

Document:-
A/CN.4/SR.359

Summary record of the 359th meeting

Topic:
Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-
1956, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

86. Even the large majority of the sessile or sedentary species during their life cycle passed through a mobile stage. Oysters, coral, pearl oysters, crabs, etc., had mobile embryos which formed part of the plankton before passing on to the sessile or sedentary stage.

87. The criterion of permanent attachment to the bottom, therefore, was not valid in the determination whether a species was to be regarded as belonging to the living resources of the continental shelf, since if it were applied, no living species could be considered as belonging to the shelf. In the life of the modern fauna of the continental shelf, there was an intimate physical and biological relationship between them and the shelf, which was essentially the same for sessile and sedentary species. Every living organism needed a physical basis or substratum to its existence, whether it were solid, liquid or gas, and that substratum, in the case of sessile and sedentary species, was the bed of the continental shelf, which had a direct influence upon its marine population. That influence was reciprocal, for those organisms affected the ecological conditions of the shelf through the normal biological processes of life and death. There was therefore no major distinction to be drawn between the sessile and the sedentary organisms.

88. The relationship between the fauna inhabiting the bed of the continental shelf was characterized by three features. In the first place, the shelf represented the substratum for the benthonic species, providing them with a favourable environment for their existence and reproduction. Secondly, there was the reciprocal influence, with twofold results, between the benthos and the shelf. Thirdly, the immobility of the sessiles was merely one of the features derived from their relationship with the shelf, but it was neither the only one nor the major one.

89. Given that biological situation, the conclusion was inescapable that the majority of the benthonic species and the continental shelf should both be governed by the same juridical system. Since the sovereignty of the coastal State over the continental shelf was already a recognized juridical institution, it followed that the sessile and sedentary marine fauna should also be incorporated in that system.

90. That principle had already been recognized by various States in respect of exclusive rights in sedentary fisheries—rights which were based on the interdependent relationship between certain species and the sea-bed. How, therefore, could the basis of those rights be withheld in the case of other species which, as he had shown, presented a similar physical and biological relationship? The difference between sessile and sedentary species in respect of the sea-bed was merely a secondary difference which did not affect the fundamental dependence of both with regard to the bed of the continental shelf.

91. In that connexion, he would refer to an important piece of legislation which, although not an international instrument by its nature, had repercussions outside the country that had enacted it. Under Public Law No. 31, the "Submerged Lands Act", passed by the Congress of the United States on 22 May 1953, the United States released and relinquished to certain States in the Union within fixed limits in the Gulf of Mexico all title to the

sea-bed and subsoil beneath navigable waters, and to the natural resources of such sea-bed areas.

92. Section 2(e) of the Act contained a very wide definition of "natural resources", covering both sessile and sedentary species as well as others, while Section 9 made it clear that the natural resources of the North American continental shelf were the property of the United States and subject to its exclusive jurisdiction and control.

93. The criterion of immobility, of permanent attachment to the bottom, was inadequate for the determination whether certain fauna should be regarded as natural resources of the continental shelf, and the only valid basis for such juridical determination lay in the physical and biological interdependence of certain species and the sea-bed regarded as a substratum and habitat. He would suggest that that principle could best be enunciated in the following definition: "The marine, animal and vegetable species which live in a constant physical and biological relationship with the bed of the continental shelf". That criterion would exclude so-called bottom fish.

94. There were two alternatives before the Commission: it could either embark on a detailed technical analysis of the problem or it could adopt the draft article as it stood, leaving consideration of the scientific aspects of the question to the experts in the General Assembly or to a special international conference, to be convened in order to deal with the whole subject.

The meeting rose at 1 p.m.

359th MEETING

Monday, 4 June 1956, at 3 p.m.

CONTENTS

	<i>Page</i>
Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/99/Add.1 and A/CN.4/102/Add.1) (<i>continued</i>)	
The continental shelf (<i>continued</i>)	
Article 2 (<i>continued</i>)	143
Article 3	149

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCHELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/99/Add.1 and A/CN.4/102/Add.1) (continued)

The continental shelf (continued)

