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Comments by Governments on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session

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the Sea, Volume I (Preparatory Documents)*

COMMENTS BY GOVERNMENTS ON THE DRAFT ARTICLES CONCERNING THE LAW OF THE SEA ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS EIGHTH SESSION

(Preparatory document No. 5)

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NOTE BY THE SECRETARY-GENERAL

1. The General Assembly at its eleventh session, on 21 February 1957, in connexion with the agenda item "report of the International Law Commission on the work of its eighth session: (a) final report on the régime of the high seas, the régime of the territorial sea and related matters", adopted resolution 1105 (XI). By that resolution it was decided that an international conference of plenipotentiaries should be convoked to examine the law of the sea. In paragraph 7, the Secretary-General was requested to invite appropriate experts to advise and assist the Secretariat in preparing the Conference, with terms of reference, *inter alia*:

"(a) To obtain, in the manner which they think most appropriate, from the Governments invited to the conference any further provisional comments the Governments may wish to make on the Commission's report and related matters..."

2. Accordingly, after consultation with the experts, a letter was sent on 25 March 1957, on behalf of the Secretary-General, to the Governments invited to the

Conference, requesting them to send to him before 31 July 1957 any further provisional comments they might wish to make.

3. The present document reproduces the texts of comments received from the following Governments: Austria, Canada, Chile, Cuba, Czechoslovakia, Denmark, Germany, Federal Republic of, Iceland, India, Italy, Morocco, Nepal, Norway, Peru, Poland, Sweden and the United Kingdom of Great Britain and Northern Ireland.

4. Comments received after 22 October 1957 are reproduced as addenda to the present document, as follows: Netherlands (A/CONF.13/5/Add.1), China (A/CONF.13/C.5/Add.2), Ethiopia (A/CONF.13/5/Add.3) and Thailand (A/CONF./13/5/Add.4).

COMMENTS BY GOVERNMENTS

1. Austria

LETTER FROM THE PERMANENT MISSION OF AUSTRIA TO THE UNITED NATIONS, DATED 20 AUGUST 1957

[Original: English]

In connexion with articles 29 and 30 of the draft codification of the law of the sea, the Austrian Government would like to suggest consideration of the principle that Governments may have the right to grant permission to fly the national flag when their own nationals charter an unmanned and unequipped ship registered in a foreign port (bare boat charter).

In the Austrian federal law of 17 July 1957, regarding the right to fly the flag of the Republic of Austria, this procedure is provided in the case that an Austrian national charters such a ship for a term not shorter than one year.

2. Canada

NOTE VERBALE FROM THE DEPARTMENT OF EXTERNAL AFFAIRS OF CANADA, DATED 10 SEPTEMBER 1957

[Original: English]

The Canadian Government desires to say that it considers that the increased interest of States in the exploitation of the resources of the sea, and the con-

sequent need for conservation and regulation of these resources along with the need to preserve the principle of the freedom of the seas, calls for a reappraisal of the existing law of the sea and subsequent agreement on generally accepted rules, whether they be existing rules reaffirmed or revised or entirely new rules. Accordingly, the Canadian Government welcomes the convoking of an international conference to examine the law of the sea and proposes to be represented at this Conference, as the Secretary of State for External Affairs informed the Secretary-General on 17 April 1957. Regarding the International Law Commission's report on the law of the sea, the following are the views of the Canadian Government on *some* of the recommendations of the Commission:

A. Breadth of the territorial sea and contiguous zone (articles 3 and 66)

The Canadian Government considers that any new rules must meet the essential needs of coastal States. The three-mile limit is not adequate for all purposes. It is not adequate for the enforcement of customs, fiscal and sanitary regulations. It is also not adequate for the protection and control of fisheries. The Commission has recognized in article 66 the need for extended jurisdiction in respect of the enforcement of customs, fiscal and sanitary regulations. The Canadian Government considers it to be fully as important that the rules of international law should provide adequately for the regulation and control of fisheries off the coast of any State. One way of providing for this would be by accepting, for general application, the twelve-mile breadth for the territorial sea. That would allow for complete fishery, customs, fiscal and sanitary control and regulation within that limit and dispense with the need for any provisions along the lines of those contained in article 66. It is recognized, however, that a general extension of the breadth of the territorial sea to twelve miles could have consequences of importance with regard to the freedom of sea and air navigation. Instead, therefore, of having a general adoption of the twelve-mile breadth for the territorial sea, an alternative approach which would not affect the rights of navigation by sea or by air would be to agree on a contiguous zone of twelve miles as recommended by the Commission, but with the modification that, within that zone, the coastal State should have the exclusive right of regulation and control of fishing. Rights over fisheries accorded by such a zone should, in the view of the Canadian Government, be as complete as those that are afforded to a coastal State within the limits of territorial waters.

B. Straight baselines (article 5)

This recommendation is acceptable to the Canadian Government as reflecting the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*.¹ The Canadian Government agrees that the employment of straight baselines as outlined by the Commission should be recognized universally as being a proper means of establishing the datum-line for

¹ *Fisheries Case, Judgment of 18 December 1951, I.C.J. Reports 1951, p. 116.*

measuring the territorial sea or contiguous zone, in appropriate cases.

C. Continental shelf (article 67)

In its final report on the law of the sea, (A/3159, section III, para. 2, p. 40), the International Law Commission stated that it "accepted the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose of exploiting its resources..." The Commission believed, however, that the legal boundary of the continental shelf should be a fixed limit in terms of the depth of the superjacent waters because a boundary defined in terms of the admissibility of exploitation, as the Commission's first draft of 1951 proposed, would "lack the necessary precision and might give rise to disputes and uncertainty". The 200-metre depth was selected by the Commission as the limit of the continental shelf because it considered that this depth is where the continental shelf in a geological sense "generally" comes to an end and that the limit proposed would be sufficient for all practical purposes at present.

Against the contingency that exploitation of the sea bed at depths greater than 200 metres might prove technically possible, the Commission recommended at its eighth session that the continental shelf in the legal sense might be considered as extending beyond the 200-metre depth mark to areas at greater depths where the superjacent waters admit of the exploitation of the resources of the sea bed of these areas.

This additional provision reintroduces the uncertainty which led the Commission to favour a fixed limit in terms of the depth of superjacent waters for determining the legal boundary of the shelf. It is considered that the foreseeable possibilities of exploitation at greater depths 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 per cent 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.

It should be added that this suggestion might also solve the special problem raised by the International Law Commission regarding submerged areas of a depth less than 200 metres which are separated from the main shelf by narrow channels. While the scarcity of soundings in many areas makes it impossible to be definite concerning the number of such submerged areas it is thought that if the actual edge of the shelf were considered to be the boundary, by far the greater number of these "islands" would then be included as part of the shelf and would so not create a special problem.

D. High seas fishing (articles 51, 52, 53 and 56)
Article 51

There is a possibility that, in a given area, the nationals of one State could be exploiting one kind of

living marine resource and, at the same time, the nationals of another State could be exploiting another kind of resource. The article, as presently drafted, does not seem to take account of such a situation. It refers to an area rather than to a particular resource. A more explicit statement appears to be desirable.

Article 52

The article, as drafted, might be interpreted as applying only to a case where the nationals of two or more States fished the same stock or stocks of fish in any one area. In some instances, to provide adequate conservation measures it would be desirable to have them applied to the same stock of fish even though it were fished in different areas. A clarification in wording is therefore suggested.

The criterion suggested by the Commission (see para. 1 of its commentary to article 52) for invoking the procedure envisaged in this article is that a State be "regularly engaged in fishing". Under article 53, an existing régime does not apply to a newcomer unless he is engaged in substantial fishing (see para. 2 of the Commission's commentary on article 53). It would seem reasonable therefore that under article 52 a State ought only to be allowed to call for the establishment of a régime if it is engaged in substantial fishing, subject of course to articles 54, 55 and 56.

Article 53

The article, as drafted, would make conservation measures adopted pursuant to articles 51 and 52 applicable to other States only in the case of fishing for the same stocks of fish in the same area. From the conservation point of view, the provision is inadequate. It is the stocks of fish which must be protected regardless of the fact whether they are fished in the same area or not.

In paragraph 2 of the Commission's comment on this article, it is stipulated that the regulations should be applicable to newcomers only if they engage in fishing on a scale which would substantially affect the stock or stocks in question. It would be preferable to have this stipulated in the article, for instance, by adding after "any of the interested parties" in paragraph 2 the words, "engaged in the fishing on a substantial basis".

Article 56

Although there may, in certain circumstances, be some justification for a State not engaged in fishing in an area not contiguous to its coast requesting a fishing State to take certain conservation measures, care should be taken that this request would not extend to measures necessarily having to be taken within the boundaries of the fishing State. This article, therefore, should be qualified to indicate that the fishing State would be under no obligation to take measures within its boundaries.

The Government of Canada is of the opinion that the Commission's articles on fishing should be subject to the "abstention principle" which was considered at the Technical Conference on the Conservation of the Living Resources of the Sea held in Rome in 1955 and which is stated in the report of the Conference² (paras. 61-62), namely:

² Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (United Nations Publication, Sales No : 1955.II.B.2.) p. 7.

"61. A special case exists where countries, through research, regulation of their own fishermen and other activities, have restored or developed or maintained stocks of fish so that their productivity is being maintained and utilized at levels reasonably approximating their maximum sustainable productivity, and where the continuance of this level of productivity depends upon such sustained research and regulation. Under these conditions, the participation of additional States in the exploitation of the resources will yield no increase in food to mankind, but will threaten the success of the conservation programme. Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action.

"62. The International North Pacific Fishery Commission provides a method for handling the special case mentioned above. It was recognized that new entrants in such fisheries threatened the continued success of the conservation programme. Under these circumstances the State or States not participating in fishing the stocks in question agreed to abstain from such fishing when the Commission determines that the stock reasonably satisfies all the following conditions:

"(a) Evidence based upon scientific research indicates that more extensive exploitation of the stock will not provide a substantial increase in yield;

"(b) The exploitation of the stock is limited or otherwise regulated for conservation purposes by each party substantially engaging in its exploitation; and

"(c) The stock is the subject of extensive scientific study designed to discover whether it is being fully utilized, and what conditions are necessary for maintaining its maximum sustained productivity. The Convention provides that, when these conditions are satisfied, the States which have not engaged in substantial exploitation of the stock will be recommended to abstain from fishing such stock, while the States engaged in substantial exploitation will continue to carry out the necessary conservation measures. Meanwhile, the abstaining States may participate in fishing other stocks of fish in the same area."

All the above comments are, of course, provisional at this stage. The fact that comments have not been submitted on other matters does not indicate that the remainder of the draft articles are necessarily acceptable to the Canadian Government as they now stand. The comments are submitted with a view to facilitating the exchange of views among countries that will be essential in working out agreed provisions on the law of the sea.

3. Chile

LETTER FROM THE PERMANENT MISSION OF CHILE TO
THE UNITED NATIONS, DATED 19 JULY 1957

[Original: Spanish]

Before proceeding to the substance of my reply, I wish to place on record expressing our Government's great appreciation for the work done by the International Law Commission. The study entrusted to it was not an easy one. It related to a subject which is complex in itself and to a field of law which has been constantly influenced in its development by interests of various kinds, where it has not always been possible to say definitely what rules are capable of being codified and what rules are still in the stage of progressive development. Finally, this field of the law has, in recent years, received the impact of new trends which have their origin in the same considerations as those that have

traditionally guided the development of the law of the sea and which are now striving to find definite expression in rules of law.

The International Law Commission, thanks to its ability, wisdom and diligence, succeeded in preparing draft articles of exceptional merit on the subject; the conclusions it reached constitute, for the greatest part, the most felicitous formulation of definitively established principles of international law; and if, in some respects, the results of its studies were not satisfactory, at least from our point of view, the reason is that the Commission wished to adhere too strictly to the rules regarded as classical, without giving due weight, as it was not authorized to do, to new aspects which affect present needs and which demand that the principle of law giving them the necessary protection should be duly formulated.

The chief difficulty encountered by the International Law Commission in its task was how to define the breadth of the territorial sea; and if we could analyse the causes of this difficulty in detail we would find that the statement made in the previous paragraph is fully justified. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea; it makes the *a priori* affirmation that international law does not permit an extension of the territorial sea beyond twelve miles; and it adds that many States do not recognize a breadth greater than that of their own territorial sea. In the light of the diversity of the rules of law governing the subject, it concludes that it cannot take any decision as to the breadth of the territorial sea.

The considerations underlying these conclusions on the part of the International Law Commission were primarily of a legal character. Nor could they have been otherwise, for the Commission's task was essentially legal in character. There are, however, other considerations — including economic and political considerations — and it is these which account for the decision to broaden the scope of the forthcoming conference on the law of the sea. If, on the one hand, we consider the problem of the territorial sea from the economic aspect, we enter immediately into the problem of the conservation of marine resources, the problem which has caused many States to extend the breadth of their territorial sea. If, on the other hand, we study it from the political point of view, we enter into the problem of freedom of navigation, which is of interest chiefly to the great naval Powers.

Taking these aspects into account, one can readily appreciate how difficult it is to work out a formula that, in keeping with what are known as classical or traditional principles, succeeds simultaneously in solving the various problems involved in the extension of the territorial sea. The difficulty is even greater if one considers that the great naval Powers are also the owners of large fishing fleets. Hence, there is a conflict which cannot be composed by juridical formulae so long as — before any attempt is made to solve it in law — its true causes are not duly inquired into. As the law gradually evolves new rules to deal with each problem of the sea, particularly the problem of the conservation of marine resources, the extent of the territorial sea will become less important and it will be easier to arrive at a uniform agreed solution for all

countries in conformity with present trends of international law.

Meanwhile, my Government considers that there is not at present any generally accepted rule of international law determining the extent or breadth of the territorial sea and, furthermore, that there are absolutely no grounds for considering that international law does not permit an extension of the territorial sea beyond twelve miles.

Article 7, paragraph 2, of the International Law Commission's report provides that, for the purpose of the waters within a bay being considered internal waters, the mouth of the bay, the coasts of which belong to a single State, should be fifteen miles wide. In our opinion this distance is exceedingly short, especially if it is borne in mind that not even a moderately precise definition has been given of "historic" bays, a definition which is absolutely necessary in order that States may specify what is their position concerning this point.

With reference to articles 8 and 9 of the draft, concerning ports and roadsteads, my Government considers that, inasmuch as in certain localities it is difficult to draw any precise distinction between a port and a neighbouring roadstead, roadsteads should have the same legal status as ports and their waters should be treated, like those of ports, as internal waters.

With regard to groups of islands (article 10), a subject on which the Commission was unable to agree, my Government considers that where the islands of an archipelago are separated by narrow passages and surrounded by treacherous waters navigable only by ships of small tonnage, those waters should constitute internal waters.

In cases where both coasts of a strait belong to one and the same State along their entire length, then, under article 12, paragraph 3, the whole strait will belong exclusively to the single coastal State, irrespective of the distance separating the two coasts; nevertheless innocent passage should be allowed to vessels of other countries if the strait in question normally serves for purposes of navigation between two parts of the high seas or constitutes the entrance to a gulf or bay which has other coastal States.

In part II of the Commission's report, article 27 states that the freedom of the high seas comprises, *inter alia*, freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines and freedom to fly over the high seas. On this article my Government would not have to offer any comment were it not to point out that it should be provided that these freedoms are or may be subject to restrictions. In that way there would be a clear stipulation laying down a principle which the International Law Commission itself accepted in its report when it drew up rules that affect, principally, the freedom of navigation — the only fundamental freedom on the seas.

As regards article 29, more elaborate provisions would be necessary to specify the characteristics which a vessel should possess for the purpose of being held to have the nationality of a particular State.

The provisions of article 47 on the right of hot pursuit also need to be supplemented. The article should contain some provision dealing with the exercise of the right of hot pursuit in case of breach of the rules which may be in force in specified areas to ensure the conservation

marine resources. Furthermore, since reference is made to hot pursuit of a ship by an aircraft and since the freedom to fly over the high seas has been included as one of the freedoms of the sea, some provision should be added to deal with hot pursuit of an aircraft by another aircraft.

Articles 49 to 59, inclusive, of the report concern the right to fish and the conservation of the living resources of the sea. My Government considers that these articles treat of the principal problem to be discussed at the coming conference. It will depend on the manner in which this problem is dealt with and on the way in which it is resolved whether or not it will be possible to work out agreements concerning the other aspects of the law of the sea, particularly the delimitation of the territorial sea. We recognize that these provisions constitute a great advance, striking evidence of the speed of the evolution of this branch of the law of the sea; but this evolution has not reached the end of its course. It is not sufficient to recognize the special interest of the coastal State in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea; it is also necessary to proclaim the coastal State's right to conserve the marine resources in a zone lying off its coasts which is delimited in the light of technical or scientific considerations. One cannot claim to place on a footing of virtual equality distant States which, by reason of the freedom of the high seas and the freedom to fish, seek to protect the financial interests of large concerns, and the coastal State, which, while also actuated by motives of financial gain, is in addition concerned with the subsistence and the common weal of its population.

Lastly, in connexion in particular with the contiguous zone and the continental shelf, my Government wishes to reiterate the comments made in a letter dated 8 April 1952.³

In replying in the above terms to your request, my Government wishes to state that the opinions expressed at this juncture are of a provisional character and may be superseded by the view which may be formed concerning these problems, in consequence of fresh evidence or situations, in the course of the discussions in the conference convened for March 1958.

4. Cuba

TRANSMITTED BY A LETTER FROM THE PERMANENT MISSION OF CUBA TO THE UNITED NATIONS, DATED 1 MAY 1957

[Original: Spanish]

I. Territorial sea

A. Juridical status

The Government of Cuba notes with satisfaction that the International Law Commission has recognized the sovereign character of the rights enjoyed by the State in the belt of sea adjacent to its coast, described as the "territorial sea". Such a conception of the status of this marine area is consistent with the practice of States and

was expressly confirmed by The Hague Codification Conference of 1930. Not only does sovereignty constitute the characteristic feature of the territorial sea, but it is indeed the essential element which distinguishes that sea from other marine areas, where the coastal State is accorded other rights.

The sovereignty of the coastal State over its territorial sea is subject to one single fundamental limitation: it must not hamper innocent passage by ships of foreign nationality. In this connexion, the Government of Cuba is also of the opinion that the provisions contained in article 15 *et seq.* of the Commission's draft are consistent with international law and practice.

B. Breadth and limits of the territorial sea

The Government of Cuba is aware of the difficulties which the Commission encountered in trying to formulate a rule on this matter. It recognizes that, as regards the delimitation of the territorial sea, the practice of States is not uniform and that the problem should be considered further with a view to finding a satisfactory solution.

In the opinion of the Cuban Government, the Conference, in considering article 3 of the Commission's draft, will have to take into account, *inter alia*, the following principles and considerations:

1. The question of the breadth of the territorial sea is not a domestic matter but one of international law. The coastal State is not free to fix the breadth unilaterally since, in the words of the International Court of Justice in the Anglo-Norwegian Fisheries Case, "the validity of the delimitation with regard to other States depends upon international law".⁴

2. Any extension beyond the traditional limits must take into account not only the interests of the coastal State but also the general interests of the international community. In particular, due regard should be paid to the "historic" fishing rights of third States the nationals of which have, since time immemorial and without interruption, engaged in fishing in the areas of the high seas affected by the extension.

3. Within the territorial sea the coastal State not only enjoys rights but is also bound to discharge certain obligations and responsibilities.

4. In present-day conditions, having regard to the development of the international law of the sea, the coastal State also enjoys or may be accorded other rights, beyond the outer limit of its territorial sea. These rights include the State's rights in the "contiguous zone", the rights necessary for the exploitation of the continental shelf, of submarine areas contiguous to islands (the "insular" shelf) and of other submarine areas, and the rights relating to the conservation of the living resources of the sea. Without doubt, the existence or recognition of these rights may render an extension of the territorial sea unnecessary and unjustifiable.

5. Where the breadth fixed by a coastal State for its territorial sea gives rise to a conflict between the interests of the coastal State and those of third States, the dispute should be submitted for settlement in accordance with the methods and procedures prescribed

³ Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), p. 43.

