depth, which might prevent exploitation. Who is to say with authority, in the absence of actual trial, that a maximum depth reached off one state can or cannot be reached off another? It is not difficult to envisage the confusion and controversy which must arise in the course of ascertaining, verifying, and publishing the latest data on such a maximum depth. And confusion will be compounded if any substantial group of states with offshore interests are not parties to the Convention.

It may be said that the problem of fixing a precise limit for the shelf under the Convention definition, though real enough, is not of great practical importance. This may be true, at least for a time. But no rule which leaves offshore limits of jurisdiction so hazy can be regarded as adequately stated. The manner in which the shelf doctrine in some cases has already been distorted so as to encroach on the freedom of the high seas should be a warning.[3] It is probably unprofitable to speculate whether it would not have been preferable to adhere to a fixed limit set at a specified depth, even if that were greater than 200 meters—perhaps with the additional proviso that if exploitation actually were carried out at a greater depth, rights should accrue accordingly. But as a matter of practice under the Convention, it might be possible for each party to file periodically with the Secretary General of the United Nations a statement indicating the maximum depth at which it was exploiting the resources of its shelf.

[3] The cautionary remark of Professor Scelle—always a critic of the continental shelf doctrine—at the 357th meeting of the International Law Commission (May 31, 1956) may be recalled in this connection: "It was not surprising that difficulty was experienced in evolving a precise definition of a term which was essentially indefinable. Adoption of the concept whereby the continental shelf extended as far as exploitation of the natural resources of the seabed was possible would tend to abolish the domain of the high seas." I.L.C. Yearbook, 1956, Vol. I, p. 135.

The greatest such figure, established to the satisfaction of the Secretary General, would determine the outer shelf limits for all parties until the next succeeding report.

The fourth paragraph of Article 2 raises other questions of a different but also controversial nature. This provides that the natural resources subject to the shelf regime shall include "living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil." The text is traceable to a 1953 decision of the International Law Commission, in which the Commission resolved to bring "sedentary fisheries" within the scope of the shelf doctrine.[4] That action, which reversed the Commission's own view two years earlier, was carried by less than a majority of the members and in the face of strong dissent.[5]

There are persuasive arguments, both scientific and practical, for the contention that so-called "sedentary fisheries" do not properly belong under the shelf regime. Logically, it would seem that the dividing line between the two domains could best be drawn between animate and inanimate resources. Biologically, it is extremely difficult to define satisfactorily a "sedentary" species. Practically, the living resources of the seas are so intimately dependent on one another that the regulation of some species under one regime and of others under another is bound to create problems. Legally, the unilateral regulation of any fishery in the high seas is a dubious proceeding, and creates a serious hazard to the freedom of high-seas fisheries in general.[6] Considering that the same Conference which framed the shelf instrument also adopted a Convention on Fishing and the Conservation of the Living Resources of the High Seas,[7] based in general on sound scientific principles, it seems regrettable that "sedentary fisheries" should be excluded from the comprehensive arrangements envisaged in the latter document. The treatment of "sedentary fisheries" as a resource of the shelf would appear to be one of the points on which the work of the Conference may be criticized most justly.

Articles 3, 4, and 5 of the Convention are designed primarily to protect the status as high seas of waters over the shelf, to preserve the right of other states to lay cables and pipelines on the shelf, and to spell out more specifically the rights and duties of the coastal state *vis-à-vis* other users of the high seas. These articles, very similar to the views formulated by

[4] I.L.C. Report, 5th Sess., 1953 (U.N. Doc. A/1316), p. 14; 48 A.J.I.L. Supp. 32 (1954).

[5] The vote was six in favor, four against, three abstentions. U.N. Doc. A/CN.4/SR.205.

[6] At the Conference the original proposal for Art. 2(4) expressly excluded "crustacea and swimming species." Although approved in committee, this clause was stricken out in plenary session. The result is to make more doubtful than ever the precise scope of the paragraph.

[7] The text is in U. N. Docs. A/CONF.13/L.54, printed below, p. 851, and A/CONF.13/L.58.

the International Law Commission, strike on the whole a fair balance among the interests concerned. In Article 5(1) the Convention follows the final I.L.C. draft in providing that exploitation must not result in any "unjustifiable interference" with navigation, fishing, or conservation; this formulation is much preferable to the phrase "substantial interference" used in earlier I.L.C. drafts, since it recognizes the possibility that even substantial interference may be justifiable if the particular resources at stake are in fact more valuable than the other use concerned. Article 5(4), specifying that artificial installations shall not possess the status of islands or any belt of territorial sea, is probably unobjectionable at present; but it may become unrealistic if technical developments lead to the construction of true islands with areas and permanence greater than many natural islands. Here an extension of established principles relating to accretion may eventually be called for.