Article 2 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 2 of the draft articles on the continental shelf.
2. Mr. EDMONDS, referring to Mr. Padilla-Nervo's mention at the previous meeting of the United States Submerged Lands Act,¹ wished to make it clear that that statute included no expression of the foreign policy of the United States Government.
3. Section 2 included definitions of "land beneath navigable waters" and "natural resources", which had been quoted by Mr. Padilla-Nervo. Section 9, however, made it clear that nothing in the Act was to be deemed to affect the rights of the United States to the natural resources of that portion of the subsoil and sea-bed of the continental shelf lying seaward of the area of lands beneath navigable waters, all of which natural resources appertained to the United States and were subject to its jurisdiction and control. In the general definition, the term was used as including all natural resources, while in the subsequent text, which confirmed the jurisdiction and control of the United States, reference was made to the natural resources of the subsoil and sea-bed only. Mr. Padilla-Nervo had overlooked that distinction.
4. The United States Government had repeatedly maintained that the living natural resources of the subsoil and sea-bed, as covered by that legislation, included only those in attached forms, which interpretation was confirmed in a subsequent section.
5. Reading the statute as a whole, it was clear that its one purpose was to limit the jurisdiction of the individual States of the United States over the continental shelf. The Act applied to a domestic situation in the United States. Conversely, it was declaratory of the interest of the individual states in contrast to that of the Federal Government. Within the classic territorial limit, it gave to the individual states exclusive jurisdiction over the natural resources of the sea-bed, whereas in section 1302 the Federal Government reserved to itself the natural resources of that part of the shelf to seaward of the area of lands beneath navigable waters as defined in section 1301. The definition of navigable waters related to the boundary between the United States and the individual states within the United States and had no reference whatever to any international boundary. The Act simply purported to give to the individual states within territorial waters a right that the Federal Government had previously claimed, and at the same time Congress also informed the several states that they had no rights outside that territorial limit, for the portion of the continental shelf outside territorial waters was under the jurisdiction of the Federal Government.
6. The statute, which, he would stress once again, was

a purely domestic instrument, had no significance whatever with regard to the international posture of the United States Government. The position of the United States Government in various international problems was made known by declarations before international bodies, in the negotiation of treaties and agreements and in official statements by the President and the State Department. Through those various agencies, the United States had declared its attitude with regard to the natural resources of the sea-bed of the continental shelf, which was that only those living resources which were permanently attached to the bottom were an integral part of the continental shelf.

7. A study of document 36 of the Inter-American Specialized Conference, from which he would quote, led him to support the Chairman's proposal to maintain the decision made by the Commission in 1953 that natural resources included those permanently attached to the bed of the sea. Despite the fact that those attached species drew their nourishment from the surrounding water and might also be pelagic during part of their lifetime, their fixed position during the stage when they were in commercial utilization led to practical conservation problems justifying their being regarded as a special case.

8. Another practical problem calling for close consideration was that since, as Mr. Padilla-Nervo had stated, there was no interruption in the gradual transition of characteristics of the various forms from the firmly attached species to the free-swimming fish of the high seas, it was essential, if the Commission were to decide that some species should be regarded as resources of the shelf, to establish a practical distinction between such species and those species which remained resources of the sea. Omission to do so would merely promote further controversy. The distinction between attached and unattached species provided a clear-cut line of demarcation consistent with both conservation and practical requirements. If that distinction were not made, the entire situation might easily become unmanageable.

9. Mr. SANDSTRÖM said that, whereas the Commission's 1951 draft had considered only mineral resources, at its fifth session, in 1953, it had extended the definition of natural resources to include sedentary fisheries. He had opposed the change at that time and still regarded such a comprehensive formulation as unjustified. He had not intended to raise the question at the present session, but in order to avoid a further long discussion, he would join in supporting Mr. Padilla-Nervo, whose view was diametrically opposed to his own, in suggesting that the 1953 text be left as it stood.

10. Mr. PADILLA-NERVO was in entire agreement with Mr. Edmonds' interpretation of the United States Submerged Lands Act, and hoped he had made it clear at the previous meeting that it was purely a domestic and not an international instrument.² He had quoted that law because it contained a definition of what the Federal Government reserved to itself in relation to individual states. That was very important because the question of

¹ A/CN.4/SR.358, para. 91.

² *Ibid.*, para. 91.

a definition was a highly controversial one, as was shown by the inability of the Inter-American Specialized Conference to reach agreement on the subject. Paragraph 2 of the Ciudad-Trujillo resolution stated textually:

2. There is no agreement among the States here represented concerning the juridical regime of the waters which cover the above-mentioned submarine areas or concerning the question whether certain living resources belong to the sea-bed or to the superjacent waters.³

11. Although he had a definition in mind, he would have welcomed something on the lines of the definition of natural resources given in Title I, Section 2 (e), of the Submerged Lands Act, which read as follows:

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, but does not include water power, or the use of water for the production of power;

That definition illustrated the diversity of the criteria in respect of living resources. He personally suggested the broader definition "The marine animal and vegetable species which live in a constant physical and biological relationship with the sea-bed and continental shelf, excluding bottom fish".