⁴ I.C.J. Reports 1951, p. 132.

by international law for the peaceful settlement of disputes between States.

C. Groups of islands (archipelagoes)

The Government of Cuba regrets that the Commission was unable to formulate a provision concerning the delimitation of the territorial sea around a group of islands or archipelago. The Government of Cuba has taken note of paragraph 4 of the commentary to article 10 of the draft, in which the Commission points out that article 5, concerning straight baselines, may be applicable to groups of islands lying off the coast. It is to be hoped, however, that the Conference will complete the text with a provision envisaging groups of islands pure and simple, and that it will set forth an objective criterion analagous to the one now applicable to off-shore archipelagoes. The case for which provision has to be made is that of groups of islands or archipelagoes constituting a single geographical and economic entity; this naturally excludes shoals and islands which, even though forming part of the territory of the State, are widely dispersed and outside the area occupied by the principal group. The latter cases will continue to be governed by the traditional rule, which recognizes that every island has its own territorial sea.

II. The continental shelf and other submarine areas

A. Nature and scope of the rights enjoyed by the coastal State

The Government of Cuba accepts the criterion adopted by the Commission in defining the submarine areas over which the coastal State enjoys rights and agrees that those rights are of a sovereign nature. On this point, it should be noted that the definition in article 67 corresponds in essentials to that approved by the Inter-American Specialized Conference at Ciudad Trujillo⁵ and that it ensures equality among all coastal States.

Furthermore, the Government of Cuba 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 superjacent waters as high sea, or that of the airspace above those waters. Certain States have claimed that those rights extend to the so-called "epicontinental" waters, but the great majority of States have shown themselves opposed to that claim and consider that such waters are part of the high seas and are subject to the legal rules applicable thereto.

B. Natural resources of the submarine areas

The text of the draft (article 68) refers merely to the "natural resources" of the continental shelf, whereas the commentary explains that the term includes "mineral resources" and the species known as "sedentary", that is to say those permanently attached

to the bed of the sea, but does not cover bottom-fish and other fish which occasionally have their habitat at the bottom of the sea or are bred there. The Government of Cuba accepts this criterion, but hopes that the Conference, when it comes to a scientific study of the subject, will include this specification in the article proper, in order to eliminate all future doubt regarding the living species which belong to the sea bed and those which are subject to the rules applicable to the superjacent waters.

III. Conservation of the living resources of the high seas

The provisions of the Commission's draft on this subject certainly represent a radical departure from the traditional concept of the freedom of fishing. The Government of Cuba recognizes, however, that the problem of the conservation of those resources and the development of modern fishing methods have made it necessary to revise the traditional concept, which allowed absolute and unrestricted freedom in the exploitation of such marine wealth. The provisions of the draft represent an effort to subordinate the right accorded to the coastal State to certain conditions and limitations, designed to guarantee the rights of others against excesses or abuses on the part of the coastal State and against the unilateral adoption of conservation measures which might prove unnecessary or inappropriate. The stipulation of such conditions and limitations would secure to the other States a safeguard without which the practical success of the draft might be prejudiced.

The Conference should carefully consider, among other provisions, paragraph 2 of article 58, under which measures unilaterally adopted would remain in force pending a decision by the arbitral commission for which provision is made in the draft. It is submitted that unilateral measures to which any of the States affected by them has entered an objection should not become obligatory until the arbitral commission has convened and approved them.

Furthermore, the Government of Cuba considers that the draft should contain a provision to the effect that the measures referred to in article 53 should not be applicable to new participants in the exploitation of any given stocks of fish or other marine resources unless they engage in fishing on a scale which substantially affects the stocks or resources in question. Such a recommendation had already been made by the Commission itself, in paragraph 2 of the commentary to article 53.

5. Czechoslovakia

LETTER FROM THE PERMANENT MISSION OF CZECHOSLOVAKIA TO THE UNITED NATIONS, DATED 5 AUGUST 1957

[Original: English]

The comments of Czechoslovakia with regard to the draft codification of the rules of international law applying to the régime of the sea, as well as its views on general issues related to the question of the codification of the law of the sea, were submitted by the Czechoslovak delegation to the eleventh and to preceding

⁵ Final Act of the Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters", Ciudad Trujillo, March 15-28, 1956 (Washington, D.C., Pan-American Union, 1956).

sessions of the General Assembly during the consideration of the report of the International Law Commission on the work of its eighth session and on the work of its preceding sessions. The Czechoslovak Government requests that these comments be taken into account in the elaboration of the repertory prepared by the group of experts.

The Czechoslovak Government reserves its right to submit its observations and eventual proposals regarding the legal regulation of the question of free access to the sea of land-locked countries at a later time after a more detailed study of all the aspects of this matter.

6. Denmark

TRANSMITTED BY A LETTER FROM THE PERMANENT MISSION OF DENMARK TO THE UNITED NATIONS, DATED 5 AUGUST 1957

[Original: English]

The following comments are intended to replace the observations previously made by the Danish Government on the provisional reports of the International Law Commission.

Article 1

According to this article, the sovereignty of a State extends to a belt of sea adjacent to its coast, described as the territorial sea.

This principle is acceptable, provided that it does not preclude the possibility of fixing the breadth of the belt differently for the different relations in which a State exercises sovereignty over the parts of the sea nearest to its coast. According to Danish law and practice, Denmark maintains, for the purpose of customs control, a limit of the territorial sea which is normally four nautical miles from the coast, while in other respects the limit of the territorial sea is generally three nautical miles from the coast. In other words, the territorial sea as a concept of international law should not necessarily be regarded as a uniform concept, but should be variable according to the different functions it serves.

Article 2

No comment.

Article 3

In the opinion of the Danish Government it would be desirable—as recommended by the International Chamber of Shipping in its statement of 27 April 1955⁶—to reach international agreement on a definite and not too wide limit of the territorial sea. However, the Danish Government are in agreement with the Commission's statement to the effect that no uniform international practice can be shown to exist as regards the breadth of the territorial sea.

In these circumstances and in the light of existing practice, the Danish Government take the following view:

The existing legal position is not tantamount to complete freedom for each State to decide the breadth of its territorial sea. This was the opinion expressed by

the International Court of Justice in its decision of the Anglo-Norwegian Fisheries Case. Thus, a State cannot, by altering the rules which it has so far applied for the delimitation of its territorial sea, incorporate any large areas which have hitherto been high seas into its own territorial waters, to the detriment of the interests of other States. On the other hand, it cannot be equitable to bind those States which have so far maintained a territorial sea of, say, three nautical miles to that limit indefinitely, irrespective of other States maintaining a considerably broader territorial sea. Hence, a certain limited extension by a State of its territorial sea cannot be considered unreasonable when such extension is motivated by weighty national considerations, and it can be effected without infringing upon the established interests of other States in the waters involved. Such extensions should not, however, exceed the limits generally observed in neighbouring waters and it should not be exorbitant as compared with the rules practised by other States, notably those whose coasts are adjacent to the waters in question.

One of the essential elements in the determination of the breadth of the territorial sea must necessarily be the economic importance of the territorial sea to the coastal population. In its decision of the Fisheries Case, the International Court of Justice recognized that such economic factors were relevant to the application of a system of straight baselines. Under such a system, maritime areas which would otherwise belong to the high sea may be included in the territorial sea, with the consequence that the economic exploitation of these areas are reserved for nationals of the coastal State. Once the relevance of such economic factors has been recognized, it seems hardly justifiable to limit the application of this principle to the problem of straight baselines. Vital economic interests of the coastal population may require that the areas of the sea reserved to that population be extended by other means than a system of long baselines, in particular by the adoption of a wider breadth of the territorial sea. This would be the case, for instance, outside a coast which has no hinterland offering reasonable means of existence to the local population, in particular the coasts of isolated islands or groups of islands of which the inhabitants practically entirely depend upon the natural resources of the sea for their livelihood. In such exceptional circumstances it would seem reasonable to allow the coastal State to fix a wider breadth of the territorial sea than the breadth normally adopted for other coastal areas.

In view of the fact that a State not only has certain rights but also a number of obligations in respect of its territorial sea, the Danish Government suggest that it should be provided expressly that a State shall not limit its territorial sea to less than a breadth of three nautical miles.

Article 4

No comment.

Articles 5 and 7

These two articles seem to cover certain identical situations. A special rule on bays which, on the basis of geometrical computations, lays down general conditions for drawing a baseline across the mouth of an

⁶ *The Shipping World*, vol. 132, p. 486.

indentation, will hardly provide a satisfactory solution to the problems posed by the widely different geographic conditions which obtain where coastlines are irregular. It should be considered whether the rule laid down in article 5 would not be adequate for all cases of irregular coastlines and thus make it possible to dispense with article 7 altogether. If necessary, the word "deeply" before "indented" in the second line of article 5 could be deleted.

In particular, objections may be raised to the provisions of paragraphs 2 and 3 of article 7, which lay down that the baseline at the mouth of a bay should not exceed fifteen miles. Such a rule does not sufficiently take account of the great varieties of geographic conditions which may obtain where coasts are indented. Although there may not normally be any need for baselines longer than fifteen nautical miles, it may in certain circumstances be justifiable to draw a longer closing line, for instance where geographical conditions are such that no other baseline would be easily recognizable by the navigator on the spot. Furthermore, economic and defence factors, which may legitimately be taken into consideration, may in certain cases require the application of a baseline exceeding fifteen miles.

The last phrase of paragraph 1 of article 5 provides that "baselines shall not be drawn to and from drying rocks and drying shoals". It will be very difficult to implement a provision of this nature on coasts where the range of the tide is considerable. At least in Danish theory and practice such rocks and shoals are used in several cases—and this is believed to be in full conformity with international law—as basis for the calculation of limits of fishing zones, etc. Further the said rule does not appear to be compatible with the rule in article 4, which establishes that the breadth of the territorial sea is measured from the low-water mark. For these reasons the phrase should be deleted.

Articles 6 and 8

No comment.

Article 9

Since 1912 the Roads of Copenhagen have been declared Danish internal waters, *cf.* Royal Decree No. 293 of 20 December 1912, Sect. 1 (c), paragraph 2, and Royal Ordinance No. 356 of 25 July 1951 governing the admission of foreign warships and service aircrafts to Danish territory in time of peace, paragraph 3.

Article 10

In its comments on article 10, the International Law Commission mentions the question of formulating a special rule for groups of islands. In the opinion of the Danish Government it should not be necessary to formulate such a rule, because the principle underlying article 5 implies that straight baselines may be drawn between the islands of a group. Article 5 should possibly be amended so as to preclude any doubt. It would not appear reasonable to make a distinction between islands lying off a coast and islands forming an independent group. Incidentally, any such distinction would be difficult to maintain from a geographical point of view because an island may be so large that in the application of the said principle it should rank equally with a mainland.

Article 11

No comment.

Article 12

With regard to straits whose coasts belong to the same State it must be permissible, under the general principle laid down in article 5, to draw straight baselines across the strait near its mouths. The drawing of such baselines should not affect the normal right of free passage through the strait, *cf.* article 5, paragraph 3.

Articles 13 and 14

No comment.

Articles 17 and 24

Paragraph 4 of article 17 refers to the right of innocent passage through international straits. The provision applies to all vessels, including warships. The Danish Government fully accept the basic principle of the right of innocent passage through international straits, but would find it very desirable that the provision be drafted so as to indicate, in exact terms, that the right of passage through an international strait does not imply permission for any navigation other than passage, and applies only in the normal sailing route. This could be achieved by formulating the paragraph as follows:

"There must be no suspension of the innocent passage of foreign ships *through those parts of a strait which are* normally used for international navigation between two parts of the high seas."

The Danish Government thus agree that, in time of peace, warships should be accorded the right of innocent passage through international straits. It is the view of the Danish Government, however, that the recognition of this right does not debar a State from taking, in certain areas, reasonable measures for the protection of its security, provided that such measures do not amount to a prohibition or to a suspension of the right of innocent passage, *cf.* paragraph 4 of article 17. The requirement of previous notification, for example, would be within the scope of such reasonable measures. Hence, the Danish Government believe that the Commission has gone too far by suggesting, in its commentaries on article 24, that the coastal State "may not make the passage of warships through such straits subject to any previous authorization or notification".

In the view of the Danish Government it cannot be regarded as an interference with the innocent passage of a warship through an international strait when for special reasons, for instance security reasons, such passage is made subject, not to any authorization, but merely to previous notification through diplomatic channels. Such notification would only serve to give evidence of the innocent character of the intended passage.

Articles 18 and 19

The Danish Government regret that the provisions against discrimination referred to in the commentaries on these articles have not been included in the rules formulated by the Commission, especially in article 19. Irrespective of the reasons given in the commentaries for omitting these provisions, the Danish Government maintain that it would be useful to have the principle of non-discrimination clearly established.

Article 20

It would be desirable if two additional sub-paragraphs (d) and (e), of the following tenor could be inserted in paragraph 1 of this article after sub-paragraph (c):

"(d) If the crime has been committed by or against any other person than the captain of the ship or a member of the crew or by or against any person who is a national of the coastal State; or

"(e) If the crime committed is homicide or another felony involving risks or serious bodily harm."

The Danish authorities are aware that the proposed provisions appear to be at least partially covered by sub-paragraphs (a) and (b), but nevertheless consider it reasonable to have the jurisdiction of the coastal State unambiguously established in the case mentioned.

Articles 21-23 and 25-28

No comment.

Article 29

The Danish Government welcome the proposal for establishment of international rules to ensure that ships are not registered under the flag of a State on the basis of purely formal consideration; the nationality indicated by the registration and flag of a ship should represent a genuine link between the ship and the country of registration, the latter assuming responsibility for the observance of certain standards, notably with regard to the inspection of and the service on board such ships. In this connexion, the Danish authorities emphasize that the implementation of the proposed rules, which assumes the existence of certain guarantees or evidence of the actual relationship of the ship with the State concerned, may serve to support the various endeavours of international shipping circles (including the Danish shipping trade) to prevent the nationality and registration of a ship from being established on the basis of such mere formalities as to come within the concept of "flag of convenience".

In one particular relation this question has been discussed at the Preparatory Technical Maritime Conference held in London in September/October 1956: viz. in relation to the International Labour Organisation and the maritime conventions adopted under the auspices of the ILO. The Conference adopted a draft resolution which emphasizes the responsibilities that the country of registration should assume with regard to the safety and social conditions of mariners employed in ships flying the flag of the country.⁷

Articles 30-32

No comment.

Article 33

The Danish Government cannot accept that State-owned vessels used in commercial service should be allowed, in any field whatsoever, a more favourable status in international law than privately-owned merchant ships. The question is of a great practical significance inasmuch as the merchant fleet of several States must be regarded as State-owned. In the opinion of the Danish Government State-owned and privately-

owned merchant ships should have equal status in all respects.

Article 34

Regardless of the broad general scope of this article, the Danish authorities feel that it has the practical significance of impressing upon those States which have not ratified or carried into effect such international regulations as the Safety Convention of 1948 the importance of observing a certain minimum standard, cf. the commentaries on article 29 above.

Article 35

Although objections may be raised against the rule contained in this article to the effect that disciplinary or penal proceedings may only be instituted against the person responsible before the authorities of the flag State or of the State of which the person concerned is a national, the Danish Government will not oppose this rule.

Articles 36-46

No comment.

Article 47

Paragraph 2 of this article provides that "the right of hot pursuit" ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State. It would not appear to be reasonable if the resumption of pursuit should be precluded by the pursued ship seeking temporary refuge, in sight of the pursuer, in the territorial sea of a third country. To discontinue the right of pursuit a real stay in the territorial sea of a third country of say twenty-four hours or a stay in port, however short, should be required. Any such stay in port could be substantiated by means of the clearance papers of the ship.

Paragraph 3 of this article provides that hot pursuit shall not be deemed to have begun unless the pursuing ship has "satisfied itself by bearings, sextant angles or other like means that the ship pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone". In the opinion of the Danish Government teletechnical aids (radar, decca, loran, etc.) should also be mentioned expressly; these new aids for the fixing of a ship's position must be regarded as being at least as accurate as those used so far, and in several cases even more accurate.

Moreover, it does not appear to be sufficiently clear whether the provision also applies to cases where pursuit of a foreign ship is commenced in the territorial sea by a ship of the pursuing State on account of offences committed previously. According to the internal rules applied by the Danish Fisheries Inspection Service such pursuit is permissible.

Insofar as cases of this nature may be regarded as covered by the general rules of the draft, it would be desirable if specific rules were introduced laying down certain time-limits, *inter alia*, because it will often be difficult after the lapse of several years to procure the evidence required. Several countries thus require ship's logs to be preserved for short periods, ranging from two to five years.

Article 48

No comment.

⁷ International Labour Organisation, Preparatory Technical Maritime Conference, Reports III/1, III/2: Flag Transfer in Relation to Social Conditions and Safety, Genève, 1956.

Articles 49-60

In the opinion of the Danish Government, the particular Danish interest in the preservation of the fauna of the arctic regions makes it very desirable that the proposed convention should apply to marine mammals such as whales, walrus and seals in conformity with its purpose of protecting and developing the living resources of the sea. It has been noted with satisfaction that this has been expressed in the present draft, and the Danish Government can, therefore, on the whole accept the principles embodied in these articles.

Article 59

According to this article, the decisions of the arbitral commission shall be binding. On the other hand, the article leaves the following questions open: who is to supervise the observance of the provisions, and what coercive measures may be applied against countries which refuse to abide by the decisions and against the fishermen of such countries. In the opinion of the Danish Government, the efficacy of the whole arbitral system will depend on a satisfactory solution of these questions.

Articles 60-65

No comment.

Article 66

The Danish Government wishes to point out that the report of the International Law Commission leaves open a problem which is of particular interest to Denmark, namely, the scope of the jurisdiction accorded to a coastal State by reason of its responsibility to take measures for the safety of navigation.

As the waters round the Danish coasts are comparatively shallow at a great distance from the nearest coast and contain many shoals and reefs constituting a danger to navigation, the Danish Government have assumed responsibility for marking the fairways by means of light-vessels, buoys, etc., far beyond the Danish territorial sea. This particular responsibility rests partly on an old-established practice and partly on the express provision contained in article 2 of the Treaty of 14 March 1857, on the Abolition of the Sound Dues, under which the Danish Government were obliged to preserve and maintain "... the buoys and beacons now existing which serve to facilitate navigation in the Kattegat, the Sound and the Belts" and, moreover, "in future, as heretofore, in the general interest of navigation to take up for serious consideration whether it might be useful and convenient to alter the location and form of these ... buoys and beacons or to increase their number, everything without any charge to foreign shipping". By agreements between the Danish Lighthouse Authority and the corresponding authorities of the neighbouring countries, the area for which each country is responsible has been delimited for the waters outside the territorial sea.

In order to meet this responsibility efficiently and safely, the Danish authorities must be able to ensure that the regulations they have issued for this purpose can be enforced against everyone navigating the said waters, irrespective of nationality. As examples of such regulations may be mentioned:

(a) Prohibition of jettison of rubbish, cargo, ballast, ashes or the like in places where it may cause a reduction of the depth of the fairway to such a degree as to endanger free navigation;

(b) Rules on the placing of pound net stakes, including prohibition against placing such stakes in fairways where they may constitute a danger to navigation;

(c) Prohibition of establishing, without permission, such sea-marks and similar objects in the fairways as may obstruct navigation;

(d) Prohibition against destruction or damage of established sea-marks and against using sea-marks for mooring or for securing fishing tackle, etc.;

(e) Rules on the removal of wrecks and rendering them harmless, including the right of making the salvage of wrecks abandoned by the owner conditional on special permission by the Danish authorities. (Only such rules will provide the necessary assurance that the salvage contractor carries out the salvage with due regard to the safety of navigation and, particularly, provides the necessary depth of water over any wreckage left.)

Under general rules of international law, it is beyond doubt that such regulations can be enforced against Danish nationals outside the territorial sea. It is, however, obvious that the efficacy of the rules would be materially impaired if objection is raised to their enforcement by the Danish authorities against foreign nationals. Experience—especially since 1945—has proved the need for regulating and supervising the salvage of wrecks by foreign contractors in those parts of the high seas where Denmark is responsible for the buoying of the fairways.

