THE CONTINENTAL SHELF AND THE ABU DHABI AWARD

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A highly novel and rather controversial addition to the body of customary international law, the concept now familiarly known as the *Continental Shelf,* has come into being since the close of the last war. The proposed doctrine was first explicitly formulated in a proclamation by President Truman dated September 28, 1945. It was then declared:

> the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, as appertaining to the United States, subject to its jurisdiction and control.[1]

Since this initial declaration over twenty nations have added claims to the continental shelf contiguous to their coasts.

A recent and most interesting event in the development of the proposed doctrine has been the release of an Arbitration Award of The Right Hon. Lord Asquith of Bishopstone in the *Matter of an Arbitration between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheikh Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi and its Dependencies.*[2] The concept of the continental shelf was most intimately involved in the deliberations of Lord Asquith. The dispute concerned control of rights to the sea-bed and subsoil of the submarine area of the Persian Gulf adjacent to the coast of Abu Dhabi.[3] Sheikh Shakhbut had, like the rulers of the other

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[1]For the text of the United States Proclamation see 40 AM. J. INT'L L. Supp. pp. 45-48 (1947).

[2]*The Award* was published in 1 INT'L AND COMPARATIVE L. Q. 247 (Part 2) (April 1952). Subsequent references to the text of the Award will be to this publication. The proceedings of the Arbitration took place in Paris during the week of August 21-28, 1951. Those appearing on behalf of the Petroleum Development (Trucial Coast) Ltd. were: Sir Walter Monckton, Professor Lauterpacht, Mr. G. R. F. Morris and Mr. R. Dunn. Representing His Excellency, the Ruler of Abu Dhabi were: Mr. N. R. Fox-Andrews, Professor Waldock, Mr. Stephen Chapman and Mr. J. F. E. Stephenson.

[3]Lord Asquith describes the Sheikhdom in the following terms: "Abu Dhabi has a coast line of about 275 miles on the Gulf. It is bounded on the West by the State of Qatar, and on the East by the State of Dubai, both much smaller States . . . Abu Dhabi is a large, primitive, poor, thinly populated country, whose revenue, until oil was discovered, depended mainly on pearling. It is, like the other Trucial Principalities, a British protected State; that is, its external relations are controlled by His Majesty. Internally, the Sheikh is an absolute feudal monarch."

Trucial Sheikhdoms and a number of middle eastern States, declared on June 10, 1949 that:

> the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely as occasion arises on equitable principles by us after consultation with the neighbouring states appertain to the land of Abu Dhabi and are subject to its exclusive jurisdiction and control.

In this article the Arbitration Award will be considered both in its own right, and as a vehicle to illustrate the developing notion of the continental shelf. An outline of the legal points in issue will follow immediately after a statement of the facts.

1. STATEMENT OF FACTS AND POINTS OF LAW

On January 11, 1939, Sheikh Shakbut entered into a written contract in the Arabic language with Petroleum Development (Trucial Coast) Limited, a member of the Iraq Petroleum Company group, whereby the Sheikh purported to transfer to that Company the exclusive right to drill for and win mineral oil within a certain area in Abu Dhabi. The written agreement contained an arbitration clause *(clause compromissoire)* providing for the reference of disputes arising under it to arbitration. The operations of the company were held up by the war. Since the war the Middle East has become one of the great world petroleum reservoirs. It was the discovery in other parts of the world of petroleum on the continental shelf and the devising of technical means to exploit it that has impelled jurists to search for a legal basis to its appropriation.

A representative of the concessionary company wrote from London on March 25, 1949, (almost three months before the Sheikh had claimed the submarine areas), mooting in a very tentative fashion that where "exclusive rights are granted to a Company in respect of the whole of a State including its territorial waters then the Company is entitled to the same rights in respect of the subsoil of the Continental Shelf appertaining to that State".[4] The Sheikh contended that only land territory was so included and consequently the seaward subsoil in his jurisdiction was available for concession to others. A Concession in the offshore subsoil was obtained by a subsidiary of the Superior Oil Company of California. The ensuing dispute over the possession of rights in this area arising between the Sheikh and Petroleum Development (Trucial Coast) Limited was taken to arbitration according to the terms of the *clause compromissoire* and, eventually, an umpire, Lord Asquith, was appointed.