12. In view particularly of the difficulty of reaching agreement on a definition of species permanently attached to the bottom, he would stress again his opinion that the Commission should not itself attempt such a technical definition, but leave it to a conference of experts.

13. Sir Gerald FITZMAURICE said that he was in complete agreement with the view put forward by Mr. Edmonds. Mr. Padilla-Nervo seemed to favour a definition which would bring under the heading of the natural resources of the sea-bed any living creature in a constant physical and biological relationship with the continental shelf. He thought that conception was taken from a conclusion of the Mexico Conference of the Inter-American Council of Jurists.⁴ The United Kingdom experts whom he had consulted regarded that definition as being much too wide, for it covered swimming fish such as flatfish, plaice and soles, which could not under any ordinary criteria be regarded as belonging to the sea-bed.

14. It happened that *The Times Literary Supplement* of 25 May contained a review of a book by Robert Morgan, entitled *World Sea Fisheries*, and one paragraph of that review was particularly appropriate. It read as follows:

No account of sea fisheries can be written to-day without some basic information on the physical environment and on the biological factors which dictate and control the richness of any fishery. The author provides this background in the first of the three sections into which he divides the book. He demonstrates the dependence of fish, as the last link in a long and often complicated series of food chains, upon the production of vegetable plankton, the abundance of this in turn being governed by the amount of nutrient salts in shallow

waters. Nor is this all, for the quantity of nutrients becomes exhausted, and its replenishment depends on the extent of the mixing of deep oceanic water with the impoverished surface waters at the edge of the continental shelf. Thus fluctuations in the fisheries are ultimately controlled by the movements of the oceanic water masses and the degree to which these waters succeed in flowing on to the continental shelves, so enriching the areas where most of the commercial fishes are found.

15. The conception of feeding-grounds on the bed of the sea near the coast as the prime factor in the sustenance of fish was too great a simplification. The whole process involved a combination between the action of oceanic waters and vegetable substances in the shallow coastal waters. For those reasons Mr. Padilla-Nervo's concept was too wide and he would be unable to support it.

16. Mr. PADILLA-NERVO said that at the previous meeting he had attempted to make it clear that the so-called bottom fish, which included plaice, sole, halibut and others, which had a nutritional link with the sea-bed, were excluded from the definition he had referred to.

17. He repeated his suggestion that the question should be left for consideration by a specialized conference; the warning signal of Ciudad Trujillo should not be disregarded. The best course for the Commission would be to include a reference to the point in the comment along the lines of the text in paragraph 2 of the operative part of the Ciudad Trujillo resolution. He feared that if the Commission were to risk making a recommendation, the same technical discussion would be repeated in the General Assembly.

18. Mr. SCALLE said that when President Truman expressed his views first on the question of the continental shelf and secondly on fisheries, he had done so with moderation and had drawn a clear distinction between the two, which had provided a starting-point for the Commission's work in that field. But now the continental shelf was assuming such extraordinary proportions that he would like to know exactly how much free sea was left—in other words, how much of the high seas was still open for fishing. There would soon be none at all, for certain South American States had, quite legitimately, demanded that, if there were no free sea they should be compensated, and had accordingly claimed for themselves a territorial sea extending as far as two hundred miles. That appeared quite monstrous, but from the point of view of justice it was not so, because there were some continental shelves that were extremely broad and stretched out into the ocean almost indefinitely—for example, the continental shelf which started from the coasts of Australia and might stretch right up to New Guinea. At the rate they were going, and to judge by the opinion of governments and certain commercial firms, there was no reason why the process should ever stop. It was purely and simply the law of grab. The concept of Grotius was completely finished and done with.

19. He felt that the Commission had committed an abuse in encouraging the notion of the continental shelf,

³ A/CN.4/102/Add.1, p. 2, para. 2.

⁴ A/CN.4/102, Annex 1.

which he was more and more convinced was completely unacceptable.

20. Mr. SPIROPOULOS, supporting Mr. Scelle, said that the path on which the Commission had set out was a dead-end. The gradual evolution of the concept of the continental shelf had shown that the idea of exploitability, an early criterion, had itself been so exploited as to extend the continental shelf to areas that were really part of the high seas. If that process continued, they risked losing all they had gained.

21. He shared Mr. Padilla-Nervo's view that the scientific aspects of the question should be left to technical experts. The Commission had neither the necessary competence nor the time to devote to such questions. Its proper concern was with general principles. Besides, the question of the continental shelf was a *de lege ferenda* question.