The Danish Government would therefore propose the addition of a new article worded as follows:

"A State which by international agreement or custom has assumed responsibility for buoyage and similar measures to ensure the safety of navigation in fairways outside the territorial sea shall be entitled to issue such regulations as are necessary to meet this responsibility and to enforce them against anybody, irrespective of nationality, who navigates in these waters."

Articles 67-70

No comment.

Article 71

According to this article the exploitation of the continental shelf must not result in "any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea". The Danish Government attach great importance to this overriding principle and, in particular, to the provision of paragraph 4 according to which due notice must be given of any installations constructed on the continental shelf. With respect to the safety zones around such installations, it seem preferable to provide expressly in the article, what is now mentioned in the commentaries only, that the radius of such safety zones should not exceed 500 metres.

Articles 72 and 73

No comment.

7. Germany, Federal Republic of

NOTE VERBALE FROM THE OFFICE OF THE PERMANENT
OBSERVER OF THE FEDERAL REPUBLIC OF GERMANY,
DATED 18 SEPTEMBER 1957

[Original: German]

In view of the short time at its disposal, the Federal Government has not been able to study more than a few of the questions to which the draft articles relate. Accordingly, the Federal Government reserves the right to make further comments at a later stage, particularly regarding the problems of the continental shelf and the territorial sea.

The Federal Government would like the order of the individual articles to be carefully reconsidered and would suggest that parts I and II (dealing, respectively, with the territorial sea and the high seas) should be preceded by a general part containing provisions relating to all questions common to the territorial sea and the high seas, e.g., the nationality and the immunity of ships.

In addition, the Federal Government would like to submit the following comments and suggestions concerning the articles specified below:

Article 5, paragraph 1

While reserving more specific comment concerning this article for a subsequent occasion, the Federal Government would like to ask already at this juncture whether it might not be advisable to delete the words "to any appreciable extent" in the third sentence.

Article 15

The Federal Government considers it desirable that a general saving clause should be inserted concerning the validity of the rules contained in existing agreements relating to the laws of war and neutrality.

Article 15, paragraph 3

The Federal Government proposes the following text for article 15, paragraph 3:

"Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules."

Article 17, paragraph 1

The Federal Government is somewhat critical of the present wording:

"...or to such other of its interests as it is authorized to protect under the present rules and other rules of international law ...",

and would suggest that the question whether this text is really consistent with the principles underlying the convention should be more closely examined and that the article should be drafted in more precise terms.

Article 20

The Federal Government would welcome an examination of the compatibility of the provisions in their present form with certain more far-reaching obligations arising out of bilateral or multilateral extradition agreements.

Article 22

The Federal Government proposes that the words "ships for commercial purposes" should be replaced by the words "ships operated for purposes other than those connected with the exercise of government functions".

Article 23

The Federal Government ventures to suggest that perhaps this article should deal also with the immunity of government ships operated for purposes connected with the exercise of government functions.

In addition, the Federal Government proposes that the present wording should be amended to read:

"The rules contained in sub-section A and in article 19 shall also apply to government ships operated for purposes connected with the exercise of government functions."

Article 24

The Federal Government proposes the following text for article 24:

"The coastal State may make the passage of warships through the territorial sea subject to previous notification. The provisions of articles 17 and 18 shall apply *mutatis mutandis*. Such notification shall not be required for passage through straits normally used for international navigation between two parts of the high seas."

A further point to be considered is whether this article is not also the proper context for a provision relating to the immunity of warships (this observation would not, of course, apply if the convention should be preceded by a general part dealing with these questions, which are common to the territorial sea and the high seas).

Article 28

As the provisions in this article do not apply to the high seas only, the Federal Government proposes the following wording:

"Every State has the right to sail ships under its flag."

Article 29, paragraph 1

The Federal Government considers that it would be desirable if the third sentence of paragraph 1 could be amended to read:

"Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State, the ship and its owner."

Article 30

The Federal Government suggests that perhaps the following sentence should be added, to take account of the prevailing practice:

"At the request of a warship, the flag shall be shown."

Article 31

The Federal Government points out that the treatment of ships without a nationality is not regulated by this article; some express provision governing the status of such ships is probably desirable.

Article 32, paragraph 2

The Federal Government considers that the words "for the purposes of these articles" should be replaced by the words "for the purposes of this convention" and suggests that this paragraph, amended as proposed, should be transferred from article 32 to article 24.

Article 33

The Federal Government proposes that the words "whether commercial or non-commercial" should be deleted, and that the passage should read:

"... used only on government service for purposes connected with the exercise of government functions ...".

Article 35

The Federal Government would point out that article 35 departs in certain respects from the provisions of articles 1, 2 and 3 of the Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collision or other Incidents of Navigation (1952).

Article 41

The Federal Government would like to inquire whether the words "it is intended" are designed to refer exclusively to subjective elements (*mens rea*). Perhaps the wording should be reconsidered.

Article 45

The Federal Government proposes the following text:

"A seizure on account of piracy may only be carried out by warships, government ships exercising special supervisory functions or military aircraft."

Article 47, paragraph 1, second sentence

The Federal Government suggests that the second sentence of article 47, paragraph 1, should be redrafted to read:

"Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea of the pursuing State and may only be continued outside the territorial sea if the pursuit has not been interrupted."

Article 48, paragraph 1

The wording of paragraph 1 does not appear to be adequate. Accordingly, in view of the terms of article 50, the Federal Government suggests that consideration should be given to the question whether this paragraph might be re-worded to cover other kinds of waste water harmful to the living resources of the high seas.

Article 51 et seq.

The Federal Government welcomes regional agreements for the conservation of the living resources of the high seas and considers that such regional agreements can be reconciled with the principles of the freedom of the seas and their common use by all. The Federal Government is carefully considering whether this object can be achieved by the provisions of sub-section B. It warmly welcomes the idea of instituting arbitration procedure to settle this problem. So far as the individual articles of sub-section B are concerned, however, the Federal Government reserves detailed comment.

Article 61-65

In the opinion of the Federal Government it would, perhaps, be desirable to add a provision specifying that the laying and re-laying of submarine cables and pipelines must not improperly obstruct shipping, fisheries and other activities utilizing the waters in question.

8. Iceland

NOTE VERBALE FROM THE MINISTRY FOR FOREIGN AFFAIRS OF ICELAND, DATED 7 AUGUST 1957

[Original: English]

The Government of Iceland accepts the invitation to participate in the Conference.

The views of the Icelandic Government concerning

the report of the International Law Commission were stated by the Icelandic representative in the Sixth Committee on 10 December 1956 (reproduced below).

On this occasion the Ministry would once more draw attention to the following:

The most important problem as far as the Icelandic Government is concerned is the question of coastal jurisdiction over fisheries. Necessary conservation measures should of course be adopted, but the coastal State should have a priority on the utilization of the coastal fisheries up to a reasonable distance regardless of whether that area is called territorial sea, contiguous zone, superjacent water of the continental shelf or something else. The distance might vary very well in different countries in view of economic, geographic, biological and other relevant considerations. This matter is particularly clear where the coastal population as in the case of Iceland is dependent on the coastal fisheries for its livelihood.

Statement by the Icelandic representative in the Sixth Committee on 10 December 1956, on the subject of the report of the International Law Commission

It will be recalled that, in 1949, the Icelandic delegation to the Assembly emphasized the fact that all the aspects of the law of the sea were so closely related that only a study of all those aspects would give a complete picture of the various problems involved. At that time, and again in 1953 and 1954, some delegations were of the opinion that the various problems could be separated and dealt with independently. Some maintained, e.g., that the problem of the seabed and subsoil of the continental shelf could be dealt with as such. My delegation from the beginning insisted that this was not the correct view. In its comments to the International Law Commission in 1952, the Icelandic Government pointed out that it considered it unrealistic that foreigners could be prevented from pumping oil from the continental shelf but that they could not in the same manner be prevented from utilizing or even destroying other resources which are based on the same seabed. In order to prevent any prejudicing effects in this matter, the Icelandic delegation opposed separate treatment of the seabed and subsoil of the continental shelf.

It seems fortunate that the Assembly, on the advice of the Sixth Committee, consistently decided that the unity should be preserved when those problems were being dealt with. Indeed, in the report of the International Law Commission covering its eighth session,⁸ it is stated:

"Judging from its own experience, the Commission considers — and the comments of Governments have confirmed this view — that the various sections of the law of the sea hold together, and are so closely interdependent that it would be extremely difficult to deal with only one part and leave the others aside."

In the consolidated draft on the law of the sea, numerous difficult problems are dealt with in a way which is quite acceptable to my delegation. Generally speaking, the draft — as far as it goes — is a valuable contribution to this very difficult area of international law.

⁸ *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), chap. II, para. 29.*

In our opinion some of the proposed articles can be improved, *e.g.*, the provisions concerning drying rocks as base-points. But generally speaking, the Commission's draft is worthy of support.

In one extremely important matter, however, the Commission has not proposed a definite solution. I am here referring to the problem of the extent of coastal jurisdiction over fisheries. The Commission has refrained from drafting definite articles concerning this problem, partly because it felt that it did not have technical competence to do so and partly, perhaps, because it felt that political considerations were involved. Thus, the problem remains unsolved and a solution must be found. Since this is a problem to which the Icelandic Government has drawn attention from the beginning, my delegation will limit its observations at the present stage to this fundamental aspect of the draft.

At first there seemed to be a tendency within the Commission to ignore or at least to deal very unrealistically with the problem of jurisdiction over fisheries. The Commission in those earlier stages seemed to think that the problem of jurisdiction over fisheries could be solved by, on the one hand, the exclusive rights of the coastal State within its territorial sea and, on the other, the adoption of articles concerning conservation measures on the high seas which would be equally binding to all nations fishing in a given area. In other words, within the territorial sea the coastal State would have privileges as far as fishing was concerned. Outside the territorial sea all parties, including the coastal State, would be in the same position as far as fishing was concerned. At first sight this may seem very reasonable, but from a practical point of view the question immediately arises: What if the breadth of the territorial sea has not been determined in any way whatsoever with regard to fisheries? Of course it is necessary and to everyone's benefit to ensure the maximum yield of the fish stocks both within and outside the territorial sea. But what if the requirements of the coastal State and other States in the coastal area are not satisfied by the maximum yield? Why then should the priority position of the coastal State be limited to a certain area called the territorial sea if the breadth of the territorial sea has not been determined with any regard whatsoever to this fundamental matter?

In the report of the Commission on the work of its eighth session it is fair to say, this problem meets with much more understanding than before. On page 38 of the report the following statement is found:

"The Commission's attention had been directed to a proposal that where a nation is primarily dependent on the coastal fisheries for its livelihood the State concerned should have the right to exercise exclusive jurisdiction over fisheries up to a reasonable distance from the coast having regard to relevant local considerations, when this is necessary for the conservation of these fisheries as a means of subsistence for the population. It was proposed that in such cases the territorial sea might be extended or a special zone established for the above-mentioned purpose.

"After some discussion of this problem the Commission realized that it was not in the position fully to examine its implications and the elements of exclusive use involved therein. The Commission recognized, however, that the proposal, as in the case of the principle of abstention (see commentary to article 53) may reflect problems and interest which deserve recognition in international law. However, lacking competence

in the fields of biological science and economics to adequately study these exceptional situations the Commission, while drawing attention to the problems, has refrained from making any concrete proposals."

My delegation would certainly agree with the proposition that, where a nation is primarily dependent on the coastal fisheries for its livelihood, the State concerned should have the right to exercise exclusive jurisdiction over fisheries up to a reasonable distance in view of local conditions and it does not matter to us whether the area in question is called the territorial sea or not. We would also agree with the abstention principle. As a matter of fact the quotation from the report which I have just made, represents the crux of the problem as my delegation sees it. There has to be a clear-cut distinction between two things, *i.e.*, the conservation problem and the utilization problem. If there is a conflict of interests as to the latter, the coastal State should have priority up to a reasonable distance regardless of whether that area is called territorial sea, contiguous zone, superjacent waters of the continental shelf, or something else.

The distance might very well vary in the different countries. Some might be content with three miles, others — and certainly the majority — would want more. We think that the statement of the Icelandic Government of 1952 is still correct. It reads as follows:

"The Government of Iceland does not maintain that the same rule should necessarily apply in all countries. It feels rather that each case should be studied separately and that the coastal State could, within a reasonable distance from its coasts, determine the necessary measures for the protection of its coastal fisheries in view of economic, geographic, biological and other relevant considerations."

This, in our view, would be the only realistic way of dealing with this matter.

If Iceland is taken as an example of the issue involved it is easy to get a clear picture of the problem.

It is a well-known fact that Iceland is a barren country. No mineral resources of forests exist, and agriculture is limited to sheep-raising and dairy-farming and the products are barely sufficient for local consumption. Consequently, most of the necessities of life have to be imported and financed through exports, 97 per cent of which consist of fisheries products. Indeed, it is as if nature had intended to compensate for the barrenness of the country itself by surrounding it with rich fishing grounds. Iceland is situated on a platform or continental shelf, whose outlines roughly follow those of the coast itself and which provides ideal conditions for spawning areas and nursery grounds, thus ensuring, if over-fishing is prevented, a continuous supply of important food fishes.

The coastal fishing grounds have always been the foundation of Iceland's economy and it can be said, without any hesitation, that without them the country would *not* be habitable. Therefore, there is no doubt that if the survival of the Icelandic people is to be secured, it is of fundamental importance to conserve the fish stocks in Icelandic waters.

In view of these facts it is of importance to note that, although the protection of fish stocks in Icelandic waters was quite adequate in former times, it was disastrously reduced at the very time when it was most needed. This unfortunate development can be briefly summarized.

The Icelandic Government has on several occasions drawn attention to the fact that, from 1631 to 1662, foreigners were prohibited from fishing to a distance of at least twenty-four miles (four leagues) from the coast, and at that time all bays were also closed to foreign fishing. From 1662 to 1859, the distance was reduced to sixteen miles. The development may also be described by saying that, in the seventeenth, eighteenth and part of the nineteenth century, the Icelandic fishing limits were four leagues, the league at first being the equivalent of eight miles, later six and finally four miles. In the latter part of the nineteenth century, the enforcement of the prevailing limits by the Danish authorities became inefficient and, in 1901, they concluded an agreement with the United Kingdom which specified the ten-mile "rule" for bays and three miles fishery limits around Iceland. These limits were applied until the agreement was terminated in 1951, after the Icelandic Government had given due notice in accordance with the terms of the agreement. For many years it had then been clear that the fish stocks were rapidly decreasing due to over-fishing, so that if positive steps were not taken the country's economic foundation would be faced with ruin. Therefore, the Icelandic Parliament in 1948 adopted a law authorizing the Ministry of Fisheries to establish explicitly bounded zones within the limits of the continental shelf of Iceland and to issue the necessary regulations for the protection of the fish stocks within the zones. It was considered reasonable to use the continental shelf in this connexion because the outlines of the shelf follow those of the coast, and a topographic chart shows quite clearly that the continental shelf is the platform of the country and must be considered to be a part of the country itself. On this platform are found some of the most valuable spawning grounds and nursery areas in the world. It is a fact well known to all fishery biologists that these shallow areas constitute the source on which the great off-shore fisheries in Iceland are based. In 1952, regulations were issued on the basis of this continental shelf law, where straight baselines were drawn across the bays and the fishery limits were drawn four miles seaward from these baselines. Within these limits, all foreign fishing has been prohibited as well as Icelandic trawl and seine fishing. Although these regulations were opposed by four European countries they have been strictly enforced, and it is the considered opinion of experts in this field that these protective measures have resulted in a complete reversal of the development.

The decline of the fish stocks before the conservation measures were taken was clear and followed the same pattern as the decrease of the stocks between the two World Wars, when the total catch of haddock and plaice in this area was reduced by about 80 per cent.

The beneficial effects of the measures appeared almost immediately and have been enjoyed by all nations fishing at Iceland for more than four years now.

In a memorandum issued by the Icelandic Government in October 1955, it was emphasized that the total catch of demersal fish taken from Icelandic waters rose sharply in 1953 and the catch per unit of effort also showed a clear upward trend for the most important of the species which make the main basis of the fisheries off Iceland.

If we consult the latest statistical figures regarding the

most important food fishes, we find that there is still a clear improvement from 1954 to 1955.

Nobody who is concerned with fishing in Icelandic waters would like to imagine how the situation would be now if no conservation measures had been taken. We know the evil development before 1914, we also remember the steady decrease of the fish stocks between the wars and, indeed, we were faced with rapidly approaching ruin in the beginning of the fifties. As time passes it becomes more and more evident that the steady, general and increasing improvement cannot be ascribed to stock fluctuations. It is the fruit of the conservation—of the protection of the young fish.

As already stated, the measures which have been taken are based on the continental shelf law so that they can only be considered partial steps within a wider framework. Further measures have for some years been under consideration, and there is not the slightest doubt in the mind of the Icelandic Government that, as far as international law is concerned, it would be perfectly legal and a matter of self-preservation to extend the present four-mile limits considerably. While, for instance, twelve miles would undoubtedly be perfectly legal, no specific distance has been decided upon as yet.

The policy of the Icelandic Government in these matters has met with objections in some quarters where particularly conservative notions are cherished in this field. It has been said that this policy is contrary to international law, that international law in general specifies the so-called ten-mile rule in bays and a territorial sea of three miles, that outside those limits fishing is free for all, and that all that is required is to adopt conservation measures through international agreements which would be equally applicable to all. It seems clear that these ideas are most strongly advocated by nations who are more interested in fishing off the shores of other countries and these ideas are therefore clearly based on their own self-interest. If that particular self-interest were common to a great majority of the members of the international community, then it would probably find expression in the rules of international law. Whatever may have been the situation in the past, my delegation is firmly convinced that today the overwhelming majority of the Members of the United Nations do not support these ideas and consider that, if they were ever valid as rules of international law, they are now quite obsolete.

In this connexion, a fundamental distinction must, as already stated, be made between two different things. On the one hand there is the problem of conservation of the fish stocks. From a scientific point of view there seems to be pretty common agreement as to what measures are required to ensure the maximum sustainable yield. Theoretically, such measures could be taken either unilaterally or through international agreements with exactly the same effect. From a practical point of view, however, experience has shown that it has been extremely difficult to get nations to agree on the adoption of measures of this kind. The Over-fishing Conventions of 1937 and 1946 provide clear examples of this nature. As a matter of fact, while the nations concerned were debating these matters for a period of some fifteen years, the people of Iceland watched the systematic destruction of the fish stocks in the very areas regarding which the over-fishing problem was being

debated on the international level. With that experience in mind, my delegation feels that the coastal State, having the greatest interest in maintaining the resource, is in the best position to adopt and enforce the necessary measures although, of course, international agreements will have to complete the picture as far as the actual high seas are concerned. In that sense, the conservation articles of the International Law Commission draft would be a valuable contribution as a supplement to coastal jurisdiction.

The other problem to which I referred relates to the situation where, in spite of adequate measures to sustain the maximum yield, that maximum yield is not sufficient to satisfy the requirements of all those who are interested in fishing in a given coastal area. In that case, which is the crux of this entire matter, we maintain that the proper solution is not to take some arbitrary number of miles equally applicable to all coasts and call it the territorial sea on the basis of some considerations which have nothing to do with fisheries, and say that within that area the coastal State has priority but outside it the situation is the same for all. This procedure seems so clearly unreasonable that it should not be necessary to provide any further arguments. The different coastal areas are so variable that it is neither reasonable nor realistic to put them all in the same straitjacket and our contention is, as already stated, that each coastal State should itself determine its fishery limits on the basis of all relevant considerations. The standard objection against this proposition is that such a formula would lend itself to abuse so that excessive demands would be made even in the absence of any real need. From that point of view it has been suggested that some arbitral body should be empowered to make the final decision. Various proposals of this nature were defeated within the International Law Commission itself and it would indeed be difficult, if not impossible, to entrust this task to such a body unless the criteria upon which a decision should be based were quite specific. On the other hand, if such specific criteria can be found, the need for the arbitration body diminishes accordingly. For instance, in the case of Iceland nobody can dispute the fact that the entire economy of the people is based on the coastal fisheries. Also, it is clear that the country is situated far away from other countries, and that the platform or continental shelf provides the necessary environment to produce the fisheries resources. In such a case it would seem quite reasonable to do exactly what the Icelandic Government has already done, which is to claim the necessary control over the fisheries within the limits of the continental shelf and to exclude foreign fishing within that area as far as is necessary in order to satisfy the Icelandic requirements on a priority basis.

