

## LAW OF THE SEA CONVENTIONS

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Mr. FULBRIGHT, from the Committee on Foreign Relations,  
submitted the following

### REPORT

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The Committee on Foreign Relations, having had under consideration Executives J to N, inclusive, four conventions on the law of the sea, and an optional protocol concerning the settlement of disputes, reports the conventions and the protocol without objection and recommends that the Senate give its advice and consent to their ratification.

#### PURPOSE OF THE CONVENTIONS

The purpose of the four conventions and the optional protocol on the law of the sea is to codify existing international law and to establish additional international law in this field. The conventions are concerned with the rights and duties of states and vessels in the territorial sea, contiguous zone and on the high seas, rights and responsibilities with regard to fishing and conservation on the high seas, and the formulation of "international law" with respect to the exploitation of the natural resources of the continental shelf. Not covered in these conventions are the questions of the breadth of the territorial sea and the extent of exclusive fishing rights of coastal states.

#### BACKGROUND

The International Law Commission of the United Nations at its first session in 1949 decided to study the law of the high seas and the law of the territorial sea with a view to codification. This was done at subsequent sessions, draft rules were prepared, and comments of governments were considered. The Commission completed its work at its eighth session (1956) and pursuant to General Assembly Resolution 899(IX) of December 14, 1954, the Commission grouped together in its report all the rules it had adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone, and the conservation of the living resources of the sea.

The final report of the Commission stated that its draft rules on the law of the sea were a mixture of codification of existing international law and recommendations for the progressive development of international law and that it had been unable to separate the two. It therefore recommended that the United Nations General Assembly call an international conference to examine the law of the sea, and to try to reach agreement on appropriate international conventions.

The General Assembly by Resolution 1105(XI) of February 21, 1957, provided terms of reference for an International Conference of Plenipotentiaries to examine the law of the sea, taking into account the legal, biological, economic, and political aspects of the problem. The General Assembly also recommended that the Conference study the question of free access to the sea of landlocked countries.

The United Nations Conference on the Law of the Sea was held at Geneva from February 24 to April 27, 1958, and resulted in the following four conventions and an optional protocol, dated April 29, 1958:

1. Convention on the Territorial Sea and the Contiguous Zone;
2. Convention on the High Seas;
3. Convention on Fishing and Conservation of the Living Resources of the High Seas;
4. Convention on the Continental Shelf; and
5. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes.

The conventions were signed on behalf of the United States of America on September 15, 1958, and have been signed by 52 states; some states not signing every convention.

While in some instances the proposed rules tend to clarify issues that have been in controversy in recent years, the greater part of the rules are declaratory of the present practice of states and may be considered accepted international law even without the conventions being ratified.

#### MAIN PROVISIONS

##### *1. Convention on the Territorial Sea and the Contiguous Zone*

The Convention on the Territorial Sea and the Contiguous Zone embodies those principles of international law that have specific reference to the status of these areas of the sea, their demarcation, and the rights and responsibilities of both the coastal state and the community of nations with respect to them. The first articles of the 32 contained in this convention reiterate the universally recognized principle of the sovereignty of the coastal state over its internal waters and the territorial seas, and that this right of sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.

The convention recognizes *two* methods for determining the base line, that is, the line from which the territorial sea is measured. The first method, long recognized as the general rule, establishes as the base line the low waterline following the sinuosities of the coast. The second method, which is an exception to the general rule, allows the use of straight base lines joining appropriate points where the coastline is deeply indented or, where there is a fringe of islands along the coast in its immediate vicinity.

Where the straight base line is allowed it has the effect of bringing into the territorial sea areas of water heretofore considered high seas.

Hence where the straight base line is applied, the coastal state must indicate the lines on published charts.

Article 5 of the convention preserves a right of innocent passage through waters converted from high seas or territorial sea to internal waters by application of the straight base-line system permitted by article 4. Application of the rules of the Convention on the Territorial Sea and the Contiguous Zone concerning straight base lines would not have the effect of changing the status of waters which are now internal.