22. Mr. KRYLOV agreed with the view that a definition of natural resources should be left to technical experts. All the evidence showed the difficulties of devising a satisfactory international definition.

23. The CHAIRMAN, speaking as a member of the Commission, said that, while sharing Mr. Scelle's concern at the threat to the freedom of the high seas represented by the development of the concept of the continental shelf as interpreted by many States, he was sure that Mr. Scelle would agree that it was undeniable that many States did claim sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources, and that their claims were strengthened by the lack of opposition from other States. That was a contemporary development which was bound to have repercussions in international law. The rights of the coastal State existed and therefore should be regulated. If the Commission undertook that task, it would be lending valuable support to the principle of the freedom of the seas.

24. Without going into the technical aspects of the question, he would draw attention to the report of a working group set up by committee 1 (Continental shelf) of the Inter-American Specialized Conference, the conclusion of which read as follows:

1. In relation to "submarine cables and oleoducts":

The existence of oleoducts, gas pipelines, electric power cables, and other similar installations in the continental shelf is a potential danger to navigation and fishing. Therefore, it is necessary to take adequate technical precautions to prevent accidents and damage.

2. In relation to "the benthonic environment and its elements":

The benthos is the aggregation of plants and animals normally associated in the depths of the waters. It may be considered that there are three groups in the benthos:

- (a) Those that are permanently attached to the bottom;
- (b) Those that walk or crawl on the bottom;
- (c) Those that float or swim near the bottom.

Some organisms may belong to one of these groups at one stage of their lives and to another group at a different stage.

Some of the benthonic forms may at times draw away from the bottom. Some pelagic forms may at times be found near the bottom, but this is not their characteristic habit.

Those which attached to the bottom are the most vulnerable with respect to pollution, sedimentation, and changes in the bottom.

25. With regard to Mr. Padilla-Nervo's stress on the failure to reach agreement at Ciudad Trujillo, he wondered whether that failure ought really to be taken as a warning to the Commission. It must not be overlooked that the Ciudad Trujillo Conference had also failed to agree on the juridical regime of the superjacent waters of the continental shelf.⁵ Was it proposed that the Commission should therefore abandon the decision that it had adopted in article 3? He could not conceive such a possibility, for article 3 embodied a provision that was a vital safeguard for the principle of the freedom of the high seas. The Commission's task was not to legislate, but to codify.

26. Mr. Krylov had proposed that the definition of "natural resources" should be left to technical experts. Experts had in fact reached a decision, but even if they had not, if the Commission had followed Mr. Krylov's advice, the articles on fisheries or the territorial sea would never have been drafted. The Commission had, quite rightly, not hesitated to tackle technical problems, and, if the General Assembly became conscious of the Commission's inadequacy in the scientific field, it was open to it to convene an appropriate technical conference, as it had done in 1951. Mr. Krylov's proposal was unacceptable.

27. The essential purpose of the articles was to define the rights of the coastal State in respect of the continental shelf. In granting such rights, it was essential to indicate the resources to which they extended. No major difficulty had been encountered at the fifth session with regard to the definition of sedentary fisheries or to those organisms permanently attached to the bottom. There might be different attitudes towards his own proposal and, if the Commission was not disposed to accept it as an additional paragraph to the article, the best solution might be to deal with the question in the comment.

28. Mr. PADILLA-NERVO said that, in view of the Chairman's remarks, he must point out that he had never referred to article 3. That article covered a legal question with which the Commission was fully competent to deal and with which, indeed, it should deal.

29. His own remarks had related merely to the definition of "natural resources" in article 2 and had been prompted solely by the Chairman's proposal to include a definition of the term in the article—a definition which the Ciudad Trujillo Conference had failed to reach despite the presence of a number of experts, and which the Rome Conference had not tried to reach, although it was a scientific conference. In suggesting that the Commission should not attempt to define the term, but should leave that task to a specialized conference, he had not wished to imply that he would be unwilling to discuss the question if the Commission decided to do so. In the latter event, as he had already mentioned, he would propose to the Commission another criterion for defining the term, in place of that proposed by the Chairman.

⁵ A/CN.4/102.Add.1, p. 2, para. 2.

30. Mr. KRYLOV thought that the Commission should not rely on the opinion of American experts, but should have its own experts to advise it. If the Commission attempted to deal with the question of definition, it would never complete its session's work. The best course was to defer further consideration of the term "natural resources".