My Government has followed the work of the International Law Commission in this field with the greatest interest for many years. It has always been our understanding that the intention was to deal with the complete report of the Commission at the General Assembly. In 1949, the Assembly passed a resolution requiring the Commission to study simultaneously the régime of the territorial waters and the régime of the high seas. In 1953, the Assembly passed another resolution to the effect that it would not deal with any aspect of these matters until all the problems involved had been studied by the Commission and reported upon by it to the

Assembly. And, finally, in 1954 as we all know, the Assembly passed still another resolution, the first operative paragraph of which :

“Requires the International Law Commission to devote time to the study of the régime of the high seas, the régime of territorial waters and all related problems in order to complete its work on these topics and submit its final report in time for the General Assembly to consider them as a whole in accordance with resolution 798 (VII) at its eleventh session”.

Consequently, we have taken it for granted that the Assembly would deal with this whole matter. On the other hand, the Commission itself has suggested that a special conference be convened to consider some of the problems involved. Several of the previous speakers have supported this view, and we now have before us a draft resolution proposing this procedure. The main argument seems to be that many technical questions are involved in which expert advice would be needed, and it could not be expected that lawyers should have the necessary competence in this respect. As we see the problem, it was never expected that the International Law Commission would have technical qualifications regarding all the problems and, indeed, during its course of labour the Commission has had the benefit of advice from experts in geography on its own initiative and, not so long ago, a special world conference was called to deal with the problem of the living resources of the sea in order that the Commission might benefit from technical advice in that particular field. If the Commission felt that it needed expert advice in some other field during the many years of its work on this subject, it surely could have said so before now. Be that as it may, surely all the Governments who are interested in this problem know what their views are and, as far as we can see, their views could be submitted through this Committee just as well as through a special international conference. The main argument for that course of action is that an unnecessary delay would be prevented and in this field such a delay becomes even more dangerous. Within a very short time we may see huge factory ships equipped with electrical apparatus capable of inflicting tremendous destruction upon the fish stocks, and we may also see various other modern devices which will make the present regulations for the size of meshes of fishing nets completely inadequate and unrealistic. Developments in this field are extremely rapid and certainly the time has come to face these problems and do something about them. That is why in this question of vital interest the Icelandic delegation as a matter of principle has been instructed to vote against the proposal for a special conference which has been submitted to us.

9. India

NOTE VERBALE FROM THE MINISTRY OF EXTERNAL AFFAIRS OF INDIA, DATED 12 AUGUST 1957

[Original: English]

In respect to the question of conservation of living resources of the seas, the Government of India feel that it is appropriate to make a distinction between such areas of the high seas which are within a belt of 100 miles from the territorial sea of a coastal State or States (to be known as coastal high seas), on the one

hand, and such portions of the high seas which do not fall within such belt on the other. As regards the coastal high seas, the principles that may be adopted may well be as follows:

(a) The coastal State shall have the pre-emptive right to take conservation measures in specified areas within all such belts for the purpose of preservation of living resources;

(b) If such measures are taken by a coastal State, other States fishing or interested in fishing in that area may approach the coastal State for negotiations with regard to adoption of such measures;

(c) Any measures adopted by the coastal State for preservation of living resources shall be applicable equally to the nationals of the coastal State and nationals of other States that may be fishing or may wish to fish in that area;

(d) If the coastal State has not adopted any measures for conservation of the living resources, any State fishing or interested in fishing in any area may approach the coastal State for taking conservation measures in such areas.

The reasons for such views are:

(i) A coastal State has naturally a more vital interest in the preservation of living resources of the coastal high seas as its nationals are more dependent on such living resources for their food;

(ii) Measures taken by a coastal State can be more appropriately enforced by such a State than any other State;

(iii) Enforcement of conservation measures framed by any State or States other than the coastal State may lead to political, legal and other disputes between the States concerned;

(iv) Since a coastal State has a special interest in the coastal high seas as already recognized by the International Law Commission, it would be unfair on coastal States if such States are not given the first opportunity or enforcing the conservation measures.

These comments are, however, provisional and Government of India reserve the position as to their stand during the international conference of plenipotentiaries.

Territorial sea

Article 3

In view of the differing views held by various countries on the question of the breadth of the territorial sea, the Government of India are of the view that the maximum breadth of the territorial sea should be fixed at twelve miles and, within that limit, each country, whatever the geographical configuration of its coastline, should have freedom to fix a practical limit. The Government of India are greatly interested in this question and are strongly of the view that the traditional limit of three miles is not sufficient in the present circumstances. But, at the same time, they are of the opinion that any extension of territorial sea beyond twelve miles is not justified. The Government of India have recently extended the breadth of India's territorial sea to the extent of six miles.

Articles 7, 8 and 9

The provisions of these articles are still under consideration of the Government of India.

Article 13

In view of the position of some riverline ports where the conditions in the estuary are peculiar, a proviso should be added to this article to the following effect:

"Provided that if there is a port located at or near the mouth of a river or the estuary into which a river flows, the territorial sea shall be measured from the outermost limits as may be notified by the Government or the port authority of its jurisdiction over the port, in the interest of pilotage and safe navigation to and from the ports."

Article 15

The Government of India are of the view that the following clause ought to be added at the end of paragraph 1:

"except in times of war or emergency declared by the coastal State."

Article 18

The Government of India are of the view that the words "with the laws and regulations relating to transport and navigation" should be omitted and in their place the following clauses should be substituted:

"(a) The traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

"(b) The safety of traffic and the protection of channel and buoys;

"(c) The protection of the waters of the coastal States against pollution of any kind caused by ships;

"(d) The conservation of the living resources of sea;

"(e) The rights of fishing, hunting and analogous rights belonging to the coastal States;

"(f) Any hydrographical survey."

Article 19

The Government of India would like to reserve comments on this article.

Régime of the high seas

Article 27

The Government of India are of the view that it is desirable to clarify that the freedoms enumerated in this article are to be enjoyed in conformity with the rules of international law. The position as it exists today is that the freedom of the high seas is subject to certain recognized exceptions in international law, including the right of a coastal State to adopt measures necessary for self-defence. Some of these exceptions find place in the subsequent articles, and it does not appear to be the intention of the International Law Commission to introduce any basic changes in the existing position. To put the matter beyond controversy, the Government of India would suggest the insertion of the following clause at the end of this article:

"These freedoms shall be enjoyed in conformity with the provisions of these articles and other rules of international law." It would appear that a similar provision has been made in article 1, paragraph 2, relating to the régime of the territorial sea.

Articles 49 to 56

The Government of India are greatly interested in the provisions of these articles and, whilst they have no comments to offer on the provisions of articles 49 and 50, the Government of India are of the view that the

basis of articles 51, 52, 53 and 56 are unacceptable. Although article 54 recognizes the fact that a coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its coasts and the right of such a State to take conservation measures under article 55, the articles do not go far enough to protect the legitimate interests of the coastal State and, in particular, of the under-developed areas with expanding population and increasingly dependent for food on the living resources of the seas surrounding the coasts. The Government of India are of the view that a coastal State should have the pre-emptive right of adopting conservation measures for the purpose of protecting the living resources of the sea within a reasonable belt of the high seas contiguous to its coasts. Unless such a right of the coastal States is recognized, States with well-developed fishing fleets may indulge in indiscriminate exploitation of the living resources of the sea contiguous to the coast of another State, much to the detriment of that State and its people. The Government of India consider that it will be undesirable to confer a right on a State to adopt conservation measures or establish conservation zones in seas contiguous to the coasts of another merely because its nationals have engaged in the past in fishing in such areas. The primary right and duty of conservation of living resources should rest with the coastal State in respect of areas contiguous to the coasts. The Government of India do not deny the right of other States to fish in the high seas contiguous to the coast of another but, where conservation measures have been adopted by the coastal State, other States should approach the latter for suitable agreement in this regard. The Government of India feel that the exercise of such a right by a coastal State will be in general interest of the international community and will not in any way interfere with the freedom of *bona fide* fishing in the high seas enjoyed by all the States.

Articles 57 and 59

The Government of India would consider these articles after a decision has been reached on the question of arbitral procedure.

Article 60

The Government of India would prefer to reserve their comments on this article.

Continental shelf

Article 73

The Government of India are of the view that the provisions of article 73 may not be suitable for adoption in every case and this should be subject to the acceptance of the jurisdiction of the International Court of Justice by each country.

10. Italy

TRANSMITTED BY A NOTE VERBALE FROM THE
PERMANENT MISSION OF ITALY TO THE UNITED NATIONS,
DATED 7 AUGUST 1957

[Original: French]

Breadth of the territorial sea

Having regard to the many opinions expressed on this

subject and mindful of the fact that a useful comparison of the various views can only be made at a general conference, the Italian Government reserves its right to make concrete suggestions at the forthcoming conference itself.

Nationality of ships

Some further clarification seems necessary of the notion of the "genuine link" mentioned in article 29. The article should therefore enumerate, not as formal requirements but by way of illustration, some of the conditions which have to be fulfilled before that "genuine link" can be said to exist. It should be possible to determine these conditions from a comparative study of the provisions in force in the principal maritime States, and in that way it should be possible to arrive at a common denominator acceptable to the majority.

Immunity of other government ships

It is apparent from the text of article 33 that the Commission decided to assimilate ships used on commercial government service to warships for purposes connected with the exercise of powers on the high seas by States other than the flag State.

We consider that the assimilation is not sufficiently justified, for in the case in question the activities carried on by those using the ship might be of an essentially private nature.

Hence the category of State ships should be kept within the limits laid down by the Brussels Convention of 10 April 1926 concerning the immunity of State-owned vessels.

Piracy

Article 39 of the draft states that illegal acts (of violence, etc.) committed by the crew or the passengers of a private ship or a private aircraft against a ship on the high seas or in territory outside the jurisdiction of any State are acts of piracy. But it does not provide for the converse: namely, that the illegal acts in question directed by a private ship against an aircraft are also to be considered piracy.

We think it advisable to draw the Commission's attention to this point because the commentary on the article shows that this particular case has not yet been studied.

The ships or aircraft which should be considered pirate ships or aircraft:

To prevent the definition of pirate ships given in article 41 from covering only ships permanently engaged in acts of piracy, it would be advisable to replace the principle of intended use by that of actual use, which has the advantage of making provision also for the case of occasional use for piracy.

Seizure on account of piracy:

As far as article 45 is concerned, we propose that the power of seizure should be extended also to ships performing official duties, such as customs control and policing; this would be consistent with the provisions of article 47, paragraph 4.

Living resources of the high seas:

In order to limit the excessive prerogatives extended

to the coastal State by article 55, we propose two alternative solutions :

(a) The coastal State should not be entitled to adopt the measures referred to in article 55 until after a favourable arbitral decision ; or

(b) The measures adopted unilaterally by the coastal State should be suspended *de jure* as soon as any other State lodges objections.

Composition of the arbitral commission :

We propose, as a means of improving and expediting the arbitral procedure envisaged in article 57, that the names of members qualified to serve on the arbitral commission should be kept on a panel drawn up after consultation with States, in a manner analogous to that employed in the Permanent Court of Arbitration.

Submarine cables and pipelines

As regards article 61, paragraphs 1 and 2, we consider that provision should be made, in view of technical advances, not merely for the laying of telegraph or telephone cables and oil pipelines, but rather, by a more general wording, for the laying of any kind of submarine cable or pipeline.

Contiguous zone

The rule concerning the contiguous zone is not acceptable in its present form, chiefly because it does not satisfy the requirements of action to curb smuggling.

It may be pointed out that Italy has a territorial sea six miles wide, but its customs supervision zone extends up to twelve miles from the coast. In the latter zone full jurisdiction to enforce the customs laws is now exercised.

In view of Italy's geographical position and the configuration of its coasts, the diminution, as provided for in the draft, of the powers granted to the coastal State in the contiguous zone would make the measures for the prevention and punishment of smuggling ineffectual.

The draft article concerning the contiguous zone could be accepted by Italy if it was amended to read as follows :

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

This question also has a bearing on article 47. According to the commentary to that article, the majority of the Commission considers that the most favourable construction that can be placed on the draft text, from the point of view of the coastal State, is that pursuit may only be undertaken if the ship committed the offence in question in internal waters or in the territorial sea ; "acts committed in the contiguous zone cannot confer upon the coastal State a right of hot pursuit".

We consider that, as far as customs control is concerned, such an interpretation appears excessively restrictive and that the right of hot pursuit should be

recognized also in cases where the ship committed the offence in the contiguous zone.

Finally, we consider that the convention should contain transitional provisions to deal with the situation prevailing at the time when the rules applicable at the entry into force of the convention are to be superseded by the new régime established by the convention itself.

11. Morocco

NOTE VERBALE FROM THE MINISTRY OF FOREIGN AFFAIRS OF MOROCCO, DATED 2 AUGUST 1957

[*Original : French*]

... the Ministry has the honour to state that, as yet, no limit to the territorial sea has been laid down in Morocco, except that for fishing purposes the limit of territorial waters was fixed at six (6) sea miles by an article of a *Dahir* (*Dahir* of 31 March 1919).

This state of affairs seems, therefore, to be eminently favourable and should enable our country to discuss international agreements concerning the law of the sea and to accede to the international conventions being prepared, since it is bound by scarcely any precedents.

It would seem that whatever comments could be made on the text proposed by the International Law Commission have been made, and the draft submitted by that Commission at its eighth session is apposite, with the exception of article 3, which remains vague and will require further elaboration during the forthcoming discussions.

Nevertheless, despite its undoubted interest in the conference, Morocco will be unable to consider participating in it.

12. Nepal

LETTER FROM THE MINISTRY FOR FOREIGN AFFAIRS OF NEPAL, DATED 12 JUNE 1957

[*Original : English*]

Though international law does not seem so far to provide for the right of free access to the sea for land-locked countries, it has been granted in practice by common courtesy or convention. What is conceded in actual practice should, in our opinion, be put in the form of law because such a step alone can ensure the real protection of this vital right of the land-locked countries. The persons concerned with the codification of international law should consider the possibility of inserting suitable clauses in the codification of the law of the sea with regard to the right of access to sea of the land-locked countries. The study of this question has been neglected in the past and this important right has not yet been incorporated in international law. This was the line of argument adopted by our representatives when the subject came up for discussion in the Sixth and Second Committees at the eleventh session of the General Assembly. It was further urged by our representatives that the land-locked States should be

entitled, not only to the normal right to communication, but also to the right of free passage without restrictions in the territorial seas and the related right of free passage over land.

13. Norway

LETTER FROM THE PERMANENT MISSION OF NORWAY
TO THE UNITED NATIONS, DATED 12 AUGUST 1957

[Original: English]

These comments should replace all comments previously submitted by Norway to the International Law Commission's different draft articles on the law of the sea. Such previous Norwegian comments, both in writing and orally, in the Sixth Committee of the General Assembly, should accordingly be disregarded in the preparation of the systematic review of the comments of Governments to the draft.

General

The International Law Commission, in paragraph 32 of its report (*cf.* its commentary to part I, section III), confirms that "the draft regulates the law of the sea in time of peace only". This should be made clear in the text itself.

It would facilitate the reading and application of the text if it opened with a definition of certain frequently recurring terms.

In the first place, the terms "territorial sea", "high seas" and "internal waters" (of which the two latter are now defined in article 26) might be defined in an opening article. It should anyway be stated expressly in the text that the term "territorial sea" does not include internal waters.

Similarly, the terms "merchant vessel", "private vessel" (used in articles 39 and 40) and "government ship" should be defined and then used consistently. In this connexion, it should be made clear that the term "merchant vessel" includes fishing vessels (*cf.* the commentary to article 15) and other private vessels not used for trading purposes. It should also be made clear whether the term "merchant vessel" includes government ships used for commercial purposes. As for the term "government ships", reference is made to the Norwegian comments to articles 33 and 23.

Article 3

The Norwegian Government wishes to support efforts to prevent unreasonable extensions of the breadth of the territorial sea. In its opinion a close proximity to the territory is inherent in the very concept of territorial sea. In its judgement in the Anglo-Norwegian Fisheries Case, the International Court of Justice pointed out that one of the "basic considerations inherent in the nature of the territorial sea" is "the dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts".⁹ Exorbitant claims in regard to the breadth

of the territorial sea are incompatible with this basic concept.

On the other hand, the Norwegian Government would consider it futile to seek general agreement on rules governing the extent of the territorial sea which would deprive any country of stretches of its territorial sea over which today it enjoys uncontested jurisdiction. Thus the Norwegian Government would find it impossible to accept a breadth of less than four miles for its own coasts.

Article 5, paragraph 1

It does not appear clearly from the text of the article that the fourth sentence, "Account may..." etc.) establish an exception to the third sentence only and not to the condition laid down in the first sentence, (*cf.* para 4 of the commentary.)

The last sentence of paragraph 1, providing that drying rocks and drying shoals cannot be used as points of departure for the drawing of straight base lines, should be deleted. Its content is contrary to obtaining principles of international law. The International Court of Justice, in its judgement in the Anglo-Norwegian Fisheries case, held that the method employed for the delimitation of the Norwegian fisheries zone and the baselines fixed in application of this method are in conformity with international law.¹⁰ Some of these baselines are drawn from drying rocks (the International Law Commission does not appear to have been aware of this fact (*see* Yearbook, 1956, I, p. 185, and II, p. 25)). Reference is made especially to the discussion of drying rocks in the judgement.¹¹

If the question is viewed from the standpoint of the progressive development of international law, there does not seem to be any reason for the introduction of a development of the proposed kind. The Commission, in paragraph (8) of its commentary, argues that, if drying rocks are used as basepoints, "it will not be possible at high tide to sight the points of the baselines". The same difficulty will arise, however, when drying rocks are used as points of departure for measuring the extension of the territorial sea as proposed in article 11. Seafarers must anyway acquaint themselves with the position of drying rocks in order to avoid them.

Article 7, paragraph 1

Paragraph 1 of this article is not clear and does not reflect obtaining principles of international law. The order of the last two sentences of paragraph 1 should in any case be reversed, in order to make it clear that the sentence beginning with the words "Islands within" relates to the second sentence.

Articles 7 to 9

The object of these articles must be to establish maximum limits which the coastal State is not allowed to exceed. The word "shall" in articles 7, paragraph 1, 7, paragraph 3, and 8 and the words "are included" in article 9 should be amended accordingly.

⁹ I.C.J. Reports 1951, p. 133.

¹⁰ *Ibid.*, p. 143.

¹¹ *Ibid.*, p. 128.

Article 12, paragraph 1

It is stated in paragraph (7) of the commentary that "the rule established by the present article does not provide any solution for cases in which the States opposite each other have adopted different breadths for their territorial seas". It is difficult to see how this commentary could be reconciled with the actual wording of the article.

As now drafted, the article would seem to apply regardless of whether the two States in question have adopted the same or different breadths for their territorial seas, the only condition being that their coasts "are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts".

It is clear, however, that if the two States maintain different breadths, the rule will in some instances lead to an absurd result. Suppose two States, of which one claims six and the other three miles, oppose each other at a distance of eight miles. The proposed rule would in that case lead to the surprising result that the latter State would get a broader territorial belt than it claims.

And such cases could arise irrespective of whether or not agreement is reached on a maximum breadth of the territorial sea. Different breadths would still be possible, inasmuch as the actual delimitation of the territorial sea, within the maximum limits imposed by international law, must be left to the discretion of each individual State.

The foregoing should make it reasonably clear that it is impossible actually to determine the dividing line between the territorial seas of two opposing States by a rule of international law.

The natural solution for the problems of conflicting claims in such cases would seem to be a provision to the effect that no State is entitled to extend the boundary of its territorial sea beyond the median line or, to put it differently, that no State is entitled to include in its territorial sea waters which are closer to the baseline of another State than to its own.