The general principles relating to bays which are included in the convention provide that a bay, the coasts of which are owned by a single state and having certain geographical characteristics, is considered internal waters. The closing line of the bay must not be longer than 24 miles, and if the natural entrance of the bay is of a greater width, a straight base line of 24 miles may be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length. Fixing the allowable length of the closing line at 24 miles is a significant departure from the rule which had been recognized by many governments and which had fixed the maximum length of the closing line at 10 miles. The liberalization of this requirement will qualify many bay areas of the world for conversion to internal waters, thereby bringing under national control areas heretofore classed as high seas—for example, Cape Cod Bay.

The convention defines the respective rights, duties, and responsibilities of the coastal state and foreign vessels in the territorial sea. These provisions are largely declaratory of existing international law.

Articles 14 through 17 deal with the right of innocent passage through the territorial sea. Passage is defined as "innocent" so long as it is not prejudicial to the peace, good order, or security of the coastal state. This simple, yet precise, definition of innocent passage, something which has not heretofore existed in international law, affords to maritime navigation the greatest freedom of movement consistent with the necessity of the coastal state to protect itself.

The right of passage of foreign fishing vessels is more restricted. Their passage is not considered innocent if they do not also observe the laws and regulations made by the coastal state to prevent such vessels from fishing in the territorial sea.

Article 14 contains the words "whether coastal or not" to indicate clearly that the right of innocent passage through the territorial sea applies to ships of landlocked countries as well as to ships of coastal states. This was done in compliance with a request by the United Nations General Assembly which asked the Conference on the Law of the Sea to study the question of free access to the sea of landlocked countries as established by international practice or treaties.

Article 16 provides for the temporary suspension in specified areas of the territorial sea of the right of innocent passage for security reasons. On the other hand, no such suspension in straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a state is permissible.

Article 21 provides that government ships operated for commercial purposes are subject to the same rules as other merchant ships. This provision was opposed by the Soviet Union and other state-trading countries which desired immunity for such vessels.

Article 24, which provides that in a zone of the high seas contiguous to its territorial sea—limited to 12 miles from the base line of the territorial sea—the coastal state may prevent infringement of its customs, fiscal, immigration, or sanitary regulations and punish infringement of such regulations. Although it has become fairly common practice for the coastal state to exercise a special jurisdiction in a limited area of the high seas contiguous to the territorial sea, particularly in customs matters, no definite rule had been agreed upon. Article 24 confirms the practice followed by the United States of exercising customs jurisdiction over a zone outside of its territorial sea.

This convention does not fix the breadth of the territorial sea. This subject and the closely related one of the extent to which the coastal state should have exclusive fishing rights in the sea off its coast were hotly debated without any conclusion being reached. A U.S. proposal for a 6-mile territorial sea plus exclusive fishing rights for the coastal state in a contiguous 6-mile zone (subject to fishing rights of other states established through fishing over a 5-year period) received 45 votes in favor and 33 against, but failed to get the two-thirds required for adoption.

When the U.S. compromise failed, the chairman of the American delegation to the Conference, Arthur H. Dean, stated:

Our offer to agree on a 6-mile breadth of the territorial sea, provided agreement could be reached on such a breadth under certain conditions, was simply an offer and nothing more. Its nonacceptance leaves the preexisting situation intact.

We have made it clear from the beginning that in our view the 3-mile rule is and will continue to be established international law, to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement. Unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law, but are indeed in conflict with the universally accepted principle of freedom of the seas.

He noted further that—

We have made it clear that in our view there is no obligation on the part of the states adhering to the 3-mile rule to recognize claims on the part of other states to a greater breadth of the territorial sea. On that we stand.

The General Assembly of the United Nations has convened a second International Conference for the further consideration of the questions of the breadth of the territorial sea and fishing rights in coastal waters. It opened at Geneva on March 17, 1960.