In dealing with the problem of boundaries on the same continental shelf, both as between states opposite one another and as between states adjacent to each other along the same coast, Article 6 rightly stresses agreement among the states concerned as the first method of solution. Only in the absence of agreement, "and unless another boundary line is justified by special circumstances," is the general rule laid down in the article to be resorted to. What constitutes "special circumstances" is not defined, and no method is provided for determining their existence, so the phrase does provide a means by which a disputant state can indefinitely delay the application of the Convention rule by pleading "special circumstances" in any particular case. Yet in view of the fact that special circumstances do exist in numerous cases, the provision seems warranted.

The rule specified in Article 6, when and if resorted to, provides that the boundary in the case of opposite states shall be the median line between their respective baselines, and in the case of adjacent states shall be a line equidistant from the nearest points on their baselines. This formula, based on geometrical principles made familiar largely through the work of the late Dr. S. Whittemore Boggs of the Department of State,[8] has merit chiefly in providing a point of departure for negotiations. Its application in complex geographical situations is not always easy; and if applied strictly, it often produces a line which is unduly complicated or which, in the light of other considerations, appears inequitable or impracticable.

A further technical difficulty in Article 6 arises with respect to its provision that boundary lines shall be constructed with reference to the respective baselines of the states concerned. This presents no problem if those states all establish their baselines on the same principles: but if one claims advanced baselines while another follows a more restrictive practice, the boundaries will be correspondingly affected to the disadvantage of the more conservative state. Presumably the draftsmen of Article 6 considered that the baselines there referred to should be those laid down in accordance with the companion Convention on the Terri-

[8] Boggs, International Boundaries 176–192 (1940).

torial Sea and Contiguous Zone; but there can be no assurance that the two instruments will always go everywhere together.[9] An associated problem arising from the same situation is that a shelf boundary drawn under the rule in Article 6 may not necessarily link up with a boundary drawn through territorial waters on a different basis—thus creating a hiatus and possibly even some embarrassment. One is led by these considerations to the conclusion that, in spite of the effort in Article 6 to provide an acceptable method of determining boundaries in the event of disagreement, the only reliable boundary line remains one fixed by agreement or by the judgment of a competent tribunal.

The last substantive article of the Convention, Article 7, declares that nothing therein shall prejudice the right of the coastal state to exploit the subsoil by means of tunneling, irrespective of the depth of the waters above. While perhaps of no great importance at present, this *carte blanche* may possibly cause conflict in the future if one state seeks by tunneling to exploit resources which another is seeking to reach from installations at sea. In this connection it is not clear whether "tunneling" includes such techniques as directional drilling.

Of the eight formal articles of the Convention, Articles 12 and 13 are of particular significance. Article 12 permits reservations to be made to any articles except the first three, and it seems quite likely that advantage may be widely taken of this permission. Much of the eventual effectiveness of the Convention, if it enters into force at all, will depend on the number and nature of such reservations. Article 13 provides that, after a five-year period from its entry into force, any party may ask for a revision of the Convention and the General Assembly shall then determine the steps to be taken regarding such request. This valuable provision opens the way to a re-examination of the Convention in the light of experience.

When and if such a re-examination occurs, some of the misgivings discussed here may be found to have been without substance, while other and unexpected difficulties will have come to the fore. Pending revision, however, it would seem most helpful to the orderly development of law in this field if the Convention were to receive as wide acceptance and support as possible. It is far from perfect, but insistence on perfection should not be allowed to stifle a promising beginning. Those who view any innovation with alarm must recognize the need for law to keep abreast of technological progress; while those who see in the Convention undue restrictions on their claimed rights may well consider that the alternative of continuing disorder is not a sound foundation for any rights at all.

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[9] The text of the Convention on the Territorial Sea is in U.N. Docs. A/CONF.13/L.52, printed below, p. 834, and A/CONF.13/L.58. Even within the limits of that Convention, it would seem possible for states to disagree over the proper positions of baselines.