Article 14

The article gives rise to the same difficulties in respect of States which have adopted different breadths of their territorial seas, as does article 12, paragraph 1. Indeed, if the common land frontier ends at the inland end of a bay, there may be no clear-cut difference between the two cases. The boundary proposed by the International Law Commission would stop at the outer edge of the territorial sea of the State claiming the lesser breadth, and would therefore not prevent the State claiming a wider breadth from including in its territorial sea coastal waters lying closer to the coast of the former State than to its own.

For the same reasons as outlined in the Norwegian comments to article 12, paragraph 1, article 14 must provide a workable rule also for cases in which the States concerned have adopted different breadths for their territorial sea. The article should not attempt to determine where the boundary line goes, but merely lay down the maximum limit beyond which the States concerned may not extend their territorial seas. Like article 12, paragraph 1, this article should confine itself

to providing that no State is entitled to extend the boundary of its territorial sea beyond the median line (*i.e.*, the line of equidistance).

Since the problems treated in articles 12, paragraph 1, and 14 are substantially the same, it would seem more appropriate to merge the articles into one.

The general principle enunciated above does indeed afford a basis for the settlement of conflicting claims in respect of the delimitation, not only of the territorial seas, but also of the contiguous zones, the continental shelves and the zones in which coastal States may exercise special rights in respect of fisheries (articles 54, 55 and 60). It might therefore be worth considering whether it would not be best to solve all such conflicts in one single article applicable to them all.

Article 20, paragraph 1

There does not seem to be sufficient reason why the coastal State should be allowed to exercise jurisdiction as envisaged, in sub-paragraph (a) unless the consequences of the crime extend to its territory.

If this point of view is adopted, sub-paragraphs (a) and (b) might as well be amalgamated and be so worded as to provide that the coastal State may exercise penal jurisdiction if the consequences of the crime extend to its land or sea territory.

The particular cases, referred to in paragraph (5) of the commentary, where the flag State might be interested in the exercise of jurisdiction by the coastal State, would seem to be adequately covered by sub-paragraph (c) of the article.

Article 21

It should be provided that the owner of the vessel is entitled to compensation if the claim for which arrest was made is disallowed by final judgement (*cf.* articles 44 and 46, para. 3).

Article 23

It ought to be made quite clear whether government ships used for non-commercial purposes are to enjoy the same immunity as warships in the territorial sea. If that is the intention, it would seem natural to give the coastal State the right in their case also (*cf.* article 24) to make the passage subject to previous authorization or notification.

Article 33

While it would seem to follow from articles 22 and 23 that government ships are to enjoy immunity from arrest in the territorial sea only if operated for non-commercial purposes, article 33 provides that on the high seas the immunity shall extend to all "ships owned or operated by a State and used only on government service, whether commercial or non-commercial". The Norwegian Government is of the opinion that government ships used for commercial purposes must be assimilated to private ships, not only in territorial waters, but also on the high seas. This should at least be the rule in respect of the contiguous zone. There is no reason why the immunity rule should not be the same in the territorial sea and the contiguous zone.

In view of its categorical formulation ("for all purposes"), article 33 could also easily be construed to imply a restriction of the right of hot pursuit enunciated in article 47. If differential immunity rules are maintained, it should be made clear that it is the rule to which the ship is subject at the spot where the pursuit is commenced which is determinative.

While articles 22 and 23 speak of "government ships", article 33 speaks of "ships owned or operated by a State, etc.". If this difference in wording is intended to convey any difference in meaning, this should be made clear. As far as the Norwegian Government is able to judge, there is no valid reason for not using the same form of words in both contexts.

It should be specified that if the ship does not have the clear appearance of a warship, officials of the State entitled to exercise jurisdiction may board the ship, if this is necessary in order to verify its status, *cf.* article 46, paragraph 2.

Article 44

It appears from the International Law Commission *Yearbook*, 1956, II, pp. 19-20, and I, p. 48, that the Commission decided to bring the wording of article 44 (then article 19) into line with article 46, paragraph 3 (then article 21, paragraph 3). This decision, however, has not been implemented in the text of article 44, which still retains the terms "without adequate grounds" and "State".

Articles 49 to 59

The Norwegian Government wishes to present the following general comments:

1. Fisheries are at present regulated by a number of regional agreements concluded in most cases between all or the majority of the States fishing in the area concerned. Whaling is regulated on a global basis by an agreement adhered to by seventeen Governments, including all States engaged in pelagic whaling.

It would seem to be a consideration of primary importance that the proposed over-all international regulation must not in any way hobble or hinder the effectiveness of existing and future special agreements, and that it should promote the conclusion of new special agreements when required for conservation purposes. The over-all regulation must in particular be so worded as to make it clear that the new rights created by the proposed articles cannot be exercised as between the parties to any special agreement which already covers the conservation of the stock of fish and the area in question.

2. If conservation measures are to be binding upon States other than those which established them (articles 52, paragraph 2, 53 and 55), they must satisfy conditions which must be defined precisely in order to leave no more room than absolutely necessary for discretion (The criteria formulated in article 55, paragraph 2, with reference to a special case, or those suggested, for general application, in the commentary to article 58, do not seem adequate for the purpose.) Many interested States would otherwise probably find it impossible to accept the text. And in so far as the text might nevertheless become effective, it would charge

the arbitral commission, provided for in article 57, with an extremely difficult task.

3. The conservation measures cannot be based on biological criteria alone, as apparently envisaged in the present draft (articles 55 and 58). In this connexion, the Norwegian Government wishes to draw attention to two important difficulties.

During the Rome Conference on the Conservation of the Living Resources of the Sea, it was demonstrated that very detailed and extensive investigations will often be necessary in order to determine the need for conservation measures, and that further development of maritime research will be required to provide sufficiently reliable scientific evidence. But even if those conditions are met, the scientists may still find room for doubt in regard to the conclusions to be drawn from such findings and in regard to what measures of conservation they might indicate.

Account must also be taken of the technical and economic conditions of the fishing industries of the countries concerned, as has been done in the existing special agreements and in the regulations adopted under these. The matter is complicated by the great differences which exist in the various countries in regard to methods of fishing and fish processing, consumption habits and marketing conditions. Thus, one particular restriction may hit one country hard, while it may affect other countries to a far lesser extent. Consequently a regulation may be discriminatory in fact, even if it is not discriminatory in form.

4. It seems difficult to reconcile the wording of article 53, paragraph 1, with the interpretation given in paragraph (2) of the commentary.

5. As long as no conclusion has been arrived at in regard to the breadth of the territorial sea, the Norwegian Government must reserve its position on the proposal in article 55 that the coastal State be empowered to adopt measures of conservation unilaterally.

The Norwegian Government would at all events be unable to agree to such an encroachment on the freedom of the high seas unless the proposed right is checked by an unqualified right for interested States to text by arbitration whether the conservation measures conform to the prescribed criteria. The privilege should, moreover, be confined to apply within a certain, reasonable, distance from the coast and should never apply to waters which are closer to the coast of another State (*cf.* the Norwegian comments to article 14).

A reasonable geographical limitation appears all the more necessary after the deletion, at the eighth session of the International Law Commission, of the qualification (contained in the corresponding article of the draft adopted at the seventh session) to the effect that the right should pertain only to the coastal State "having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts".¹² It was precisely in reliance on this proviso that the Commission, at its

¹² *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)*, p. 14, art. 5.

seventh session, deleted an express geographical limitation (*cf.* A/3159, p. 33, para. 15).

Another — apparently unforeseen — consequence of this deletion may be that the right could be exercised even in respect of coasts in the Antarctic, where there is no population whose interests require protection. In this region, there does not seem to be any conceivable ground for conferring such a right on the coastal State. And the extension of the rule to this particular region would probably lead to frustration of the conservation measures established through the International Whaling Convention.

The proposed articles appear to have been drafted primarily with a view to fishing. The special problems which arise in respect of whaling and seal-catching do not seem to have been taken sufficiently into account. Being operated by a small number of catching units, whaling is amenable to other methods of conservation and control than those applied to fisheries.

Attention is also drawn to the problems which were raised at the eighth meeting of the International Whaling Commission at London in July 1956, and which are summarized in the report of its Technical Committee (see annex).

Article 60

The article fails to specify the kind of regulations which are envisaged and the purpose for which they may legitimately be enacted and enforced. Inasmuch as articles 50-59 are generally applicable to all conservation measures, it is natural to assume that article 60 must concern regulations of a different kind. The natural interpretation would seem to be that the article relates to the technical questions concerning the safeguarding of fishing equipment, the prevention and reconciliation of conflicts between fishermen and between fishermen and other users of the sea. On this point, however, the article must be made clear.

The article is, by its terms confined to equipment embedded in the floor of the sea. At least in the North Atlantic Ocean, however, the most important practical problems are connected with fishing gear, such as long lines and nets, anchored to the floor of the sea, but not permanently embedded in it. Such gear is very often destroyed by trawlers and other vessels passing over. If a special right is accorded to the coastal State in regard to equipment embedded in the floor of the sea, it is difficult to see why this right should not also be extended to apply, in the same circumstances, to long lines and nets.

In its present form the article imposes no clear limitations on the right of the coastal State. The right should at least be subject to the same limitations as the rights which may be conceded in respect of the continental shelf. In particular, geographical maximum limits must be laid down.

Article 62

The terms "necessary precautions" in the last sentence appear too restrictive.

Article 63

If it is intended to establish a responsibility which will

be independent of culpability, certain limitations ought to be considered, *e.g.*, in respect of the responsibility of owners of older cables *vis-à-vis* owners of newer cables,

Article 66

It should be made clear, preferably in a general provision, that the control may not be exercised in waters which are closer to the baseline of another State than to the baseline of the State exercising the control, *cf.* the Norwegian comments to article 14.

Articles 67 and 68

These articles fall within the province of progressive development of international law, and constitute a still farther departure from the obtaining rules than the comparable articles on fisheries in articles 49-59.

The Norwegian Government has some difficulty for its part in seeing the necessity of granting to 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 would 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 the non-geological interpretations, given by the Commission in its commentary, with the text of the article, would then not arise.

Article 72

Reference is made to the Norwegian comments to articles 12, paragraph 1, and 14 on the delimitation of the territorial sea of two opposing States. Like these articles, article 72 is unnecessarily complicated, because it attempts to determine the actual border line, rather than to lay down the maximum limit beyond which none of the States concerned may extend their jurisdiction. The natural and adequate way of proceeding would be to provide that no country is entitled to extend its continental shelf so as to comprise any part of the sea which lies nearer to the coast of another State, or, as suggested in the Norwegian comments to article 14, to rely on a general provision to that effect, applicable to all rights of the coastal State.

Article 73

The Norwegian Government agrees entirely that there must be no question of according special privileges of the proposed kind to the coastal State unless the rights inherent in the concept: "freedom of the high seas" are safeguarded by appropriate provisions for compulsory judicial settlement of disputes.

Annex

INTERNATIONAL WHALING COMMISSION

Report of the technical committee

1. The Committee met five times and was attended by the representatives nominated at the first plenary meeting of the Commission by the following delegations:

Australia, Canada, Japan, Netherlands, Norway, Panama, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America and Union of Soviet Socialist Republics.

*Report of the eighth session
of the International Law Commission*

37. The Norwegian Commissioner referred to the correspondence between the Secretary of the Commission and the United Nations Organization about the deliberations of the International Law Commission in relation to the draft articles prepared by them on the régime of the high seas. He recognized that it was not possible for the Technical Committee, or for the Commission itself, to take any positive action with regard to the eighth session report (copies of which had been made available to Commissioners) but he felt it would be useful to draw the attention of Commissioners to it and to ask them to discuss its recommendations, from the point of view of the whaling industry, with their Governments.

38. The Committee agreed that it was not empowered to make any recommendations regarding the substance of the International Law Commission's report nor to discuss its merits. All it could do was to draw attention to the ways in which the draft articles contained in the report might affect the whaling industry. In discussion, the following points were made:

(a) Article 26 of the régime of the high seas¹³ referred to arbitration arrangements for States engaged in fishing the same stocks of fish in any area of the high seas. If these articles were brought into force, was it possible that such States could take a disagreement to arbitration even if that disagreement arose within a commission?

(b) Article 29¹⁴ enabled a coastal State to take the initiative in undertaking conservation measures. Might other countries have to conform to these measures, even if they were members of a convention in force in the area of the seas concerned?

(c) The comment on article 27¹⁵ made reference to the "principle of abstention". Could the whale fishery be regarded on an example of a fishery where this principle might apply?

(d) In the seventh Session report, article 29 had only provided for coastal States to take unilateral action to introduce conservation measures if they could demonstrate that they had a special interest in the conservation of the living resources of the area of the high seas concerned. This condition had now been removed from the article.

(e) As regards the provisions for arbitration contained in articles 25 to 33 A,¹⁶ it seemed that there might be two or more conventions for a particular area of the high seas whose provisions were not identical. The question then arose as to which convention would be binding on newcomers to the areas concerned.

(g) Article 29 referred to the interest of the coastal State but did not contain any definition as to the area of the high seas which could be regarded as adjacent to the territorial sea of

the State concerned. Might the fact that no limitation on adjacent waters was defined enable two or more States to seek to impose unilateral conservation action in the same area of the high seas?

39. The Australian Commissioner objected strongly to the discussion and considered that the matter was outside the jurisdiction of the Commission.

14. Peru

LETTER FROM THE MINISTRY OF FOREIGN AFFAIRS OF
PERU, DATED 5 AUGUST 1957

[Original: Spanish]

The subsequent comments on some of the regulations proposed therein should be construed and understood in a spirit of appreciation and esteem for the work accomplished by the Commission. These comments, in keeping with the request made, are of course strictly provisional and do not commit or limit the position and attitudes which the Government of Peru may consider desirable to adopt at the prospective conference.

First, I should mention that the draft is not concerned solely with codification, in the limited sense of the word, but includes completely new chapters and provisions. It is both a codification and an instrument *de lege ferenda*.

With reference to this latter aspect, the Government of Peru would have preferred the document to make more extensive and fuller allowance for the new developments in international law which favour the coastal State. With respect to the utilization of the mineral resources of the continental shelf, the Commission accords to the coastal State those broader rights which it denies that State in the matter of the conservation and exploitation of the living resources of the sea adjacent to its coast. We may take it that it did not do so because it was not within its scope to consider the technical, biological, economic and political aspects, which are to be dealt with in the forthcoming conference.

A fundamental problem in any formulation of the law of the sea is the determination of the breadth of the territorial sea. From the discussion in the Commission and the General Assembly it is evident how difficult it is to agree on a single general rule applicable equally to all countries, in all cases and in all seas. Article 3 of the draft doubtless represents an advance over the one the Commission had previously approved. Although not containing a precise rule, nor really constituting a regulation, nor offering a solution to the problem, the provision still inclines toward a rule that is to be valid *erga omnes*. The Commission concludes "that international practice is not uniform as regards the delimitation of the territorial sea" (article 3, para. 1) but considers that the breadth of the territorial sea should be fixed by an international conference. In this respect, the Government of Peru favours the rule laid down in the "Declaration of Mexico City of the Principles governing the Régime of the Sea"¹⁷ and believes

¹³ Article 52 in the final draft (A/3159).

¹⁴ Article 55.

¹⁵ Article 53.

¹⁶ Articles 52 to 59.

¹⁷ *Final Act of the Third Meeting of the Inter-American Council of Jurists, Mexico City, Mexico, January 17-February 4, 1956* (Washington D.C., Pan American Union, 1956), p. 36.

that, in conformity with present reality and with the recognition that "practice is not uniform", one ought to recognize that "each State is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological and biological factors, as well as the economic needs of its population, and its security and defence".

The single rule of an invariably identical breadth is based primarily on considerations of juridical interpretation. Yet, if the problem is to be settled justly and realistically in the rules under discussion, other factors, too, must be taken into account, including economic and political factors. As the development of international law produces rules which settle the various problems of maritime law, especially those concerning conservation and the rights of the coastal States, it will become easier to solve the problem of the breadth of the territorial sea.

The Commission itself has recognized the interdependence of these two problems. Politically, their connexion is evident and they may be solved by means of a frank approach in the light of present realities. If it should prove possible to recognize an authentic right vested in the coastal State by virtue of which that State is able to protect effectively the resources in the vicinity of its coast, then the question of the determination of the breadth of the territorial sea would not present the characteristics which it now displays. Unfortunately, there was some reluctance to deduce the rules which flow logically from the recognition of the coastal State's interest.

The Commission, at its eighth session and in its report, admitted for the first time the special interest of the coastal State—a special interest peculiar to the coastal State *qua* coastal State and not shared by other States. It has therefore an objective character, not requiring proof.

Article 54, paragraph 1, clearly and categorically confirms the principle, but the regulations relating to the coastal State's acknowledged right, which is the consequence of its special interest, do not really fulfil their purpose. The number of nature of the conditions by which this right is hedged about are such as to render it practically nugatory. The stipulation that there must be an "urgent need" for the measures and the proviso that there must be prior negotiations with other States deprive the coastal State's right to adopt measures of conservation of all practical value. If the problem is considered in terms of present political realities and not in purely theoretical terms, these conditions will make it impossible for a small State to adopt successfully any necessary conservation measures if these are capable of affecting the commercial interests of a great Power. The provisions proposed by the Commission are of little present or practical value to the coastal States; they seem to be inspired by the interests of the fishing enterprises and to reflect the now very dubious notion of the inexhaustibility of the sea's resources. Present realities and the new destructive methods of fishing demand different rules, rules safeguarding the definite interest of the coastal State, which cannot remain indifferent to the prospect of extinction of the resources of its coastal waters. Once the coastal State's interest, which coincides

with mankind's, is recognized, the acknowledged principle should be incorporated in regulations in such a way that the coastal State has the power under certain conditions to adopt unilateral conservation measures in the high seas contiguous to its coastal waters.

15. Poland

LETTER FROM THE PERMANENT MISSION OF POLAND TO THE UNITED NATIONS, DATED 3 OCTOBER 1957

[Original: French]

The comments contained in the enclosed document have only a preliminary character and do not exhaust the observations arising in connexion with the report of the International Law Commission.

One of the important problems dealt with in the draft is that of the breadth of the territorial sea. The work of the International Law Commission represents a substantial achievement, but article 3 of the draft is still open to reservations.

The comments of maritime States which the International Law Commission took into account are of great diversity; they range from the proposition that the uniform breadth of the territorial sea should be fixed at three miles to the proposition that the territorial sea should be coextensive with the continental shelf or that its breadth should be fixed at 200 miles. This diversity proves that international law has not, as yet, recognized the existence of any rule established by custom or by treaty stipulating a uniform breadth of the territorial sea for all countries. The present situation derives from the historical development of national practice in this field, which has always sought to safeguard the political and economic interests of the coastal State and to ensure the freedom of navigation and fishing. The right of coastal countries to establish the breadth of their territorial sea was confirmed by the decision of the International Court of Justice of 18 December 1951 in the *Anglo-Norwegian Fisheries Case*.¹⁸

The International Law Commission's draft very rightly recognizes the institution of a contiguous zone, which permits the coastal State to assert, outside its territorial sea, certain clearly defined rights against foreign ships. However, the draft concedes to the coastal State only such rights as are necessary for the protection of its customs, fiscal and sanitary interests. This formula does not take into account the recognized practice of a number of States which have established a contiguous zone for the additional purposes of coastal defence and safeguarding their security, which are matters of considerable importance to States with a narrow belt of territorial sea.

It should be recognized that in the contiguous zone the coastal State enjoys the right to make provision for

¹⁸ *I.C.J. Reports 1951*, p. 116.

its coastal defence and security in the same manner as it is entitled to protect its customs, fiscal and sanitary interests. The validity of this argument is borne out by the time-honoured practice of a number of countries and by the opinion of learned authors on international law.

For States which base their economic system on socialist State ownership, the immunity of State-owned ships is an important matter. Economic activity, including the commercial operation of ships constitute one of the essential functions of the socialist State. That activity should therefore enjoy the same protection as is extended to all other official State activities and any commercial vessel performing economic functions which is the property of a socialist State should be considered immune.