## *2. Convention on the High Seas*

The convention defines the term "high seas" as comprising all parts of the sea except the territorial seas and internal waters. Freedom of the high seas is confirmed as the basic principle of the law of the sea. Enjoyed by the world community since the 17th century, not a dissenting vote was cast against this principle at Geneva. Freedom of the seas includes for both coastal and the noncoastal states: freedom

of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas.

A proposal was made during the Conference to insert provisions banning nuclear testing on the high seas and military exercises near foreign coasts or on international sea routes. The Conference exercised near the proposal, but a resolution was passed referring the matter of nuclear testing to the General Assembly of the United Nations for appropriate action.

#### "GENUINE LINK"

Articles 4 and 5 provide that every state, coastal or landlocked, has the right to sail ships under its flag on the high seas and fix the conditions under which it will grant nationality to ships and the right to fly its flag.

Article 5, section 1, reads as follows:

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

The International Law Commission did not decide upon a definition of the term "genuine link." This article as originally drafted by the Commission would have authorized other states to determine whether there was a "genuine link" between a ship and the flag state for purposes of recognition of the nationality of the ship.

It was felt by some states attending the Conference on the Law of the Sea that the term "genuine link" could, depending upon how it were defined, limit the discretion of a state to decide which ships it would permit to fly its flag. Some states, which felt their flag vessels were at a competitive disadvantage with vessels sailing under the flags of other states, such as Panama and Liberia, were anxious to adopt a definition which states like Panama and Liberia could not meet.

By a vote of 30 states, including the United States, against, 15 states for, and 17 states abstaining, the provision was eliminated which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no "genuine link" between the state and the ship.

Thus, under the Convention on the High Seas, it is for each state to determine how it shall exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag. The "genuine link" requirement need not have any effect upon the practice of registering American built or owned vessels in such countries as Panama or Liberia. The existence of a "genuine link" between the state and the ship is not a condition of recognition of the nationality of a ship; that is, no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state. Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such

event, it would be for the Court to decide whether or not a "genuine link" existed.

#### IMMUNITY OF STATE-OWNED VESSELS

Article 8 of the convention defines "warships" and states that they have complete immunity on the high seas. Another article states that state ships used only on government noncommercial service shall have the same immunity as warships. The Soviet bloc sought unsuccessfully to assimilate all government ships, whether commercial or noncommercial, to warships.

Article 11 has the effect of reversing the decision of the Permanent Court of International Justice in the *Lotus* case because it provides that only the flag state, or the state of which the accused is a national, may exercise penal jurisdiction with respect to incidents of navigation on the high seas. This article also provides that only the issuing state may withdraw licenses and certificates of competence and that only the authorities of the flag state may order the detention of a ship.

Regarding pollution of the high seas, the convention treats separately the discharge of oil, the dumping of atomic waste, and pollution of the high seas or airspace above resulting from any "activities with radioactive materials or other harmful objects." In regard to oil pollution, article 24 of the convention provides that—

Every state shall draw up regulations to prevent pollution of the seas \* \* \*.

At present the U.S. Government does not have any statutes or regulations pertaining to the matter of oil pollution beyond the territorial sea by vessels. The shipping industry has followed a voluntary program aimed at preventing pollution of the sea by oil. On February 15, 1960, however, the International Convention for Prevention of Pollution of the Sea by Oil was sent to the Senate. Upon adherence to this convention, there would be regulations on this subject which U.S. flag vessels would be obligated to observe.

Regulations aimed at minimizing the possibility of pollution from exploitation of the oil resources of the continental shelf have been issued pursuant to the Outer Continental Shelf Lands Act (43 U.S.C. 1331) and are incorporated in the Department of Interior regulations regarding submerged lands.