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[4]Cited by Lord Asquith in *The Award, supra* note 2, at 260, as being from the exchange of correspondence.

A number of points of much interest to international law are raised by the decision of Lord Asquith. A sagacious determination of the proper law of the agreement is presented. Primarily, the contents of the award evidence the growth and substantial acceptance of what is now termed the continental shelf doctrine.[5] In brief it provides that the littoral state may, under certain conditions, appropriate the subsoil and the sea-bed of the submarine areas beyond its marginal belt. The Abu Dhabi award was the first controversy, public or private in nature, wherein the new legal doctrine was extensively employed.[6] The practical employment of the proposed doctrine, placed in its general setting, forms the basis of this article. In this respect the authoritative value of an award involving a British Protected State and a commercial corporation must first be considered. In fact it is an arbitration with many of the attributes of an arbitration between sovereign states. Before discussing the appreciation made by Lord Asquith, and in order to determine the weight to be given that opinion, the value of an arbitration award of this nature must be assessed.

2. The Nature of a Semi-Public Arbitration Award

Richard Young, the leading American authority on the continental shelf, writes: "While the result is interesting, and of course binding on the parties, you will appreciate that it is only the outcome of a private proceeding and is

[5]The term *continental shelf* is the name by which this new legal doctrine is best known. Geographically, a standard definition is: "The sea-bed, bordering the continents, which is covered by shallow water, in general 100 fathoms or less in depth; it thus takes the form of a shelf or ledge sloping gently downwards from the coasts, and is approximately outlined by the isobath of 100 fathoms. It varies considerably in width, reaching in some places 100 miles or more. Where it is widest, the angle of slope is usually least, and may be less than one degree; where the coast is mountainous, it is usually narrow, and there is a quick transition from high land to deep water. Beyond the continental shelf there is a sudden drop in the sea-bed to a depth of 1,000 fathoms or more, so that the shelf has a steep, cliff-like edge. As the land slopes continously downwards on to the continental shelf with no change of angle at the water-line, it is widely held that the edge of the shelf represents the former boundary of the continent; the shelf may have been formed by a rise in level of the sea or a fall in level of the land, or by the denudation of the fringe of the land by the sea, or by the deposition of solid materials beneath the water by rivers, etc." Moore. A Dictionary of Geography 39 (1949).

[6]There was a prior arbitration involving Petroleum Development (Qatar) Ltd. and the Sheikh of Qatar in 1950. The facts and the agreement were essentially similar. Lord Radcliffe, the Arbitrator, "merely recorded his conclusions" and did not expound the principles upon which they were founded. Lord Asquith, in the arbitration before us, states that he has "departed from his — lord Radcliffe's — perhaps more prudent method and gone into general principles at the express invitation of the parties": *The Award, supra* note 2, at 260.

not to be regarded as an authoritative pronouncement in the field of public international law."[7]

The essence of a public international arbitration is that it have as parties to the controversy, sovereign States. A distinguishing feature of such an arbitration is that there be no higher authority above the States involved to enforce the award against a party refusing to accept it. The other parties have recourse, for purposes of enforcement, to compulsive means as permitted under international law. The parties to the Abu Dahbi Award are, respectively, a British Protected State[8] and a commercial corporation domiciled in the United Kingdom. There may be some question in international law as to the status of a British Protected State. Oppenheim declares that the position of such states lacks exact juristic precision, each case being *sui generis* so to speak.