The principle of the immunity of State-owned property should be recognized as a rule of international law which is supported by numerous decisions of municipal courts. The immunity of State ships operated for commercial purposes is especially important at a time of coexistence of countries with different economic systems. The principle of the immunity of those ships becomes one of the fundamental elements of the peaceful use of the seas.

The International Law Commission's draft does not recognize the validity of this principle in all of the maritime areas covered by the codification. State ships operated for commercial purposes have very rightly been recognized as immune on the high seas; there, they enjoy the same absolute immunity as warships. In the territorial sea, however, this just principle is said not to apply. As the draft stands, the special rules governing the rights of innocent passage of merchant ships and particularly those concerning criminal and civil jurisdiction apply also by virtue of article 22, to government ships operated for commercial purposes. In that respect, therefore, the proposed article 22 is open to reservations.

Some reservations must also be expressed with regard to the definition of piracy. The classical form of piracy committed for gain is now largely a thing of the past. The period between the two World Wars witnessed the appearance of new forms of piracy, such as the acts of piracy committed during the Spanish Civil War in the years 1936-1938 and those perpetrated in the China seas in recent years, the victims of which have included two Polish merchantmen. The definition adopted in article 39 does not cover these modern forms of piracy, which are expressly declared to constitute piracy in a number of international agreements.

The Polish Government also has certain misgivings regarding some of the rules on the protection of the living resources of the sea and reserves its right to submit concrete proposals thereon at the forthcoming Conference.

These preliminary comments are submitted without prejudice to the position of the Government of the Polish People's Republic at the Conference itself. Furthermore, the Polish Government reserves its right to state its view both on the questions mentioned above and on other points.

16. Sweden

LETTER FROM THE MINISTRY OF FOREIGN AFFAIRS
OF SWEDEN, DATED 31 AUGUST 1957

[Original: French]

The views of the Swedish Government on the earlier versions of the International Law Commission's draft were communicated in its three letters of 7 May 1953,¹⁹ 12 April 1955²⁰ and 4 February 1956.²¹ While still adhering to the opinions stated in those communications, the Swedish Government wishes to make the following additional comments on some of the articles of the final draft.

Article 3

In its earlier communications mentioned above, the Swedish Government contended, and is still of the opinion, that there is no uniform measurement of the territorial sea applying equally to all States, but that certain limits established by practice are nevertheless generally accepted and cannot be exceeded without violation of the principle of the freedom of the seas. The Swedish Government is of the opinion that the principal traditional limits of the breadth of the territorial sea are those of three, four and six nautical miles, which have all been claimed by different countries for many years. The Swedish Government itself has maintained the four-mile limit since 1779.

The Swedish Government does not consider that a general limit of twelve miles is justified by international law. It supports the solution proposed by Mr. J. P. A. François, the Special Rapporteur, in his first report on the territorial sea (A/CN.4/53) *viz.* that the territorial sea of a coastal State cannot be extended beyond six miles. A maximum limit of six miles would not only be consistent with international practice but, in the Swedish Government's view, would also eliminate the risks of an infringement of the principle of the freedom of the seas by certain States claiming an exaggerated extension of their territorial limits.

Article 5

The wording of this article has also been fully commented on by the Swedish Government in its earlier communications. The Swedish Government tried to show, in particular, and again wishes to stress, that the notion of internal waters is, first and foremost, geographical. The expression "internal waters" means the stretches of the sea which are so closely linked to the land domain that they can be assimilated thereto. This has certain immediate consequences in law. By reason of the homogeneity of these waters and the land domain the two are governed by the same rules. Consequently, there can be no right of innocent passage in internal waters, as there is in the territorial sea; and it

¹⁹ A/CN.4/71/Add.1.

²⁰ *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)*, p. 37.

²¹ *Yearbook of the International Law Commission, 1956, vol. II (A/CN.4/SER.A/1956/Add.1)*, p. 70.

is also self-evident that the straight baselines which constitute the outer limits of internal waters must, in the same way as the land domain, serve as points of departure for the delimitation of the territorial sea.

The International Law Commission's draft, however, although essentially based on these principles, also states that account may be taken, where necessary, of the economic interests of the coastal population. The Swedish Government stressed in its communication of 4 February 1956 that it considers this provision in the draft to be very debatable. If the aim is to serve the interests of the coastal fishermen or, more exactly, to favour the fishermen of one coastal State at the expense of the fishermen of other coastal States, a more satisfactory solution would seem to be to provide in explicit terms for what is intended in the final analysis: namely, an extension of the outer limits of territorial waters.

In addition, the Swedish Government has certain reservations regarding the rule proposed by the Commission under which baselines may not be drawn to and from drying rocks or drying shoals. Such features are used in certain instances for the drawing of the baselines of the Swedish territorial sea and any change in the present system would create some difficulties. The Swedish Government believes that the imposition of such a rule is not warranted and would, therefore, prefer to see the draft amended to state that baselines may be drawn to and from such features. This amendment would have the further advantage of bringing the article in question into line with the corresponding provisions of article 11, which states that drying rocks and shoals which are within the territorial sea may be taken as points of departure for measuring its extension.

Articles 51-53, 55, 56, 57, 58

As regards the régime of the high seas envisaged in the Commission's draft, the Swedish Government wishes, in the first place, to stress that it regards the introduction of measures for the conservation of the living resources of the high seas as absolutely essential. It is, accordingly, prepared to endorse the principles stated in *articles 51 to 53* of the Commission's draft. It is constrained, however, to object strongly to *article 55*, which provides that the coastal State may adopt unilateral measures affecting fishing in any area of the high seas adjacent to its territorial sea. In certain circumstances, those measures would even be binding on other States.

In the opinion of the Swedish Government, there is no reason whatsoever for granting to the coastal State, any more than to any other State, the right to take measures for the regulation of fishing outside the limits of its territorial sea, that is to say in free waters. On the high seas, the right to engage in fishing is enjoyed on a footing of equality by the nationals of all States. This principle is indeed recognized in *article 55*, for it states that the special measures which may be adopted by the coastal State on the high seas must not discriminate against foreign fishermen. In any case, the Commission's draft contains in *articles 51 to 53*, several provisions regarding the measures to be taken for the conservation of the stocks of fish in the high seas. Since these provisions apply to the sea up to the limits of the territorial sea of the States concerned, including, therefore, the maritime areas situated near to the coast, those

areas would be subject to two sets of rules: those set forth in *articles 51 to 53* and those contained in *article 55*. This would inevitably create difficulties, particularly as no provision delimits the maritime area in which the coastal State is competent to take measures in pursuance of *article 55*. The Swedish Government considers that the provisions set forth in *articles 51 to 53* are fully adequate in themselves, especially in view of the fact that every coastal State may take advantage thereof, on the condition that its nationals engage in fishing; and furthermore, if that State has a special interest in the conservation of the living resources of an area adjacent to its territorial sea, the provisions set forth in *article 56* seem to provide the necessary safeguards and to render *article 54* superfluous.

The Swedish Government is consequently not disposed to accept the content of *article 55*. Considering, however, that some States which favour the adoption of that article refuse to accept the arbitral procedure described in *article 57*, the Swedish Government wishes to add a few comments on that last point.

The fishing regulations which a coastal State would be able to enact under *article 55* would affect maritime areas which would nevertheless continue to be governed by the principle of the freedom of the seas. The right of the coastal State to enact regulations of this kind has naturally been made subject to certain conditions, such as the production of scientific evidence showing an urgent need for such measures and the obligation to ensure that they do not discriminate against foreign fishermen. If those conditions remain unfulfilled, the coastal State is not entitled to take the measures in question. The onus of proving that the required conditions are fulfilled should therefore lie on the coastal State which has taken the measures, and other States are obviously not bound to accept the statements of the coastal State unless they are fully substantiated. Hence, it seems reasonable that these other States, in so far as they do not desire to acquiesce in the measures taken by the coastal State in pursuance of *article 55*, should not be obliged to comply with them until an impartial tribunal has ruled that the conditions specified in the article are fulfilled. That is why the Swedish Government believes that the enactment of any regulations in conformity with the ideas contained in *article 55* is only conceivable if there exists a system of arbitration such as that provided for in *article 57*. A system of that kind should, however, be rounded off (with a consequential amendment in *article 58, paragraph 2*) by a provision stipulating that a State which has referred a dispute to an arbitral commission should not be bound to observe the measures adopted until that commission has given its decision. This comment is equally applicable to the measures specified in *article 53* of the draft.

Finally, the Swedish Government considers that there may be some contradiction, in *article 57*, between, on the one hand, the period of three months specified in *paragraph 2*—which states that, failing agreement on the choice of the members of the arbitral commission, they shall be nominated by the Secretary-General of the United Nations after consultation with certain other functionaries—and, on the other hand, *paragraph 5*, which stipulates that the arbitral commission shall in all cases be constituted within three months. This would

seem to leave the Secretary-General no time for his consultation.

Article 66

This article deals with the right of a coastal State to take certain measures of control in a twelve-mile zone of the high seas contiguous to its territorial sea. The Swedish Government, in its earlier communications, expressed its objections to a provision of this kind, pointing out that it had no support in international law. The Swedish Government still adheres to that opinion and wishes to repeat that, in the past, States wishing to exercise control over foreign vessels beyond their territorial limits concluded treaties with the foreign States concerned in order to obtain the necessary power (e.g., the so-called United States Liquor Treaties or the Helsingfors Treaty of 1925 between the Baltic States).

Articles 67-73

As regards the provisions concerning the continental shelf, the Swedish Government also wishes to refer to the opinion which it expressed before and which, according to article 69, the Commission apparently shares, namely, that the principle of the high seas must prevail even in the epicontinental waters and that the question of the continental shelf cannot be linked with that of the breadth of the territorial sea. The Swedish Government has admittedly expressed its readiness to accept certain rules designed to facilitate exploitation of the natural wealth of the continental shelf. It is nevertheless opposed to the suggestion that the rights which are conceded to the coastal State for this purpose should be described — as they are in article 68 — as “sovereign rights”. The exercise of sovereign rights over the shelf by the coastal State might, among other things, impede free scientific research, such as that carried on in the interests of fishing at the bottom of the sea and in the sedimentary deposits. In addition, the Swedish Government would like the right of the coastal State to exploit the continental shelf to be restricted to the exploitation of inorganic natural resources. The Swedish Government would thus welcome a provision excluding from the application of articles 67 to 73 all forms of fishing and all exploitation of the organic wealth of the continental shelf. If the principle of the freedom of the seas is to be respected, such exploitation must remain open to the nationals of all States.

In the above comments, the Swedish Government has concentrated on certain specific provisions of the International Law Commission's draft which seem to deserve particular attention. It wishes to state, however, that it may propose certain amendments or additional provisions at the forthcoming conference.

Finally, the Swedish Government would like to state its position on the General Assembly's wish as expressed in the relevant resolution, that, besides dealing with the questions appearing in the International Law Commission's report, the conference should also consider the question of the free access to the sea of land-locked countries. As the International Law Commission has made no proposal on this subject, and there is thus, as yet, no basis of discussion to assist the conference in dealing with it, certain difficulties are apt to arise. Even at this stage, however, the Swedish Government wishes

to point out that the question seems to belong in a field which is governed by several conventions concluded under the auspices of the League of Nations: the Convention and Statute on Freedom of Transit and on the Régime of Navigable Waterways of International Concern, signed at Barcelona on 20 April 1921; the Declaration recognizing the Right to a Flag of States having no Sea-coast; and the Convention on the International Régime of Maritime Ports, adopted at Geneva on 9 December 1923. If these conventions should be considered insufficient, they could, in the Swedish Government's opinion, serve as a point of departure for any supplementary agreement which the conference may decide to prepare.

17. United Kingdom of Great Britain and Northern Ireland

TRANSMITTED BY A NOTE VERBALE FROM THE PERMANENT MISSION OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, DATED 20 SEPTEMBER 1957

[Original: English]

I. Introduction

Her Majesty's Government consider that the International Law Commission's report constitutes a valuable piece of work which will contribute materially towards the conclusion of possible conventions or other instruments on the law of the sea. They believe that, in the necessary spirit of general co-operation, agreements on such a result can be reached, and that it would in its turn materially contribute to diminishing international friction.

In the opinion of Her Majesty's Government, the true interests of all nations are best served by the greatest possible freedom to use the seas for all legitimate activities. From this point of view increasing encroachments on areas which should properly be regarded as high seas cannot but be matters of serious concern.

Many problems connected with the law of the sea are in the first instance problems of definition. This is particularly so in respect of the outer limits of the territorial sea, international boundaries for the territorial sea, and the international boundaries of contiguous zones and the continental shelf. Ideally, these definitions should be subject to precisely defined and agreed rules of hydrographic procedure, so that the competent authorities all over the world will be able to produce the same results in drawing particular limits or boundaries on charts.

II. Comments on the draft articles

These comments should not be taken to mean that Her Majesty's Government are necessarily fully satisfied with articles not commented on.

Article 3

Her Majesty's Government wish to draw attention to the comments they have already made on this article

and, in particular, to emphasize that the determination of the breadth of the territorial sea is a matter which is governed by international law, so that the limits of its territorial waters cannot be fixed by each State at its sole discretion. They believe that a uniform solution of this problem is necessary. A solution on a regional or local basis, which would result in varying limits of territorial waters in different parts of the world would not only lead to great practical difficulties, but would only serve to perpetuate existing uncertainties, and would undoubtedly lead to the whole question being thrown open again in a few years time.

As regards the question of breadth, wide extension of the limits of territorial waters cannot but prejudice the principle of the freedom of the seas, since any such extension must impinge on the free availability of the seas for the common use of mankind. The only uniform limit which has received a wide measure of recognition (from the practice of States, the decisions of international tribunals and the opinion of other authorities) is that of a three-mile breadth of territorial waters. Any extension of territorial waters beyond that limit must give rise to difficult problems. There is, for example, the problem of straits; any extension of territorial waters beyond the three-mile limit would be likely to make a number of straits wholly part of the territorial waters of the riparian State or States, and in some cases might result in existing high seas becoming entirely territorial waters. A more serious result would ensue where the high seas at either end of the strait disappeared into territorial waters so that the strait lost its character of an international strait joining two parts of the high seas.

A second aspect of any extension of territorial waters is that it would extend the area in which the coastal State would be able to exercise jurisdiction over the merchant vessels of other States, with a possibility of resultant delays and hindrances to the freedom of navigation. Thirdly, any such extension cannot but affect freedom of air navigation, since it will affect the area claimed by States as the air space above their territories. Fourthly, there are practical problems which would arise from any extension of territorial waters, and would particularly affect the smaller vessels of all countries. For instance, a limit of more than three miles would make it more difficult for small fishing vessels accurately to fix their position from the shore; and radar and lighthouses will, because of increased distance, be less effective as aids to navigation.

The arguments that are advanced in favour of more extended limits of territorial waters, and sometimes in favour of varying limits for different States, are based on the existence of problems which, it is believed, can be more satisfactorily resolved by other means. The development by a coastal State of the resources of the sea bed and subsoil of the continental shelf can take place without any extension of territorial waters, and the problems arising from the necessity of conserving fisheries adjacent to territorial waters can best be solved by international agreement, taking account of the varying circumstances of the fisheries and directed to particular needs, and not by an extension of the limits of territorial waters. For customs and fiscal purposes the establishment of a contiguous zone beyond a three-mile limit of territorial waters, and extending for not more

than twelve miles from the coast, would meet all reasonable needs of the coastal State.

Article 5

Straight baselines

Certain phrases used in this article appear to be insufficiently precise, and so to give rise to difficulties. For example, the phrase "where there are islands in its [the coast's] immediate vicinity" could be used as justifying the use of straight baselines to join the coast to single isolated islands, whereas the decision of the International Court of Justice on the Anglo-Norwegian Fisheries Case was based on the existence of a continuous island fringe along the stretch of coast concerned. Furthermore, as this article reads at present, it would seem to mean that if there are any islands off a coast, a straight baseline system "joining appropriate points" may be used along the whole coast. A more precise wording seems therefore to be required to ensure that the straight baselines are drawn only in order to join the natural entrance points of the "deep indentations" and between the natural entrance points of the straits formed in a string of islands lying close off shore.

It is also considered that the requirement, which was one of the conditions laid down by the International Court in the Fisheries Case, that straight baselines should only enclose waters strictly *inter fauces terrarum*, should be introduced into this article in order to ensure that the baselines are not automatically jointed from headland to headland, and that, when dealing with strings of islands, the lines are not invariably used to join the outermost point of one island to that of another.

The article also states that the baseline must not depart to any appreciable extent from the general direction of the coast. There is, however, no guidance on how this expression is to be interpreted; this would appear to be essential before baselines can be drawn on charts. The most practical way of ensuring that baselines do not depart from the general direction on the coast would appear to be to place a limit on their maximum length, a limit which might correspond to that which may be agreed upon for the closing of bays, and to ensure that no base point isolated from the true coastline is used in the straight line system.

Internal waters

The article also states that the sea areas enclosed must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. The International Law Commission was not able to examine closely the problems involved in defining internal waters, and a satisfactory assessment of the justification of straight baselines along a particular coast will therefore depend on a fuller definition of internal waters than that provided in the commentary to article 26.

There would seem to be advantage in including in article 5 itself the point made in paragraph 7 of the commentary, *i.e.*, that straight baselines may be only drawn between points situated on the territory of a single State.

Article 7

In paragraph 1 of this article, it is not clear as regards

the criteria for deciding whether an indentation is a bay or a curvature of the coast, whether, in determining the area to be assessed, the boundary at the landward end is to be by the high-water or the low-water mark. There would seem to be advantage in using the low-water mark. In paragraph 3, no mention is made as to whether the closing line is to be measured between high-water marks or low-water marks; again, it would seem preferable to select a low water mark.

In the same paragraph, the maximum length of the closing line is stated to be fifteen miles. This is considered to be too great. There are many practical arguments in favour of a ten-mile closing line. Even if the view is accepted that the ten-mile rule had not acquired the authority of a general rule of international law, it can nevertheless be justified both by historical practice and by the fact that it can more easily be related to the range of vision at sea.

In paragraph 4 of the article, the words following "historic bays" require modification. As at present drafted, they might be held to imply (although this is clearly neither the intention nor the practice) that all straight baselines can have a minimum length of fifteen miles. The conditions laid down by the International Court would clearly require, in many cases, and have already resulted in, much shorter baselines.

There would seem to be advantage in including in the article, as a separate paragraph, the statement in the second paragraph of the commentary that "islands at the mouth of a bay cannot be considered as 'closing' the bay if the ordinary sea route passes between them and the coast".

Article 21

Her Majesty's Government have recently passed the Administration of Justice Act, 1956, for the purpose of implementing the Brussels Convention of 1952 for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, and is on the point of ratifying the Convention. Her Majesty's Government could not therefore accept a further international instrument covering the same ground. To accept the article as it stands at present drafted would, in any case, be impossible because it does not agree with the terms of the Convention. Paragraph 2 of the article, which sets out the circumstances in which a ship may be arrested for the purpose of exercising civil jurisdiction, other than when it is lying in the territorial sea or passing through it after leaving internal waters, is drafted in such a way as not to coincide with the terms of the Convention. Paragraph 3 appears to remove every limitation of arrest in cases where a ship is lying in the territorial sea or is outward bound through it (the very circumstances in which such arrests usually take place). The arrest need not be limited, as in paragraph 2 of the article, to proceedings in respect of obligations incurred by the ship itself, or for the purpose of its voyage. The provision that a State may effect such an arrest in accordance with its laws gives support to indiscriminate arrest under local laws, and could therefore cause disproportionate dislocation and inconvenience to ships; the whole of paragraph 3 is inconsistent with, and would defeat the purpose of, the Brussels Convention.

Article 26

In paragraph 2 of the commentary to this article, reference is made to large stretches of water entirely surrounded by land, and the succeeding sentence states that "such" stretches of water, when they communicate with the high seas by strait or arm of the sea are considered as internal seas. A small drafting change would seem to be required here, since seas cannot communicate with the high seas at all if they are entirely surrounded by land. In any case, a clearer definition of the distinction between a gulf and an internal sea may be desirable.