As to the dumping of atomic waste, the convention provides that each state shall take measures to prevent pollution of the seas, taking into account standards and regulations which may be formulated by competent international organizations in taking measures to prevent pollution of the seas from this source. The Atomic Energy Commission exercises, under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011), control over dumping of radioactive waste at sea on a case-by-case basis through its licensing procedures.

#### 3. *Convention on Fishing and Conservation of the Living Resources of the High Seas*

This convention, which contains 22 articles, establishes a new legal system for the conservation of the marine resources of the high seas. Its aim is to obtain through international cooperation the "optimum sustainable yield" from the living resources of the high seas in order

to secure a "maximum supply of food" to meet the needs of the world's expanding population.

The convention contains orderly procedures for resolving disputes among nations over fishing rights and interests on the high seas.

The convention imposes on all states the duty to adopt conservation measures to conserve high seas fisheries, and recognizes in the coastal state a special right to participate in the establishment of the conservation measures applicable to stocks of fish in areas of the high seas adjacent to its territorial sea. The framework for a new system of international cooperation for fishery purposes is provided for by Articles 3 to 8, which spell out new rights and duties for both the fishing and coastal states which become parties to the convention.

Article 9 requires compulsory arbitration of any dispute relating to the negotiation and operation of conservation agreements if requested by any of the parties to a dispute and provided settlement by other peaceful means is not agreed upon. The arbitral body shall be a five-man Commission to be named by agreement between the parties to the dispute. Failing such agreement, the Commission shall be named by the Secretary General of the United Nations from among well-qualified persons, not nationals of the states involved in the dispute, and "specializing in legal, administrative, or scientific questions relating to fisheries."

#### THE PRINCIPLE OF ABSTENTION

The United States would have preferred that the convention include a provision on abstention. A resolution proposed on the subject failed by a narrow margin to secure the necessary two-thirds vote. At the conclusion of the Conference consultations were held with representatives of the fishing industry in the United States, resulting in approval by the industry of an understanding regarding abstention to be recommended to the Senate. The President's message to the Senate contained the text of the understanding as follows:

In the event that the Senate advises and consents to ratification of the Convention on Fishing and Conservation of the Living Resources of the High Seas, it is requested that it enter an understanding in its resolution of advice and consent as follows:

*"Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive —, Eighty-Sixth Congress, first session, an agreement entitled 'Convention on Fishing and Conservation of the Living Resources of the High Seas,' adopted by the United Nations Conference on the Law of the Sea at Geneva on April 29, 1958.*

*"It is the understanding of the Senate, which understanding inheres in its advice and consent to the ratification of this agreement, that such ratification shall not be construed to impair the applicability of the principle of 'abstention,' as defined in paragraph A.1 of the documents of record in the proceedings of the Conference above referred to, identified as A/CONF.13/C.3/L69, 8 April 1958."*

A/CONF.13/C.3/L69, April 8, 1958, reads as follows:

"1. Where the nationals of a coastal state, alone or with the nationals of one or more other states, are (a) fishing a stock of fish in an area of the high seas adjacent to the territorial sea of the coastal state with such intensity that an increase in fishing effort will not result in a substantial increase in the yield which can be maintained year after year, and (b) where the maintenance of the current yield, or when possible, the further development of it is dependent upon a conservation programme carried out by those states, involving research and limitations upon the size or quantity of the fish which may be caught, then (c) states whose nationals are not fishing the stock regularly or which have not theretofore done so within a reasonable period of time, shall abstain from fishing such stock, provided however that this shall not apply to any coastal state with respect to fishing any stock in waters adjacent to its territorial sea."

The principle of abstention is a procedure for dealing with special fishery conservation problems. It is incorporated in the North Pacific Fisheries Convention between the United States, Canada, and Japan. The object of the procedure is to encourage conservation in situations where, but for some protection against fishing by third parties, incentive for conservation measures would be lacking.