> It is characteristic of a protectorate . . . that the protected State always has, and retains for some purposes, a position of its own within the family of nations and that it is always for some purposes an International Person and a subject of international law . . . the protectorate is not considered a mere portion of the protecting state.[9]

Whether in this award the Sheikh, in case of his refusal to abide by the decision, would have been subject legally to the higher authority of the protecting power, or would be regarded as sovereign and beyond its coercive arm, is a matter for the appropriate executive agency of the British Government to decide. It is likely as the matter was not solely internal in character, but involved the continental shelf and affected the rights of other members of the international community, that the responsibility and control of the protecting power was operative.

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[7]The statement is taken from a letter to the writer written by Mr. Young from the Law School of Harvard University, January 3, 1952.

[8]Stephenson, in 4 INT'L L. Q. 503-506 (No. 4, 1951), states that the Arab Sheikhs who rule these sparsely populated and primitive countries have been in special treaty relations for a century or more with His Brittanic Majesty's Government (see generally XI AITCHISON, A COLLECTION OF TREATIES, ENGAGEMENTS AND SOURCES RELATING TO INDIA AND NEIGHBOURING COUNTRIES (Delhi 1933); and 12 & 13 VICT. c. 84) which as the protecting power, exercises extra-territorial jurisdiction by Orders in Council over British nationals in those States, controls the Sheikh's foreign relations and approves both their concessions and their concessionaries.

[9]1 OPPENHEIM, INTERNATIONAL LAW 174-75 (7th ed.). The nature of the relationship between the protected and the protecting States is well outlined in *Grille* v. *Haaj Thami il Glaouin*, (France, Cour de Cassation, Chambre Criminelle, 27 juin, 1937) in LAUTERPACHT, (1935-37) ANNUAL DIGEST OF INTERNATIONAL LAW CASES [hereinafter A.D.I.L.] 93. The Court held in principle that the protected State remains sovereign and preserves intact its internal personality.

Thus, though the dispute was between parties, both of whom were in this instance subordinate, it is submitted that it can not be regarded, by reason of its international ramifications, as an entirely private arbitration.[10]

J. B. Moore, in discussing the general nature of arbitration, has this to say about the significance of certain acts which are not of the nature of public arbitrations:

> These acts (recommendations on questions of international law) which are in the nature of advisory opinions are included not because they are supposed to result from the exercise of judicial power, or to have the binding force of judicial decisions, but because, by reason of their tenor and the character and learning of the persons by whom they are made, they have brought an end to controversy, or contributed to its eventual solution on legal grounds. I am less concerned with nice classifications and exclusive categories than I am with adding as much as possible to the materials with which the international structure may, especially on its legal side, be enlarged and strengthened and made more convenient and useful.[11]

It is suggested by the writer that this statement may well apply to the award of Lord Asquith. In that case it would stand or fall as a contribution to the authoritative literature on the continental shelf

> by reason of . . . [its] tenor and the character and learning of the person[s] by whom . . . [it was] made . . . and whether it has brought an end to controversy, or contributed to its eventual solution on legal grounds.

It is also suggested that a good deal of weight should be added to its persuasiveness by reason of the appearance on behalf of the parties of such jurists of international repute as Professors Lauterpacht and Waldock and Sir Walter Moncton.

3. The Position of the United Kingdom

The international nature of the dispute engages the responsibility of the United Kingdom *qua* protecting power. This is a normal consequence of the

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[10]Cases are cited in Lauterpacht, A.D.I.L., of arbitrations between States and private parties; *e.g., Greek Government* v. *Vulcan Werke,* (1925-1926) A.D.I.L. at 402-403, and *Republic of Columbia* v. *Canca Company,* (1941-1942) A.D.I.L. at 429. This would indicate that some significance in international law is attached to what may be termed 'quasi-public' arbitrations. This is not to say that they have the authority or persuasiveness of a public arbitration.