Article 34

The subject of this article is already covered in international agreements to which Her Majesty's Government, together with nearly all other maritime States, are already party. These international agreements are:

International Regulations for Preventing Collisions at Sea, 1948;

The International Convention respecting Load Lines, 1930;

The International Convention for the Safety of Life at Sea, 1948.

They cover their subjects fully and to the greatest practical degree and make provisions for amendments to keep them up to date and abreast of new developments and techniques. Even so, they do not go so far as the draft articles in some respects. They do not, for example, regulate the actual construction of cargo ships, but control it indirectly by means of regulations relating to load-lines and seaworthiness. The need to control the construction of cargo ships has not yet been proved and is certainly not pressing. It is not possible even for the United Kingdom, who have a long experience and high standards on the subject, to embody every aspect of seaworthiness in regulations.

As regards paragraph (b) of the article, the United Kingdom could not sign or accept a Convention containing this provision. Although the Government ensure by regulation that British ships shall observe certain minimum standards of food and accommodation for their crews, the conditions under which masters, officers and men are employed are a matter for the shipowners' and seafarers' organizations and are not the subject of government regulations. Even as a statement of general principle, the commitment to internationally accepted standards or to reasonable labour conditions is too vague to be practicable when it has to be undertaken as part of a binding international instrument. The United Kingdom has never found it practicable or desirable to legislate as to the adequacy of a ship's crew, but maintains a sufficient control by means of the power to detain a ship which is unseaworthy as a result of undermanning.

Article 35

As regards paragraph 2 of the commentary on the article, it should be noted that damage to an installation on the continental shelf necessary for the exploration and exploitation of natural resources (article 71) can equally be considered "an incident of navigation".

Articles 35, 36 and 48

The subject matter of these articles is either wholly or partly dealt with in existing conventions. Where this is the case it is questionable whether it should be done again.

Article 47

This article, in allowing hot pursuit from the contiguous zone, ignores the status of the zone as high seas. It is considered that the right of hot pursuit should be permitted only from within the territorial sea.

Articles 49-60

Her Majesty's Government welcome in principle this set of articles and consider that they should provide a basis for future agreements and allay the often legitimate fears of States for the conservation of marine resources alike in coastal waters and in the deep seas. They would agree without reserve with these basic propositions which the articles embrace :

(i) That fishing activities upon any marine resource should be regulated where this is needed for conservation purposes ;

(ii) That all States fishing any marine resource on the high seas should be required to seek agreement upon any conservation measures that may be required ;

(iii) That a State newly entering a high seas fishery should be initially bound by any measures of conservation already in force ;

(iv) That a State which is a coastal State in relation to any high seas fishery, whether or not it is currently engaged in that fishery, should be enabled to participate on an equal basis with other States in any plan of research or system of regulation of the fishery for conservation purposes.

Her Majesty's Government accept in principle the requirements that where States have failed to reach agreement on any issue arising from the above propositions they should resort to arbitration of an appropriate character which shall be binding upon them. Speedy arbitral decisions would, however, be essential, as unsettled controversy over the conservation of marine resources may, if at all prolonged, easily bring about loss to the fishermen as well as damage to the resource. Her Majesty's Government are therefore glad to note the proposals for short time-limits in respect of action upon a respect for arbitration, the constitution of a commission to consider the disagreement, and the rendering of the arbitral decision. These would be the more essential in the event of its being considered possible to give the coastal State a right to take unilateral measures of conservation which could only be upset by subsequent arbitration, and the commission deciding not to suspend the measures of the coastal State pending its arbitral award as article 58 would empower it to do.

Articles 54, 55 and 58 are designed to meet what are understood to be the particular needs and fears of the coastal State in regard to the safeguarding of the living resources of the sea. Her Majesty's Government recognize that both the needs and the fears may be material whether or not the coastal State has yet begun

to share in the harvesting of those resources ; this recognition is the keener because Her Majesty's Government are themselves responsible for the interests of many such territories which are now engaged in expanding their fishing industries in order to augment their food supplies. At the same time, Her Majesty's Government consider that these articles require much further study from various technical fishery aspects before it can be judged whether, and if so in what circumstances, an acceptable formulation can be devised for the fundamentally new principle which is proposed, namely, that individual States may apply measures, and on the high seas, that are operative against other interested States without their agreement and in advance of arbitration on the merits of the measures in question.

Among the technical fishery aspects requiring study are these :

(a) There is an implicit assumption that stocks of marine resources are capable of localized definition. But fish, and other marine resources, have migratory movements extending over great distances. A stock may be local to a particular State at one period of the year, and local to another State, or entirely oceanic, at other periods. To confine the action of a coastal State to "any area of the high seas adjacent to its territorial sea" may make that action quite ineffective ; to permit its extension further may be demonstrably unwarrantable. There will be a wide range of circumstances, depending on the species or stock of the marine resource in question, and it is by no means clear under article 55 where the line could be drawn beyond which unilateral conservation was not permissible.

(b) There is an implication that the coastal State is always confronted by a wide expanse of ocean. That may not be the most usual situation. Many countries are grouped around the margin of seas — the Baltic, the Mediterranean and the North Seas are examples in Europe and there are others elsewhere — which may be small in area. This reality has to be taken into account along with the migratory characteristics of fish and other marine resources. The conclusion would seem inescapable that in many parts of the world there will be several countries in a given area which might properly regard themselves as coastal States within the compass of article 55, and which might take conflicting unilateral action. This could well bring about a state of chaos in the fisheries.

(c) There are many international conservation bodies in existence for specific areas, or for certain kinds of marine resources, which have conservation programmes in operation and of which coastal States concerned have or can become members. The position of these bodies in relation to the proposed articles seems to require definition.

(d) Under article 55, the unilateral measures of a coastal State would apply to other States, in advance of reference to arbitration, if the stated requirements were fulfilled, and would remain obligatory upon all pending the arbitral decision. If this is to be an effective provision, the implication exists that not only should other States concerned undertake to see that their nationals observe the measures in question, but also that the enforcement of those measures should be supervised, particularly on the high seas. The questions arise, by

whom should the measures be supervised, and whether the other States affected would be expected or required to enforce against their own nationals the unilateral measures of the initiating State from which they might dissent, and over which they might be intending to go to arbitration. Alternatively, it may be asked whether it is intended that the State introducing the unilateral measures should be entitled to enforce them against vessels of other flags on the high seas. Her Majesty's Government would observe that agreement on the collective or the international enforcement of fishery conservation measures has so far been slow in forthcoming, and that the possibilities for the unilateral enforcement of controversial measures would not appear promising.

Article 67

The last phrase of this article is somewhat ambiguous, in that this may refer to detached parts of the shelf with depths of less than 200 metres situated beyond the shelf immediately adjacent to the coast with depths greater than 200 metres intervening. This is particularly so in view of the alternative meanings of the words "adjacent" and "contiguous" which, beside meaning "lying alongside" and "touching", may also have the sense "neighbouring" or "in close proximity to". It is appreciated that the question of "detached parts" is covered by paragraph 8 of the commentary on this article, but the final article itself should make it clear that "detached parts" are exceptions to the general rule, since this is a matter of substance rather than of comment.

Article 69

It is considered that the intention of this article could be more clearly expressed by substituting the phrase "in no way affect" for "do not affect".

Article 71

Paragraph 2 of the article refers to the establishment of "reasonable safety zones", without qualifying the breadth of the safety zone itself. It is felt that it would be preferable to include in the article a stated breadth, at present only included in the commentary. The article should also include the provision contained in paragraph 5 of the commentary, that abandoned or disused installations must be entirely removed.

Article 72

The description of the median line contained in paragraph 1 and 2 of this article could, it is believed, be better expressed as "every point of which is equidistant from the nearest point on the baselines from which the width of the territorial sea is measured".

This rendering conforms to that in articles 12 and 14.

It is suggested that a further clause be added to the effect that the median lines be permanently marked either on the ground or on charts or be fully described in relation to fixed marks on the ground. Coast lines, and thus the baselines for measuring the width of territorial waters, are liable to alter in the course of time. Boundaries through continental shelves should not be susceptible to any movement depending on nature.

Proposals for additional provisions

Her Majesty's Government believe also that there are the following problems of a technical nature which the International Law Commission did not deal with, and which might usefully be studied at the International Conference.

(a) The question of access to ports which can only be reached by traversing the territorial waters of another country;

(b) The division of territorial waters in bays where the coasts belong to two or more States, mentioned by the Commission in paragraph 7 of their commentary on article 7;

(c) The limits of territorial waters of ice-bound coasts;

(d) The use of "methods of equidistance" in the drawing of median lines, etc.;

(e) The selection of charts for the drawing of boundaries between adjacent and opposite States. Article IV specifies "large-scale charts officially recognized by the coastal State"; but in boundary problems at least two States are involved and their "officially recognized" charts may not agree;

(f) International boundaries through the contiguous zone. The Commission referred to this in paragraph 8 of their commentary in article 66; cases are not as exceptional as they suggested;

(g) The account to be taken of islands in dividing the continental shelf between adjacent or opposite States. For example, a small island may lie near the centre line of a gulf, the whole of which forms part of the continental shelf. If this island should be used as a base point of measurement for one State or another, the median line would be switched from the centre of the gulf to a position nearly three-quarters of the way across it.

(h) The division of wide continental shelves or oceans by the method of the median line a simple drawing method should be devised since all "legs" of the median line as well as distances from them to be baselines for measurement form parts of "great circles".

Land-locked States

This is an important problem to which Her Majesty's Government are devoting careful and sympathetic attention, but they are not yet in a position to comment on it.

18. Netherlands²²

LETTER FROM THE PERMANENT MISSION OF THE NETHERLANDS TO THE UNITED NATIONS, DATED 17 OCTOBER 1957

[Original text: English]

General

The Netherlands Government has carefully studied the final draft of the International Law Commission on

²² Circulated as document A/CONF.13/5/Add.1, dated 7 November 1957.

the law of the sea as embodied in chapter II of the report of the Commission on the work of its eighth session (A/3159). The Netherlands Government is grateful to the Commission for its efforts to bring more precision and clearness into the various rules and guiding principles in the domain of the law of the sea. In doing so the Commission has made good use, in particular, of the results of the 1930 Codification Conference held at The Hague and of various international technical conferences (e.g. the Conference on the Conservation of the Living Resources of the Sea held at Rome in 1955). At the same time, it has consistently based itself on the views of the Governments and experts consulted, while taking into account the observations of the specialized agencies and of other inter-governmental as well as non-governmental bodies concerned, thus bringing many problems connected with the codification and development of the law of the sea considerably nearer to a formulation acceptable to all nations concerned. That is why the Netherlands Government — as has already been stated by the Netherlands representative in the Sixth Committee at the eleventh session of the General Assembly — considers the final report of the International Law Commission on the law of the sea to be an excellent basis for discussion at the conference to be convened in accordance with General Assembly resolution 1105 (XI).

In view of the disturbing tendency on the part of certain States to issue regulations unilaterally in disregard of the interests common to all nations, as expressed in the universal rule of the freedom of the high seas, the Netherlands Government considers it to be essential that rules of international law should soon be established or reaffirmed on these matters, together with adequate guarantees for their effective implementation. The Netherlands Government is confident that the conference will succeed in making a substantial contribution towards this end.

The Netherlands Government has noted with satisfaction that a number of observations made in its earlier comments have been taken into account in the present draft. For the sake of convenience, the earlier written comments made by the Netherlands Government have, in so far as they are still applicable, been included in an abridged form among the comments on the latest version of the draft articles. The following comments therefore give a provisional summary of the Netherlands Government's views on the entire draft of the International Law Commission.

Comments on the draft articles

Article 2

This article should be incorporated in paragraph 1 of article 1 in order to make it clear that the qualification laid down in paragraph 2 of article 1 also applies to what is now article 2 of the draft.

Article 3

This article deals with two important matters, namely: (1) the uniformity of the delimitation of the territorial sea along all coasts and (2) the breadth of the territorial sea.

1. The Netherlands Government agrees with the

International Law Commission that it is the task of the conference to fix a uniform breadth of the territorial sea. Only in very exceptional cases where this is justified by history and customary law should it be permitted to the conference to depart from this general rule and to fix a breadth greater than three miles for clearly specified coastlines.

2. The Netherlands laws and regulations on the matter are based on the rule of a three-mile limit to the territorial sea. In the Netherlands Government's view this breadth is the only acceptable one and the only one recognized by international law. The freedom of the seas is a universal and fundamental rule; departures from this rule, such as the sovereignty of the coastal State over territorial waters, can only result from another generally accepted rule of equal authority. As has been rightly pointed out, no such rule exists beyond the principle that three miles is the breadth of the territorial sea. No extension of the territorial sea beyond the three-mile limit has received unquestioned acceptance as being allowed by the rules of international law.

The Netherlands Government has noted that the Commission seems in its latest report to be at first sight a little less definite about the three-mile limit than in its earlier reports. In 1955, the Commission stated in paragraph 3 of article 3 that "international law does not require States to recognize a breadth beyond three miles".²³ In the latest draft (para. 3) it is only stated that "many States do not recognize such a breadth (*i.e.*, extending beyond three miles) when that of their own territorial sea is less". But this statement should be read in conjunction with the Commission's commentary, in particular where it is said (para. 4, last sentence): "the Commission... declined to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit". In other words, as long as no agreement has been reached on any such extension of the territorial sea limit, there is, according to the Commission, which has in fact reaffirmed its opinion of 1955, no obligation to recognize the legal consequences of an extension of its sovereignty by a State over parts of the sea which other States are entitled to regard as belonging to the high seas. The Netherlands Government firmly adheres to this view.

Obviously, the basic principle of the free availability of the seas for the common use of all mankind does not exclude taking into account the legitimate interests of coastal States with regard to the exploitation of the seabed and its subsoil, the conservation of the living resources of the sea, customs, fiscal and sanitary regulations, etc. In order to satisfy these special needs the International Law Commission has formulated several proposals in respect of the continental shelf, fisheries, the "contiguous zone", etc. which, in the opinion of the Netherlands Government, may pave the way to a codification of the régime of the high seas, thus providing satisfactory solutions to the problems indicated and affording an acceptable balance of all interests involved. The Netherlands Government considers this approach to be more in line with the concepts of inter-

²³ *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), p. 16.*

national law than the extending of the limits of the territorial sea belt.

The problem of striking a balance between the special interest of the coastal State and the general interests of all seafaring peoples is one that concerns all nations. A general and universally acceptable agreement should be arrived at which would provide the only means of putting an end to present unilateral practices. No effort should be spared to arrive at such a solution, and the Netherlands Government therefore welcomes any further efforts by the conference to create order in the present rather chaotic situation by formulating proposals to this end.

Article 5

The Netherlands Government regards it as an improvement that the article is now so worded that the method of the straight baselines is not justified if applied solely for the protection of economic interests.

The Netherlands Government further welcomes the addition of the third paragraph to the article which provides the necessary guarantee that existing rights of passage are not to be encroached upon by application of the straight baselines system.

Because disputes may easily arise when the provisions of this article are applied in actual practice, it would seem desirable to provide for a system for the settlement of disputes regarding this matter. (See also the comments on article 73 on the desirability of a system for the settlement of disputes with respect to any of the provisions of the draft.)

Article 7

A study on the width, location, etc., of existing bays would be of great assistance in deciding upon the most appropriate width for determining the extent of the internal waters in bays. In this respect the Netherlands Government would like to reserve its position.

Furthermore the Conference will have to draw up rules applicable to the status of what are called international bays, i.e. bays the coasts of which belong to more than one State. According to paragraph 7 of the commentary, the International Law Commission refrained from drawing up rules with regard to this question. The Netherlands Government would, without committing itself as to the place where they should eventually be incorporated in the draft, suggest the following rules:

"1. Without prejudice to the status of those parts of gulfs and bays which are to be deemed parts of the high seas, there must be no suspension of the right of innocent passage of foreign ships through gulfs and bays the coasts of which belong to more than one State, in so far as these ships are proceeding to or from foreign ports situated on those gulfs and bays.

"2. The gulfs and bays referred to in the preceding paragraph shall include the straits connecting them with the high seas, however narrow the entrance may be."

Article 11

The Netherlands Government understands the words "as measured from the mainland or an island" to mean that the extension of the territorial sea permitted in this article may be resorted to only once so that any drying

rocks or drying shoals lying within this extension shall not again be taken as points of departure for fresh extensions.

Article 12

The Netherlands Government accepts the system of "the median line" as a basis for delimiting the territorial sea between States the coasts of which are opposite each other at a distance less than the sum of the breadths of their respective territorial sea belts. Further, it is, for the same reason as stated in the comments on article 5, considered to be desirable that provision be made for the settlement of disputes which may arise in connexion with the application of article 12. (See also comments on article 73.)

Article 14

The Netherlands Government wonders whether the rules contained in this article also purport to provide a solution for such complicated questions as may arise in cases where at the frontier between two States a river flows into the sea.

Article 15

As in this article, except in the first and the last paragraph, "innocent passage" is defined rather than "the right of innocent passage" (the latter being substantially defined in article 16 f.f.), a more logical title of this article would be "Meaning of innocent passage". The first and the last paragraph would then have to be grouped together in a separate article preceding article 15. Furthermore, a clearer wording of the article would result if the order of paragraphs 3 and 4 were reversed.

Article 17

The Netherlands Government would suggest that to paragraph 4 be added: "or between one part of the high seas and the territorial sea of a foreign State".

Article 21

The same subject-matter has been included in the Brussels Convention of 10 May 1952, relating to the arrest of sea-going ships. It is to be recommended that, in any convention to be concluded, the relationship between that convention and the Brussels Convention be clearly stated.

Article 24

The Netherlands Government would wish to see the wording of article 26 (paras. 1 and 2) of the report of the International Law Commission of 1954 restored. The Netherlands Government does not see any grounds for altering the earlier draft because, in its view, this draft fully met the requirements of actual practice. As far as the Netherlands is concerned this practice has never produced any difficulties. The argument advanced by the Commission for altering the existing text (point 2 of its commentary), namely "the passage of warships through the territorial sea of another State can be considered by that State as a threat to its security..." does not seem to have much validity since in cases of innocent passage, which in particular must comply with

the criteria laid down in paragraph 3 of article 15, such fears are obviously unjustified. Moreover, paragraphs 1 and 3 of article 17 and article 25 also afford sufficient guarantees to coastal States in this respect. Furthermore, to make the right of passage of warships through the territorial sea subject to previous authorization might endanger the safety of navigation and in particular in case of bad visibility, would make Coastal Navigation by means of bearings impossible.

Article 29

The new text of this article shows that the detailed observations made by the Netherlands Government on this matter in its previous comments have, in general, been taken into account. For instance, article 29 no longer lists some of the special conditions which ships have to fulfil in order to acquire the nationality of a certain State. It now only contains the principle that there must exist a genuine link between the State and the ship.

In the article it is stated that the above-mentioned condition must be fulfilled "for purposes of recognition of the national character of the ship by other States". The question now arises what legal consequences non-recognition of the nationality of a ship may have. In the text it might, *inter alia*, on the analogy of the decision of the International Court of Justice in the so-called "Nottebohm Case",²⁴ be explicitly stated that a State need not recognize claims by States whose flags are unlawfully flown in so far as these claims are based on the use of the flag (*e.g.*, the right to exercise jurisdiction). In so far as rules of international law are unrelated to the nationality of the ship they shall of course continue to apply. Thus, for instance, the penal jurisdiction of a State over all persons on board who possess its nationality shall not be impaired.

The Netherlands Government would, moreover, like to make the following observations on the wording of the article.

In the second sentence it is stated that "ships have the nationality of the State whose flag they are entitled to fly". It is not quite clear whether the drafters have wished to give an exhaustive definition of the concept of "nationality of ships". If such were the intention, only ships entitled to fly the flag of a certain State have the nationality of that State, thus excluding ships to which the right to fly its flag has not been explicitly granted by the regulations of the flag State. If the second sentence should indeed be interpreted as providing an exhaustive definition of the concept of "nationality", it is not clear why in the first sentence "nationality of ships" should be referred to as something separate from "the right to fly its flag". The question then arises what has been meant by "nationality" in the first sentence: solely a pleonasm, or a concept other than nationality in the sense of international law (for instance, for purposes of national legislation)?