It is necessary to have an "understanding" about the lack of the principle in the convention because article 1 of the convention states:

All states have the right for their nationals to engage in fishing on the high seas \* \* \*

It might therefore be thought that application of the abstention principle is not entirely compatible with freedom of fishing. The executive branch intends to continue to pursue the general acceptance of "abstention" as a forward step toward the achievement of the objective of conservation of marine resources and the maximum utilization of such resources in behalf of the general interest.

#### 4. *Convention on the Continental Shelf*

The continental shelf as a legal concept gained impetus with the Truman proclamation of September 1945, which announced that the United States regards the natural resources of the subsoil and the sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as subject to its jurisdiction and control. By 1956 some 20 states had made claims with respect to the shelf. The Convention on the Continental Shelf converts this state practice into codified international law.

Article 1 defines the term "continental shelf" as meaning the sea bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas. It also includes the sea bed and subsoil of similar areas adjacent to the coasts of islands.

Article 2 provides that the coastal state exercises over the continental shelf "sovereign rights" for the purpose of exploring and exploiting its natural resources. These rights are exclusive. The



term "sovereign rights" was contained in the International Law Commission draft and was a compromise between the views of those states which desired to use the term "sovereignty" and those which preferred "jurisdiction and control." Article 3 of the convention provides that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas or that of the airspace above those waters.

The only controversy at the Conference on the Law of the Sea on this convention concerned the definition of "natural resources" of the shelf. The Conference adopted a joint proposal of Australia, Ceylon, Malaya, India, Norway, and the United Kingdom defining natural resources as the mineral and other nonliving resources of the sea bed and subsoil, together with living organisms which at the harvestable stage either are immobile on or under the sea bed or are unable to move except in constant physical contact with the sea bed or subsoil.

Under this definition, for example, clams, oysters, and abalone are included as "natural resources" whereas shrimp, lobsters, and finny fish are not.

#### *5. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes*

Article I provides that disputes arising out of the interpretation or application of any convention on the law of the sea shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the Court by an application made by any party to the dispute which is also a party to the protocol. This means that with respect to the subjects covered by these conventions the United States would not attempt to reserve to itself the right to determine whether or not a matter lay within the domestic jurisdiction of the United States. Such an undertaking has become common in recent years in treaties to which the United States is a party.

Article II provides that this procedure covers all the conventions on the law of the sea except, in the Convention on Fishing and Conservation of the Living Resources of the High Seas, articles 4, 5, 6, 7, and 8, to which articles 9, 10, 11, and 12 of that convention (calling for special arbitration commissions of experts) remain applicable.

The parties may agree to resort to an arbitral tribunal, pursuant to article III, or may agree to adopt a conciliation procedure, pursuant to article IV, before resorting to the International Court of Justice.

#### COMMITTEE ACTION

The four conventions and the optional protocol were transmitted to the Senate on September 9, 1959. The Committee on Foreign Relations held a public hearing on January 20, 1960, and the record was held open for 30 days thereafter. The principal executive branch witness was Mr. Arthur H. Dean, special consultant to the Department of State, who was chief of the U.S. delegation at the negotiations in Geneva which resulted in these conventions.

During the questioning of Mr. Dean, Senator Mansfield raised the question of the use of the high seas for the testing of nuclear or other dangerous weapons. Mr. Dean testified that when this general problem was raised during the Geneva Conference it was the consensus of the conference that the matter should be referred to the General

Assembly of the United Nations to be taken up at the Conference on Disarmament in Geneva.

During questioning by Senator Long, Mr. Dean made clear that the conventions do not affect the relative rights as between the several states of the United States and the Federal Government. The conventions only affect the rights of the United States as a sovereign state with respect to the rights of other sovereign states.