[11]Moore, International Adjudication, Modern Series, Vol. 1, p. vii. He quotes from 1 Merignhac, Traité théorique et pratique de l'arbitrage 245-6 (préface) (Paris 1885). "While they have the liberty to conduct themselves as they understand, arbitrators should act in the spirit of the general rules followed in the administration of justice and calculated to assure to their decrees the respect and authority which attach to judicial decrees regularly rendered" (Moore, *op. cit. supra,* at xlvii).

relation between protecting and protected States.[12] The controversy is thus of particular interest inasmuch as the United Kingdom is implicated. Lord Asquith clearly states this relationship (page 255 of the award) by using the words "The British Persian Gulf Proclamations". Such acts as were made to appropriate the contiguous sea-bed and subsoil by the Sheikh Shakbut may thus be imputed to Great Britain. The publicity brought by the award to these Persian Gulf declarations brings the unobstrusive position taken by His Majesty's Government in the matter of the continental shelf vigorously into the public eye.

4. THE AWARD

The award of Lord Asquith falls conveniently into two portions: firstly, a discussion of the law, nature, scope and interpretation of the 1939 agreement between the parties, exclusive of considerations involving the continental shelf. This introduces such questions as: Are the concessions treaties or analogous to treaties? Or, are they strictly commercial instruments? Are they to be construed in accordance with Islamic law? Or with English law? How far should extrinsic evidence be admitted?[13] Secondly, and most important for the purpose of this article, extensive consideration is given to the existence, the nature and effect of the continental shelf doctrine.

> The arbitration is to determine what are the rights of the Company with respect to all underwater areas over which the Ruler has or may have sovereignty, jurisdiction, control or mineral rights.
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> The issues involved in the first portion of the discussion are:
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> i) At the time of the agreement did the Sheikh own the right to win mineral oil from the subsoil of the sea-bed subjacent to the territorial waters of Abu Dhabi?
>
> ii) If yes, did he by that agreement transfer such right to the claimant Company?[14]

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[12] *Spanish Zones of Morocco Claims — Great Britain* v. *Spain*, Oct. 23 1924, in LAUTERPACHT, (1923-24) A.D.I.L. at 163: "The institution of a protectorate suppresses direct diplomatic relations between the protected State and other States . . . Accordingly it is necessary that this limitation imposed on third party States should be balanced by the duty of the protecting State to answer on behalf of the protected State . . . As the protected State no longer acts in the international sphere without an intermediary and as any measure which a third party State might take to obtain . . . respect for its rights would inevitably affect the interests also of the protecting State, the latter must take upon itself at least a derivative responsibility for the protected State . . . The responsibility flows from the fact that the protecting State alone represents the protected territory in its international relations."

[13] For a more elaborate discussion of the issues and points of law which the arbitration raises see Stephenson, *supra* note 8, at 503-506.

[14] Essential portions of the agreement are Articles 2(a), 3, 12(a) and 17, which may be found on pages 248-250 of the report. These articles were taken from the version of the agreement submitted by the Sheikh and accepted by Lord Asquith who stated "There is in this matter little conflict; and there would probably have been even less but for the circumstances that the Arabic of the Gulf, in which the contract is framed, is an archaic

5. Construction of the Agreement

The Sheikh's translation of the agreement was accepted by both parties. The determination of the *proper law* applicable in construing the contract was imaginatively arrived at. Lord Asquith discusses the question in the following manner: The municipal law of England was not applicable, since the agreement was wholly made and to be performed in Abu Dhabi. *Prima facie* its law should apply. No body of settled legal principles for the construction of modern commercial instruments existed in the Sheikhdom. Justice was discretionary "in this very primitive region" and was based on the Koran. Article 17 of the agreement prescribes the application of principles rooted in good sense and common practice of the generality of civilised nations. Some of the rules of English municipal law, not otherwise available, are applicable when consonant with this directive, for instance the rule stressing the paramount importance of the actual language of the written instrument, and the principle *expressio unius est exclusio alterius.*