31. Mr. FRANÇOIS, Special Rapporteur, pointed out that in paragraph 70 of its report covering the work of its fifth session (A/2456), the Commission had made quite clear what was meant by natural resources of the sea-bed, which included those permanently attached to the bed, but did not include fish which occasionally had their habitat at the bottom of the sea or were bred there, or such objects as wrecked ships and their cargoes lying on the sea-bed. Accordingly, what the Chairman was proposing was, in effect, merely to include in the article what was, already stated in the comment. If the Chairman were prepared to withdraw his proposal there would be no need for any change at all.

32. Mr. Padilla-Nervo's proposal, on the other hand, would involve a change of position on the part of the Commission, in that the latter, after already specifying in the comment what it meant by "natural resources", would then decide to refer the matter to experts.

33. Mr. PADILLA-NERVO said that he had made no proposal on that point, but only a suggestion. What he had proposed at the previous meeting, however, was that, if the Commission did not embark on a detailed technical analysis of the problem, article 2 should be left as it stood.⁶

34. The CHAIRMAN withdrew his proposal.

35. Mr. HSU raised the question of the use of the term "sovereign rights" in article 2. He objected to it for two reasons. In the first place, it was a pompous term which was liable to be misunderstood and had to be qualified by a reference to exploration and exploitation. The idea could be just as well expressed by the term "exclusive rights", which would dispense with the need for the rather clumsy phrase "for the purpose of".

36. In the second place, the introduction of the concept of sovereignty had no conclusive majority behind it. During the discussion seven members had spoken against it and only six in favour of it. When it came to the vote, however, one of the opponents had been absent and one had decided to abstain, with the result that the concept had been adopted by a very narrow majority.⁷

37. In view of those considerations he proposed that the epithet "exclusive", which was clear and non-controversial, be substituted for the word "sovereign" in draft article 2, and that the words "for the purpose" be deleted.

38. Mr. SCALLE agreed with Mr. Hsu's proposal. The concept of sovereignty seemed to him devoid of all significance when used in so restricted a context as for

the purpose of the exploration and exploitation of the sea-bed.

39. Faris Bey el-KHOURI said that he, too, could attach no meaning to the idea of sovereign rights over the bottom of the high seas.

40. Mr. ZOUREK said that the Commission had debated the question of the appropriate term in the context at length at its fifth session, and he hoped that it would not embark on a long discussion of it again. He was in favour of keeping the text of article 2 as it was. The term "sovereign rights" was perfectly in place in the context. If the Commission were to use the term "exclusive rights" it would merely be saying the same thing in another way, and the exclusive rights would in any case be based on sovereignty. The Commission's draft text seemed to him the only way of placing the coastal State's rights in the continental shelf on a sound legal foundation in the event of the articles being adopted in the form of an international convention. Incidentally, the rights were only potential ones, since it was impossible at the moment to exercise them beyond a certain depth.

41. Mr. FRANÇOIS, Special Rapporteur, said the discussion was tending dangerously towards a third reading of the draft articles. The Commission had already debated them on second reading and was now reviewing them mainly in order to see whether they conflicted at all with the other draft articles on the regime of the high seas. It would be recalled that, after certain States had expressed a wish that the concept of sovereignty be introduced into the article, the Commission had debated the question at length and had finally adopted the term "sovereign rights".⁸ If it suddenly decided at that stage that the term was not correct, it would be going back on its previous decisions without any new element to justify such action. He was strongly opposed to any change in the text.

42. Mr. SANDSTRÖM agreed with the Special Rapporteur. The term "sovereign rights" was a compromise solution reached after a long and lively discussion. He did not want to go back on that compromise.

43. Sir Gerald FITZMAURICE observed that it was very difficult to find an ideal term to apply to the bed of the sea in such a connexion. In both drafts, it was to be noted, the terms used were qualified by the words "for the purpose of exploring and exploiting its natural resources", or a similar phrase. In the draft article 2 adopted by the Commission at its third session, the expression "control and jurisdiction" had been used. If, however, the article referred only to control and jurisdiction, some doubt might persist as to whether the coastal State actually had proprietary rights over the resources of the continental shelf. The term "sovereign rights" made that point perfectly clear, and would avoid all ambiguity if retained.

44. Mr. SCALLE said that he would not have pressed the point had not Mr. Hsu drawn attention to the very slender majority by which the term "sovereign rights"

⁶ A/CN.4/SR.358, para. 94.

⁷ A/CN.4/SR.198, para. 38.