Mr. W. M. Chapman, representing the American Tunaboat Association, the California Fish Cannery Association, and the Westgate California Corp. of San Diego, supported the ratification of these conventions. Mr. William R. Neblett, executive director of the National Shrimp Congress, Inc., testified that the groups he represented supported the conventions. Mr. Fred Myers, executive director of the Humane Society of the United States, gave the support of his organization for ratification of the conventions and urged the employment of humane methods of killing animals of the sea, especially whales, seals, and polar bears. Letters and telegrams received from numerous organizations representing the U.S. fishing industry were unanimous in urging approval of the conventions. No opposition was registered. On April 5, 1960, the committee voted without objection to report the conventions favorably to the Senate.

#### CONCLUSION

The Committee on Foreign Relations was impressed with the following list of benefits accruing to the United States pursuant to the law of the sea conventions, which was furnished by the Department of State:

"As a country which believes in the rule of law, any agreement on the rules of international law to which the United States can subscribe is of benefit to it. It is also of benefit to the United States as a principal maritime and naval power to have international agreement on the law of the sea. Aside from these benefits of a general nature, the following are some of the more specific benefits to the United States.

"In the Convention on the Territorial Sea and the Contiguous Zone, the articles on straight baselines, innocent passage and the contiguous zone are a marked advance in the content and formulation of international law. By restricting the use of the straight baseline method to certain exceptional geographic situations, its indiscriminate use to reduce to internal waters large areas heretofore regarded as high seas or territorial sea is prevented. This is in the interest of the United States which believes in the greatest possible freedom of the seas. The article defining passage as innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state furnishes a clear, simple and precise definition of innocent passage, something which has not heretofore existed in international law. It thus affords to maritime navigation the greatest freedom of movement consistent with the necessity of the coastal state to protect itself. Article 24 on the contiguous zone is of benefit to the United States since it confirms the practice followed by the United States of exercising customs jurisdiction over a zone outside of its territorial sea and also sanctions the exercise of similar

jurisdiction for fiscal, immigration and sanitary purposes in a contiguous zone, the outer limit of which is twelve miles from the coast.

"While the Convention on the High Seas is generally declaratory of existing principles of international law, by codifying these principles in agreed terms, the convention should help to provide stability and avoid disputes in this field of international law.

"The Convention on Fishing and Conservation of the Living Resources of the High Seas could prove to be particularly beneficial to the United States which is one of the great fishing nations of the world. As such, it has farflung and highly diversified high seas fisheries interests. Since the resources of the sea are not inexhaustible, with the advent of modern-day fishing vessels, equipment and techniques, stocks of fish are more than ever vulnerable to overexploitation by the fishermen of many states. If this is to be avoided, it behooves the nations in concern to agree upon appropriate conservation regimes along rational lines.

"The Convention on Fishing and Conservation of the Living Resources of the High Seas is the first international legislation dealing comprehensively with conservation problems. As a code regulating the conservation of maritime resources, it provides a sound basis for international cooperation in determining the need for and in the adoption of such conservation measures as are necessary to maximize the productivity of high seas fishery resources. At the same time, the convention represents a long step toward the development of orderly procedures for resolving problems that provide the basis for disputes among nations over fishing rights and interests on the high seas. The United States has had its share of these.

"The Convention on the Continental Shelf is particularly significant and beneficial to the United States which is one of the principal countries making use of the natural resources of the shelf because the convention reflects for the first time international agreement on the rules governing the exploration and exploitation of this vast submarine area of the world. The convention should prove specially beneficial to the United States since it endorses numerous principles which the United States has been following since they were enunciated in the 1945 proclamation of President Truman concerning the Continental Shelf.

"Finally, the optional protocol would be beneficial in that it is in accordance with the U.S. policy of striving for solution of international disputes by peaceful means."

The committee believes that adherence to the principles set forth in the law of the sea conventions will reduce disputes and friction among nations and thereby serve the cause of peaceful and friendly relations among the nations of the world. The committee, therefore, recommends that the Senate give its advice and consent to the ratification of the pending conventions and the optional protocol on the law of the sea and include in its resolution of ratification an understanding on the principle of abstention.