The crux of the dispute turns about the construction of articles 2 and 3 of the agreement which define the area within which the Concession is to operate. According to article 2, the area includes 'the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and their dependencies'. The continuation of the sentence with the words "and all the islands and sea waters which belong to that area" is regarded as significant. "And" is interpreted as meaning "plus" in order to give effect to the last part of the sentence. Otherwise the word "lands" would include the territorial waters. Thus 'the sea waters which belong to that area' could only have been intended to mean the maritime belt of territorial waters and its subjacent sea-bed and subsoil. This was the meaning in 1939 before any notion of the continental shelf as appertaining to the national territory existed and would, in his interpretation, be the meaning if the shelf doctrine had existed at that time. Thus the sea-bed and subsoil of the territorial waters were held to form part of the concession.[15] The areas beyond this belt were excluded from the concession by this interpretation of its words. From the point of view of the dispute there was little need to enter into further analysis.

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variety of the language, bearing, I was told, some relation to modern current arabic as Chaucer's English does to modern English."

[15]Lord Asquith states (*supra* note 2, at 253) that "I am not impressed by the argument that there was in 1939 no word for 'territorial waters' in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. Mr. Jourdain had none the less been talking 'prose' all his life although the fact was only brought to his notice somewhat late. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist."

"Directed as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implication of a doctrine [the Continental Shelf] not mooted till seven years later."[16]

6. THE DOCTRINE OF THE CONTINENTAL SHELF, ITS SUBSTANCE AND HISTORY.

The issues involved in the second and, for these purposes, the major phase of the discussion of the Award, as outlined by Lord Asquith on page 248, are:

> i) At the time of the Agreement did he own (or as the result of a proclamation did he acquire) the right to win mineral oil from the subsoil of any, and, if so, what sub-marine area lying outside territorial waters?
>
> ii) If yes, was the effect of the Agreement to transfer such original or acquired rights to the Claimant Company? (The Sheikh in 1949, ten years after this agreement, purported to transfer these last rights to an American Company, the Superior Corporation, which the Petroleum Development Company claim he could not do, since he had already ten years earlier parted with these same rights to themselves).

In connection with this part of his award it must be noted that much of the discussion is *obiter dicta,* but this will not affect the award's persuasiveness for this last quality is, in any case. its sole general contribution.

Lord Asquith states that the legal doctrine which later gathered around this geographical term was foreshadowed by the United Kingdom-Venezuela treaty of 1942 relating to the submarine areas of the Gulf of Paria. wherein the parties agreed to recognize 'any rights of sovereignty or control which have been or may hereafter be lawfully acquired' in such areas by the parties.

Professor J.P.A. François considers this as the turning point in the method of applying the concept of the continental shelf.[17] Formerly it had been applied to the problems of off-shore fisheries by technical experts and jurists concerned with that field. The classical enunciation (of the shelf doctrine) was the well-known proclamation by President Truman of 28 September 1945, the arbitrator declared on page 253. Lord Asquith, on pages 254 and 255 discusses in outline the geographical phenomena of the continental shelf. He also discussed the draft articles on the continental shelf

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[16]*The Award, supra* note 2, at 253. It is not the intention of the writer to make a detailed and critical analysis of what, for the purposes of this article, must be regarded as a preliminary, though necessary, phase of the arbitration. Although the award turns mainly upon the construction given the agreement, its consideration here, is to be subordinated to a discussion of the continental shelf doctrine.

[17]François, *Report on the High Seas* in U.N. Doc. A/CN. 4/17.

formulated in 1951 by the International Law Commission and concluded that they do not reflect existing law.

The American claim exemplifies the basic minimum norm for all later similar claims. It is an example of the most restricted interpretation of the legal nature of the new concept. In essence a claim is made to:

1) jurisdiction and control only over
2) the natural (petroleum and mineral) resources of
3) the subsoil and sea-bed of the continental shelf by
4) the contiguous State for
5) the purposes of conservation and prudent utilisation of these resources within
6) the area bounded by the 100 fathom line while
7) preserving the high seas character of the superjacent waters and the right to their free and unimpeded navigation and
8) making provision for possible boundary problems with neigbouring States.