⁸ A/CN.4/SR.215, para. 40.

had been adopted. He did not feel very strongly on the choice between the two epithets. It was largely a matter of taste.

45. He must take issue with the Special Rapporteur on one point, however. The Commission had not hesitated in the past to make changes in its drafts. Indeed, he had the impression that the Commission sometimes made changes merely to please a government, rather than because they were any real improvement. It was a matter of regret to him that the Commission had to make proposals to the General Assembly of the United Nations as to what it wished to be done with its drafts. The role of a commission of experts should end when it submitted its proposals to the appropriate body. Perhaps the Commission's Statute might be amended to enable it to do likewise, instead of having two or three discussions on the same question. The moment for making such a proposal might not yet have arrived, but he was convinced that it would come one day.

46. Mr. HSU said that Sir Gerald Fitzmaurice had made some very reasonable remarks on the subject. But if the object was to make it clear that the coastal State had proprietary rights over the continental shelf, why not say so in so many words? Why drag in the concept of sovereignty? As Mr. Scelle had pointed out, it was a question of taste, and the term "sovereign rights" was in bad taste.

47. Mr. SPIROPOULOS recalled that the term "sovereign rights" had been finally adopted, on his proposal, at the Commission's fifth session⁹ in order to escape from a deadlock created by the introduction of the concept of sovereignty over the bottom of the sea, but, of course, he was not very enthusiastic about the term. The majority by which it was adopted might have been narrow but it was nevertheless a majority. As a matter of fact, the epithet "sovereign" really added nothing. When a State exercised a right on land, sea or air, it was exercising a sovereign right. And the exact nature of the rights it exercised in the context was made quite clear in article 6, paragraph 2. If the Commission really wished to substitute the epithet "exclusive" he would have no objection, since it conveyed exactly the same idea.

48. The CHAIRMAN put to the vote Mr. Hsu's proposal that the word "exclusive" be substituted for the word "sovereign" in draft article 2 and that the words "for the purpose" be deleted.

Mr. Hsu's proposal was rejected by 9 votes to 3, with 3 abstentions.

49. Mr. FRANÇOIS, Special Rapporteur, said that there was a further point to discuss in connexion with draft article 2. The United Kingdom Government had drawn attention (A/CN.4/99/Add.1, page 71), to the fears of certain scientific societies that the terms of the articles might enable the coastal State to place unnecessary restrictions upon bona fide scientific research upon the shelf itself, and had suggested the insertion of provisions safeguarding the general right to undertake such exploration and research. It had further suggested, in connexion

with draft article 5, the addition of the words "or exploration in the waters above the shelf".

50. He himself had raised the question in his report (A/CN.4/97, paras. 53-57), quoting the text of two resolutions adopted by the International Council of Scientific Unions and proposing the text of an article designed to dispel the misgivings of scientific societies. Since the coastal State exercised exclusive rights over the bed of the shelf, it was naturally not bound to tolerate research work by nationals of other States on that bed. On the other hand, there could be no question of its forbidding scientific research in the waters over the shelf.

51. It would be noted that he had included in his text the proviso that "tests with new weapons may be conducted only with the approval of the coastal State". Since the Commission, after a lengthy discussion, had decided to make no reference to atomic tests in connexion with the pollution of the high seas,¹⁰ it might be better not to make any reference to tests of new weapons in draft article 2. The Commission should, however, make the other two points quite clear in its text.

52. Mr. SANDSTRÖM considered that the ideas expressed by the Special Rapporteur were implicit in the terms of draft articles 2 and 3. He doubted the need to give any further explanation in the commentary.

53. Mr. PAL said that whereas the right of the coastal State to prohibit foreign research on the bed of the shelf was implicit in article 2, the fact that it had no right to prevent research in the superjacent waters was quite explicit in article 3. He saw no need for any further explanation.

54. Sir Gerald FITZMAURICE said that scientific bodies in the United Kingdom—in particular, the Royal Society—had raised the question about the continental shelf rather than the superjacent waters, in connexion with the existing text of article 2, because they were alarmed about the possible consequences to fundamental research with regard to the sea-bed itself, as had been brought out clearly in the resolution adopted by the International Council of Scientific Unions in April 1954 and reproduced in paragraph 55 of the Special Rapporteur's report (A/CN.4/97). They were perturbed at the prospect of a coastal State's exercising its sovereignty over the sea-bed and refusing to permit scientific research. Such action would not be in the general interest, because fishery conservation and the best methods of exploiting sedentary fisheries required research, and such research had already been carried out on the continental shelf.