Another possible interpretation of the second sentence is that it is at any rate beyond doubt that ships that have (explicitly) been granted the right to fly the flag of a

certain State possess the nationality of that State, but that it is not excluded that other ships also possess that nationality. For instance, there are no legal regulations in the Netherlands granting fishing craft the right to fly the Netherlands flag: they possess Netherlands nationality, but they have not been granted an exclusive right to fly the Netherlands flag, at least not by law. The rule, thus interpreted, may entail some practical difficulties, since it is precisely the flag—and a flag that foreign ships are by law not entitled to fly—which is the indication *par excellence* of a ship's nationality.

The Netherlands Government wishes to draw attention to the fact that in the first sentence it does not say "may fix the conditions" as in the previous draft, but "shall fix the conditions". This would mean that such States as have not yet exhaustively regulated the right to fly their flag will have to lay down additional legal provisions. If this is the case, the difficulties referred to in the preceding paragraph will make themselves felt to a less extent because the right to fly their flag is then laid down by law with respect to all their ships, which will make it impossible for other ships than those entitled to fly their flag to claim the nationality in question.

Consequently, the Netherlands Government is of the opinion that article 29 gives rise to a number of questions and that it will be desirable to arrive at a clearer wording of the text of this article in the course of a further exchange of views. The Netherlands Government would at any rate suggest that the phrase "the national character of the ship" in the last sentence of paragraph 1 be replaced by the term "nationality", which is used in the preceding sentence and to which the third sentence of paragraph 1 probably refers.

Furthermore, article 29 touches upon a highly controversial matter, namely, the practice of some States to grant great fiscal and other facilities to ships that register in these States without their having any links with them. This matter is viewed with concern in shipping circles in other countries. It is feared that if ships avail themselves of these facilities to an ever-increasing extent the competitive position of other countries will be undermined and that the lack of supervision by the flag State will be detrimental to the safety of navigation. The Netherlands Government is of the opinion that the conference will also have to investigate this matter. In this connexion, attention may be drawn to the fact that this matter is now being studied by, *inter alia*, the Maritime Transport Committee of the Organization for European Economic Co-Operation (OEEC). Pending the results of this study, the Netherlands Government does not deem it appropriate to enter into the matter any further at this stage.

Article 30

The Netherlands Government would suggest that the second sentence of this article be deleted. In the Netherlands Government's view, article 29 allows to withhold recognition to a *mala fide* change of flags. This provision also applies to a *mala fide* change should it take place during a voyage.

Article 33

The Netherlands Government maintains the view

²⁴ *Nottebohm Case (Second Phase), Judgment of April 6, 1955, I.C.J. Reports 1955, p. 4.*

expressed in its comments on the 1955 draft (article 8) that, as regards immunity, a distinction should be made between ships on commercial government service and ships on non-commercial government service. In the Netherlands Government's view, there is no reason why government vessels which are operated for purely commercial purposes should be assimilated, with regard to immunity of jurisdiction, to warships. In accordance with a general tendency in international law the immunity of foreign States is not recognized in so far as they act in a private capacity. In that connexion mention may be made of the convention and statute respecting the international régime of maritime ports, which was signed at Geneva on 9 December 1923, of the international convention for the unification of certain rules relating to the immunity of State-owned vessels, signed at Brussels on 10 April 1926, of the convention drafted by the Hague Codification Conference of 1930 and of article 22 of the present draft. The same tendency is revealed by the practice of States. Some Governments which for quite a long time have advocated the principle of an unlimited immunity of foreign States have recently changed their attitude (cf. *Bulletin of the Department of State*, Volume 26, 23 June 1952, p. 984). Other States, e.g., the Soviet Union, have concluded bilateral treaties in which the principle of a limited immunity was recognized.

Besides, in view of the fact that in some countries commerce and shipping are wholly in the hands of State-owned enterprises, the principle of unrestricted immunity would mainly benefit such States.

For these reasons the Netherlands Government would prefer, in accordance with the Brussels Treaty, the words "on government service, whether commercial or non-commercial" to be replaced by the words "on non-commercial government service".

Article 34

The Netherlands Government doubts if the phrase "ships under its jurisdiction" is the correct term here. In the Netherlands Government's view, there are only reasons for imposing the obligation referred to in this article on States with regard to ships flying their flag. The phrase "ships under its jurisdiction" would, however, also include ships of foreign nationality as soon as they are in the territorial sea of a particular State. It would be going much too far to impose on the coastal State the obligation to make regulations as referred to under (b) and (c) with regard to such foreign ships. The title of part II, "High seas", suggests that ships under the territorial jurisdiction of the foreign State cannot have been meant here. That is why the Netherlands Government would suggest that the phrase "ships under its jurisdiction" be replaced by "ships sailing under its flag".

Article 39

By limiting acts of piracy to acts committed for private ends, acts performed in an official capacity are already excluded from the definition. On the other hand, as appears from article 40, such exclusion is not intended for acts committed for private ends by the crew of a government ship or a government aircraft. It seems, therefore, wise to delete the word "private" before

"ship" and "aircraft" in the first sentence of paragraph 1.

In connexion with what is stated by the International Law Commission in paragraph 6 of its commentary on article 39, it may be observed that many writers of note hold a different opinion on the subject of mutiny (cf. for instance: Higgins-Colombos, Ortolan, Oppenheim-Lauterpacht 1955, Gidel; cf. also a decision of the Privy Council in the case of the Attorney-General Hong Kong v. Kwok-a-Sing). The Netherlands Government is, however, of the opinion that the Commission's view is correct. The community of States need not interfere with a change of authority on board the ship so long as the acts of the mutineers concern the ship only.

Article 43

In the Harvard Draft (*Research in International Law*, 1932; see *American Journal of International Law* 26 (1932), *Special Supplement*, p. 743, f.f.) more detailed regulations concerning piracy are given than in the present draft. As instances may be adduced article 13 concerning the rights of third parties acting in good faith and article 14 concerning a fair trial. The concise nature of the present draft precludes the laying down of detailed regulations on these points. It might be desirable, however, to draw attention to the obligation of States to observe the principles just mentioned.

Article 44

The question arises why the wording of this article should be different from that used in paragraph 3 of article 46, as probably the same is meant in both articles.

Articles 54 and 55

It is assumed that, subsequent to the adoption of conservation measures, article 54 grants rights to the coastal State analogous to those granted in article 53 to States whose nationals are engaged in fishing. From this it follows that existing regulations cannot be put aside unilaterally by the coastal State invoking article 55. The application of such measures can only be suspended by a decision (interim or final) of an arbitral commission.

Furthermore, the Netherlands Government deems it desirable to impose upon coastal States contemplating the adoption of the measures referred to in article 55, the obligation to satisfy, prior to the adoption of these measures, a competent international body (e.g., the Fisheries Division of the Food and Agriculture Organization of the United Nations) that the conditions referred to under (a) and (b) of this article have indeed been complied with.

Article 60

The Netherlands Government is of the opinion that in this article an obligation to submit disputes to the arbitral provisions of articles 57-59 can hardly be dispensed with. If States can oppose unilateral measures of a coastal State with regard to the conservation of fisheries in a certain area adjacent to its coast, this should also be possible if regulations concerning fisheries conducted by means of equipment embedded in the floor of the seas are laid down for the same area by that coastal State. (See also comments on article 73.)

Articles 61 and 70

It is not clear to the Netherlands Government why, in addition to article 61, in which this matter is exhaustively regulated, there should still be a need for the specific provision of article 70, which, moreover, is worded differently.

The Netherlands Government would, however, prefer the definition of cables used in article 70 ("submarine cables") to the detailed enumeration of the different kinds of cables in article 61.

Article 66

In the Netherlands Government's view, the phrase "admission of foreigners" will have to be added to paragraph (a), because it does not come under "customs, fiscal or sanitary regulations" and because in many States the admission of foreigners cannot be properly supervised as soon as they have gone ashore.

Article 67

The addition that the limit of the continental shelf may be fixed beyond the limit of 200 metres if the sea bed beyond this limit admits of the exploitation of its natural resources may create a dangerous situation in the future, because if in the future an exploitation of minerals at ocean depths might be possible by means of a dredging installation installed on a ship, the coastal State must be prevented from claiming a monopoly by basing itself on the present text. This kind of exploitation must remain free in principle, just as at present fishing is free for any State.

Article 71

The phrase "unjustifiable interference with navigation, etc." in paragraph 1 is rather vague. The Netherlands Government wishes to emphasize from the outset that in the balancing of the various interests involved the interests of navigation should take precedence. Moreover, the article should include detailed provisions on notifications and warnings, and should, in particular, specify to whom the notifications are to be addressed. A penalty should be established for failure to observe such provisions. In any event there should be a guarantee that the notification shall always be given before the installations are constructed. In addition, in order to protect navigation, special rules should be made governing the construction and equipment of the installations.

The term "reasonable distance" for the safety zones in paragraph 2 is too vague. The Conference will have to lay down a clearly defined distance for these zones.

Article 72

As in the case of the boundaries of the territorial sea (see comments on article 12) the Netherlands Government supports the principles embodied in article 72 with regard to the delimitation of the continental shelf. The Netherlands Government would like to emphasize the necessity of an internationally accepted rule for these delimitations, together with adequate safeguards for impartial adjudication in the case of disputes, as it will not be sufficient simply to express the hope that the States concerned will reach agreement on this matter.

Article 73

This article provides for the settlement of disputes concerning articles 67-72. Other articles of the draft also provide for an incidental settlement of disputes. The Netherlands Government would greatly appreciate it if it would be possible to include provisions regarding the settlement of disputes with respect to all articles in any convention(s) to be concluded on the present subject matter.

19. China²⁵

LETTER FROM THE PERMANENT MISSION OF CHINA
TO THE UNITED NATIONS, DATED 27 JANUARY 1958

[Original text : English]

Article 3

The Government of China would welcome a generally acceptable rule for the breadth of territorial sea, which would reasonably satisfy the demands of the coastal States on the one hand and would not impair unduly the freedom of the high seas on the other. However, in view of the divergent views concerning this subject expressed in the course of the debate in the Sixth Committee during the eleventh session of the General Assembly, it cannot help entertaining doubt on the possibility of a uniform rule to be adopted at the forthcoming conference. Under these circumstances, the conference may probably establish a maximum permissible breadth based on the findings of the International Law Commission and, at the same time, leave to each State the right of not recognizing the breadth fixed by any other State, which, though not exceeding the maximum permissible limit, is greater than that of its own.

Article 5

The Government of China is in agreement with the principles of straight baselines established in this article based on the judgement of the International Court of Justice on the Anglo-Norwegian Fisheries Case. It is felt, however, that the conditions laid down in paragraph 1 of the article are rather vague. They could not be applied without the difficulty of judging whether or not the configuration of a coast justifies the use of the straight baseline method. In order to be applied satisfactorily as a working rule of international law, and to avoid confusion and dispute, the provisions of this article require greater precision. Since there seems to be no precise way to describe the configuration of a coast which shall justify the straight baseline method, the only way possible for these purposes seems to be to set in figures a maximum permissible length of the straight baseline. The International Law Commission had in fact adopted at its sixth session a paragraph containing the maximum length of the straight baseline and its maximum distance from the coast, the text of which is reproduced on page 14 of the Commission's report (A/3159). This paragraph was later deleted at its seventh session for reasons which, in the opinion of the

²⁵ Circulated as document A/CONF.13/5/Add.2, dated 29 January 1958.

Government of China, are not very convincing. It is considered as desirable to reinstate the said paragraph.

It is further felt that the special rules for bays as provided in article 7 would serve no purpose in the absence of a limit for the length of straight baselines. According to article 7, paragraph 4, the rules for bays shall not apply in cases where the straight baseline method is applied. A bay which satisfies the qualifications set forth in article 7, paragraph 1, would normally justify the application of the straight baseline method, and the water area within the bay becomes internal waters by the application of that method regardless of the rules concerning the closing line of a bay. Under these circumstances, the rules for bays would be apparently insignificant if there is no limit for the length of straight baselines.

Article 7

The maximum length of the closing line of a bay should be no less than twice the maximum permissible breadth of territorial sea, if the latter is adopted at the conference.

As has been stated in the comments on article 5 above, the rules for bays can only be useful if there is a limit for the length of straight baselines. In the absence of such a limit, article 7 may very well be deleted.

Article 26

Paragraph 2 of article 26 defines the term "internal waters". This definition should appear earlier in the draft articles as references to the term "internal waters" have been made in a number of instances in the preceding articles. In view of the connexion between internal waters and baseline from which the breadth of territorial sea is measured, it may be appropriate to lay down this definition in article 4. Article 26, which has for its title "definition of the high seas", does not seem to be the proper place for a definition of internal waters.

Article 29

The Government of China supports the principle that there must be genuine link between ships and their flag States. It is felt, however, that the relevant provisions of article 29 are not precise enough and would give rise to controversies which might prove to be harmful to the interests of international navigation. If the conference is to approve this principle, elaboration on the term "genuine link" may be desirable and necessary.

Article 39

The International Law Commission has correctly concluded that acts committed on board a ship by the crew or passengers and directed against persons or property on board the ship cannot be regarded as acts of piracy. However, if the acts so committed involve those of navigating or taking command of the ship, they should be deemed as acts of piracy. It is therefore suggested that a new sub-paragraph be added to paragraph 1 of article 39 as follows:

"On the high seas, against persons or property on board the ship if, for these ends, the person or persons committing such act navigate or take command of the ship."

Article 40

The following new text of article 40 is suggested:

"The acts referred to in article 39 committed by the crew or passengers of a government ship or aircraft, who have revolted and taken control of the ship or aircraft, are assimilated to acts committed by the crew or passengers of a private ship."

It is to be pointed out that the original text of this article is not satisfactory in that it envisages only the mutiny of the crew of a government ship or aircraft. Actually, the passengers of a government ship or aircraft could also revolt and engage in piratical acts, which should likewise be assimilated as acts committed by the passengers of a private ship or aircraft.

Article 47

It is generally recognized that hot pursuit must commence in the territorial sea of the pursuing State. But there has been the practice that in connexion with certain matters a State was authorized by treaty to seize a foreign ship in an area beyond the territorial sea of that State. Under this circumstance, the right of hot pursuit may be exercised even if the pursuit is commenced when the ship pursued is found in such an area. For these considerations, it is suggested that the following phrase be inserted before the second sentence of article 47, paragraph 1:

"Unless otherwise authorized by treaties or agreements entered into by the pursuing State and the flag State of the ship pursued," . . .

Article 66

The Government of China supports the idea advanced in the course of the debate in the Sixth Committee at the eleventh session of the General Assembly that coastal States should have exclusive fishing right in their contiguous zones, and would like to see a paragraph containing provisions to this effect to be included in article 66.

20. Ethiopia ²⁸

NOTE FROM THE MINISTRY OF FOREIGN AFFAIRS,
DATED 24 FEBRUARY 1958

[Original text : English]

The Ethiopian Government will not be represented at the international conference of plenipotentiaries to be convened at Geneva on 24 February 1958 for the purpose of considering the draft rules of the sea prepared by the International Law Commission. However, the Ethiopian Government has carefully considered the proposed convention, and in this memorandum sets forth its views with respect to certain of the provisions contained therein.

In reviewing the draft Convention and preparing its comments on it, the Ethiopian Government has been guided by two basic principles which might well be adopted by the Conference in guiding the conferees in their work. First, it is, of course, essential that the

²⁸ Circulated as document A/CONF.13/5/Add.3, dated 3 March 1958.

convention guarantees, and to the greatest extent possible should be based upon, the fundamental principle of freedom of the seas. The Ethiopian Government considers that, as regards this principle, the present draft provides an excellent working document upon which discussions can proceed. But, second, it is of equal importance that the conference should produce a convention which will be a practical and workable instrument. The measure of the conference's success in achieving this objective will be determined by the number of States which adhere to the convention. A convention which resolves every problem and settles the most hotly disputed issues, but to which only a handful of States adhere, is a failure and, accordingly, the conference should be assiduous in working out solutions to the problems involved in the convention which will be acceptable to the greatest number of States.

There are several questions of major significance which arise out of the present draft to which the Ethiopian Government would like to address itself and which will undoubtedly receive careful attention at the forthcoming conference.

As regards the breadth of the territorial sea, the Ethiopian Government recognizes the legitimate interests which have persuaded some States to adopt a twelve-mile limit and others to define their territorial sea in terms of three miles. Ethiopia has herself laid down in general a twelve-mile limit. The Ethiopian Government sees major difficulties in reaching agreement on a single definition as to the breadth of the territorial sea. In keeping with its statements above, the Ethiopian Government expresses the hope that some compromise solution will be found which will in some degree satisfy adherents of both views and permit States representing both views to accept the convention. As a matter of principle, the Ethiopian Government would prefer to see this question left aside, if that were possible, rather than have the convention embody a statement which would be unacceptable to any large group of States.

By and large, the draft convention has avoided the use of vague and indefinite language. One notable exception exists, however, namely article 29, which speaks of the requirement that a "genuine link" should exist between the State and the ship before other States need accept the national character of the ship.

Clearly, the necessary jurisdiction and control over a vessel requires the existence of a connexion between the State and the ship closer than that which is created by virtue merely of registration or the grant of a certificate of registry. However, the use of the phrase "genuine link" does not much improve the matter. Leaving complete leeway for States to determine how this requirement is satisfied will undoubtedly result in a plethora of conflicting definitions, with different tests being adopted for different purposes, depending upon the context in which the question arises. If it is the fact that no greater precision is possible, there would appear to be no reason for recourse to a standard so vague and imprecise as to be virtually meaningless.

The Ethiopian Government is in full agreement with the spirit of article 34 as promoting increasingly high standards regarding the safety of navigation. The Ethiopian Government, which is in the process of codifying various laws touching on these, among other

matters, will make every effort to ensure that standards which are obtaining increasing international acceptance will be applied as regards merchant shipping flying the Ethiopian flag. However, it is felt that a too sudden application of such standards to countries which have a limited merchant fleet and which have been accustomed to operate in areas where standards are perhaps somewhat less than the desired optimum would have an unnecessarily disruptive and inhibiting effect.

It is, accordingly, suggested that article 34 be couched in terms of goals to be attained over a period of time rather than as standards to be placed in immediate operation. If desired, an additional clause could be added to the article whereby States adhering to the convention would pledge themselves to move with all deliberate speed to the attainment of the specified standards.

21. Thailand ²⁷

TRANSMITTED BY THE DELEGATION OF THAILAND TO THE UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

[Original text : English]

Article 35

The purpose of draft article 35 is to attempt to protect the interests of all those who are involved in a collision or any other incident of navigation concerning a ship on the high seas. Normally it is the flag State which is the most competent to deal with a ship in matters contemplated in article 35 since international law recognizes that generally a ship is part of a floating territory of the State to which it belongs.

Article 45

The Thai delegation is of the opinion that the following should be added to article 45 :

"or other ships or aircraft on government service authorized to that effect."

This addition, though it departs from the commentary of article 45 in that it permits not only warship and military aircraft to make the arrest, will not cause friction between States, since each State will have carefully considered whether it would be proper to authorize a certain ship to make the arrest or seizure on account of piracy. It is necessary to point out in this connexion that conditions in the Far East and in other parts of the world are very different. The fact that pirate junks operate on the high sea of the Far East makes it essential, in the Thai delegation's view, for the scope of article 45 to be widened to include the use of police and customs patrol boats.

Article 57

The Thai delegation does not agree with the principle of compulsory arbitration. Arbitration generally implies

²⁷ Circulated as document A/CONF.13/5/Add.4, dated 18 March 1958.

consent of the parties to the disputes. The Permanent Court of International Justice in 1923 said: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement". Article 57 of the draft thus contradicts the basic idea upon which traditional arbitration is founded.

The Thai delegation considers that, since there exists the International Court of Justice under Article 33 of the Charter of the United Nations, disputes arising under articles 52, 53, 54, 55 and 56 should be submitted to the International Court of Justice at the request of any of the parties, unless the parties agree on some other method of peaceful settlement. This is in effect to adopt the language of article 73.