This claim has been surpassed in extensiveness of the rights claimed by those of various other nations. There are several significant variations in national practice.

A group of five South and Central American States, Chile, Costa Rica, El Salvador, Honduras and Peru, have divorced the area claimed from the geographical limit of the continental shelf. They have applied an arbitrary width to the claim of 200 nautical miles. Full rights of sovereignty were claimed over the area concerned. Fisheries were included within the resources claimed.

A further group of claims, among them that of the Ruler of Abu Dhabi introduced another variation of the proposed doctrine. The Middle East 'Oil States' surrounding the Persian Gulf claim the sea-bed and subsoil, not of the continental shelf (since the area involved is one where there is no fall-off to the Ocean Depths and the waters are about 100 feet deep only), but of the areas beyond territorial water limits and contiguous to the coast. The notion of physical contiguity or close attachment of the submarine area to the adjacent littoral State thus is substituted for the continental shelf as the source of a juridical right.

The necessity to develop and conserve resources where knowledge and technology make exploitation possible, the non-existence of a continental shelf in the true geographical sense, the inequalities among the nations in the geographical area of the adjacent shelf and other less worthy motives have surrounded the growth of the doctrine with "ample chaos".[18]

[18]Boggs, *National Claims in Adjacent Seas,* 41 GEOGRAPHICAL REV. 185. Mr. Boggs, State Dept. Geographer, states: "never have national claims in adjacent seas been so numerous, so varied and so inconsistent. There is here ample chaos from which to create

7. NATURE OF THE RIGHT CLAIMED

Along with the many forms in which the doctrine has been adopted — proclamation, decree, statute, order-in-council, etc. — there is also variation in the nature of the right claimed. The United States, for instance, claims 'jurisdiction and control'. The United Kingdom claims on behalf of the Bahamas, Jamaica, and the Falkland Islands amount to the assumption of sovereignty (*i.e.* the boundries are extended). In general this right is asserted over the subsoil and sea-bed of the continental shelf, or over a particular submarine area, or over the mineral resources only. Other States have simply included the shelf area as part of the national territory as fixed by law, constitution or decree (*e.g.*, Mexico, Honduras and Nicaragua).

Both Lauterpacht and Richard Young hold controversy over the nature of the right as futile. Exclusive jurisdiction is what the claiming nations intended to secure. This is equivalent to sovereignty. The context of the various national instruments support this view. They feel that by including these areas within the national boundaries, and thus equating them to the subsoil and sea-bed within the limits of the marginal sea, controversy over the nomenclature descriptive of the nature of the right would be eliminated.[19] Sir Cecil Hurst was also of the opinion that the United States' claim was a claim to exclusive control which right is as large as that of sovereignty. Theoretically, if the right claimed was less than sovereignty, the area might still constitute a *res nullius* and thus continue susceptible of other claims.[20] Lord Asquith contents himself in the arbitration with comment on the varied nature of the right claimed. His conclusion in this respect seems to be that the doctrine is in an unsettled state.

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a viable world of order. Among the elements present are fear, the present compelling desire for security, interest in the rights of navigation by sea and by air, a sense of the need to conserve fish and mineral resources, a bope of deriving more revenue, 'cartographic chauvinism', a wish to 'keep up with the Joneses', and common sense. No one of these elements is ever found unmixed with others." In all, including half a dozen British colonies and the Trucial Sheikhdoms, there are more than 25 different enactments of varying form and content.

[19]Lauterpacht, *Sovereignty over Submarine Areas* in 27 BRITISH YEAR BOOK OF INT'L LAW at 389 (1950) comes to the same conclusion as both Mr. Young and Sir Cecil Hurst when he states "An area which is under the state's exclusive control and jurisdiction, not delegated by or accountable to a foreign government or authority is under the sovereignty of that state." At page 390: "to the extent to which these proclamations and enactments have not encountered protest and must therefore be regarded as not inconsistent with international law, the question whether the authority of the coastal state over the adjacent submarine areas is one of sovereignty must be regarded as having received a conclusive answer." Young, *Legal Status of Submarine Areas Beneath the High Seas,* 45 AM. J. INT'L L. 228, states that additional claims with respect to water areas and resources in the sea itself are separable from the main tbesis.