55. The sovereignty of the coastal State must of course be accepted, as well as the possibility that the coastal State might refuse to permit such research, but the Commission might well include in its comment a clause stating that it was not the intention to encourage States to impede scientific research in the biology and geology of the continental shelf, and expressing the hope that States would not exercise their sovereignty in an unreasonable or vexatious manner. Since it was probable that most coastal States would not wish to do so, that stipulation

⁹ A/CN.4/SR.215, para. 40.

¹⁰ A/CN.4/SR.346, para. 40.

need not be expressed in an article, but a reference in the comment would reassure the association of scientists. Since they had submitted resolutions to the United Nations, their apprehensions should be taken seriously.

56. Mr. SANDSTRÖM agreed with that view.

57. Faris Bey el-KHOURI observed that if the Commission had adopted the proposal to substitute the word "exclusive" for "sovereign" in article 2, there would have been no grounds for such apprehensions.

58. Mr. HSU said that the stipulation suggested was not really necessary, since all members of the Commission agreed that the sovereign rights referred to were not, strictly speaking, sovereign rights.

59. Mr. AMADO agreed with the Special Rapporteur that a passage on the subject should be included in the report.

It was agreed that a passage on the lines suggested by Sir Gerald Fitzmaurice should be included in the comment on article 2.

60. Mr. ZOUREK said that he assumed that the reference to tests with new weapons would be omitted.

It was so agreed.

61. Mr. FRANÇOIS, Special Rapporteur, referring to paragraph 42 of his report (A/CN.4/97), pointed out that the Commission had included an article referring to sedentary fisheries in the text adopted at its third session.¹¹ It had subsequently altered its position, and had held that sedentary fisheries should come within the scope of the articles on the continental shelf. In taking that decision, the Commission had had regard only to fisheries involving species permanently attached to the sea-bed. However, as the Commission had stated in the report on the work of its third session, fisheries were also regarded as sedentary because of the equipment used—e.g., stakes embedded in the sea-floor. At its fifth session, that aspect of the question had been overlooked by the Commission. He had therefore suggested that the wording of the original article 3 should be inserted, as set out in the two sub-paragraphs of paragraph 42 in his report, subject to an exception in the case of fish permanently attached to the bed of the continental shelf.

62. Sir Gerald FITZMAURICE thought that a different question was being raised in paragraph 42. The Special Rapporteur seemed to be speaking of the definition of sedentary fisheries, which did not include fish not permanently attached to the sea-bed but caught by traps on the sea-bottom.

63. Mr. FRANÇOIS, Special Rapporteur, explained that he intended to deal in the proposed article with species caught by equipment fixed in the sea-floor and to refer to the continental shelf articles as regards species permanently attached to the sea-bed.

64. Mr. PAL said that at its third session the Commission had accepted the idea that sedentary fisheries were subject to the freedom of fishing, which was included in the

concept of the freedom of the high seas. At its fifth session, it had abandoned that idea and had thought of including sedentary fisheries under the continental shelf, but had not done so in express terms. It was now being asked to repair that omission. It was now to take sedentary fisheries out of the freedom of the high seas and place them under the continental shelf. Such an extension of the concept of the continental shelf was an infringement of the freedom of the high seas, and he objected to it.

65. Mr. SANDSTRÖM believed that the Special Rapporteur was referring rather to sedentary fisheries exploited for a considerable period, in which the fishers had acquired a form of prescriptive right. That was perfectly acceptable; such fisheries had long existed in Swedish waters. He could conceive of similar equipment being used on the continental shelf, and its use would be entirely justified.

66. Mr. FRANÇOIS, Special Rapporteur, said that there might be some difference of opinion as to how the idea should be expressed. His proposal might be referred to the Drafting Committee. Its purpose was to safeguard long-existing rights, often exercised by indigenous fishers, even outside the three-mile limit. Some reference to the point was required, as there was none in the existing text. The omission had already been pointed out by Mr. Mouton and Professor Böhmert.

67. Mr. SCALLE remarked that it was a doctrine of long standing.

68. Mr. PAL said that when the Commission had come to deal with the continental shelf, it had wished to leave the existing freedom of the high seas unaffected, and at its third session had not included sedentary fisheries in its definition of the continental shelf. At its fifth session, it had not included sedentary fisheries in the articles themselves, but had referred to them in the commentary. That had been the thin edge of the wedge. The Special Rapporteur, however, had expressly included them in the natural resources covered by the present article 2. While the rights in sedentary fisheries already exercised were safeguarded, there seemed to be an infringement of the freedom of fishing for other nations, as the coastal State now appeared to be given exclusive rights under article 2.

69. Mr. FRANÇOIS, Special Rapporteur, said that he was proposing to re-establish the original article 3, which in the 1951 draft did not come under the continental shelf, but under "related subjects". The proposal might, however, be examined in greater detail by the Drafting Committee, which would undoubtedly find some way of meeting Mr. Pal's objection.

70. The CHAIRMAN said that Mr. Pal was probably thinking of the criterion adopted by the Commission at its third session, when it had been referring only to the mineral resources of the continental shelf, whereas at its fifth session it had extended the idea to include sedentary fisheries.

71. Mr. PAL objected that there had been no separate article dealing with sedentary fisheries in the text prepared

¹¹ Official Records of the General Assembly, Sixth session, Supplement No. 9 (A/1858), p. 20.

at the fifth session. The dominant idea, when dealing with the continental shelf, had been that the freedom of the high seas should be left unaffected; and sedentary fisheries were already covered by the freedom of fishing, one of the aspects of the freedom of the high seas. He could not see on what principle it was now proposed to take them out of the freedom of fishing and give them to the present owner of the continental shelf. To do so would be an encroachment on the freedom of the high seas.

72. In reply to a question by Mr. AMADO, Mr. FRANÇOIS, Special Rapporteur, explained that the article dealing with sedentary fisheries had not been retained in the draft prepared at the fifth session as the Commission had overlooked fisheries regarded as sedentary because of the equipment used—e.g., stakes embedded in the sea floor—and had paid attention only to the fishing of species permanently attached to the bed of the sea.

73. Mr. SANDSTRÖM said that he assumed that the phrase “provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals” in paragraph 42, sub-paragraph 1, of the Special Rapporteur’s report (A/CN.4/97) was intended to imply that nationals of States other than the coastal State might use equipment at places where they would not disturb the nationals who had been fishing there for a considerable time.

74. Mr. ZOUREK observed that conflicts might arise between the coastal State and other States when nationals of the latter tried to fish by means of stakes embedded in the sea-floor of the continental shelf at places where nationals of the coastal State already used similar equipment.

75. The CHAIRMAN, speaking as a member of the Commission, doubted whether regulation was properly in context, since the proposal about the continental shelf referred only to exploration and exploitation. Regulation might be more properly referred to in connexion with conservation.

76. Mr. FRANÇOIS, Special Rapporteur, said that the subject was related to the question of the natural resources of the continental shelf, but he had proposed to include it as an article in the series concerning fisheries rather than in those concerning the continental shelf.

77. The CHAIRMAN suggested that article 2, with the Special Rapporteur’s proposal relating to sedentary fisheries, be referred to the Drafting Committee.

It was so agreed.

Article 3

78. Mr. FRANÇOIS, Special Rapporteur, drew attention to the comment by the United Kingdom Government on articles 3 and 4 (A/CN.4/99/Add.1, page 71). He himself believed that the point raised by the United Kingdom Government had been stated as clearly as possible in the commentary.

79. Sir Gerald FITZMAURICE was inclined to agree with the Special Rapporteur. The reason for the United Kingdom comment had undoubtedly been a dislike of the tendency to extend the rights of coastal States in the

continental shelf to claims to exclusive rights in the superjacent waters and a belief that, in view of that danger, the stipulation should be made clearer.

80. Mr. SCALLE said that the wording of the article and the Commission’s intentions were entirely clear. Difficulties might, however, arise in course of time, because it was difficult to see how freedom of navigation could be maintained over the continental shelf if exploitations became very numerous and closely spaced.

81. The CHAIRMAN said that that danger was covered by article 6.

82. Mr. SCALLE maintained that the wording of article 6, particularly the phrase “unjustifiable interference”, was practically meaningless.

83. Mr. AMADO said that it would be very difficult to prevent States, which naturally wished to increase their wealth, from trying their utmost to increase their power too.

84. Mr. SCALLE doubted whether a small State would obtain the same treatment as a large one. There was only one safeguard: the article on arbitration. Even if that were accepted, it might give dubious satisfaction.

It was decided to refer article 3 to the Drafting Committee.

The meeting rose at 6.30 p.m.

360th MEETING

Tuesday, 5 June 1956, at 9.30 a.m.

CONTENTS

	<i>Page</i>
Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/97, A/CN.4/99/Add.1) (<i>continued</i>)	
The continental shelf (<i>continued</i>)	
Article 4	150
Article 5	150
Article 6	150
Article 7	151
Article 8	153

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.