[20]Sir Cecil Hurst, *The Continental Shelf* in 34 TRANSACTIONS OF THE GROTIUS SOCIETY 153 (1948). He discusses the question in relation to the 1942 United Kingdom-Venezuela Treaty and the United States proclamation.

8. Means by Which the Continental Shelf May Be Appropriated

The next major questions asked by the Arbitrator are "How are the rights of whatever character to the subsoil (and sea-bed) of the shelf acquired? Can they indeed be acquired at all? Or would their existence inevitably conflict with the freedom of the high seas? Before the doctrine of the shelf was promulgated I think the general answer might well have been that they cannot be acquired at all."[21] International Law in the past accepted the possibility in rare cases that this region be subject to a customary right gained by certain States, by historic occupation, to conduct 'sedentary fisheries' for peals, chank, oysters, etc.

Land territory is customarily considered as *terra nullius* until appropriated by way of effective occupation. It has been historically the custom to class the high seas as a *res communis, i.e.* property common to all and subject to the exclusive appropriation of no one. This principle is significant as the basis of freedom of commerce and communication on the seas and of access to the resources of the sea. On the eve of the continental shelf doctrine the law relating to the subsoil and sea-bed of submarine areas beyond the territorial sea permitted occupation and appropriation of the subsoil if carried out from beneath the surface of the sea-bed and commenced within the territory of the adjacent state. It would seem that only the adjacent state could so occupy the subsoil. Control of the sea-bed itself was controversial. Here the unyielding principle of freedom of navigation intervened. One view was that the sea-bed could be appropriated without great interference with navigation and thus could be classed with the subsoil. In fact complete non-interference is impossible. The content and purpose of the doctrine of the freedom of the seas must be examined to see if it would be essentially affected by approriation of the sea-bed. The writer feels that both appropriation of the sea-bed and freedom of the seas are compatible if, in appropriating the sea-bed, adequate precautions are taken to ensure that interference with navigation and resources of the sea is kept at a minimum.

Questions of the following order are asked by Lord Asquith:

> Is its subsoil as a whole *res nullius?* That is to say something in which rights can be acquired, but only by effective occupation? Or is the position such that the rights in the suhsoil of the shelf adhere (and must always be taken to have adhered) *ipso jure,* occupation or no occupation, to the contiguous coastal power? Or failing that, if occupation be indeed necessary; in cases where it is almost impracticable, may proclamations, or similar acts be treated as a constructive or symbolic or inchoate occupation?"[22]

[21] *The Award, supra* note 2, at 256.
[22] *Ibid.*

It is largely agreed that four main theories may be uncovered.[23]

1) The continental shelf is a *res communis* and therefore not susceptible of occupation by any state. Exploitation by international bodies alone is permissible.

This hypothesis was firmly rejected by the International Law Commission on the ground of impracticability. It is very doubtful if an international régime could undertake the task in view of the diverse areas and conditions involved and the probability of severe organisational difficulties. State practice also denies this view.

2) The continental shelf is a *res nullius,* appropriable by means of effective occupation, *i.e.* real physical exploitation.

An ineluctable conclusion would be that any nation could establish its claim to any area of the subsoil or the sea-bed of the continental shelf in any part of the world by the simple fact of effective occupation. This view would encourage 'gold rush' tactics. Such tactics would not be likely to produce sound, orderly and integrated development of resources such as is necessary, particularly for petroleum deposits. Some jurists of this view hold that State practices flowing from the 'discovery' of the continental shelf have not as yet resulted in a transformation of the established rule of customary international law requiring effective occupation. But it should be noted that none of the States taking action (except the United States, as regards off-shore oil drilling in the Gulf of Mexico) have as yet established effective occupation as the basis of their jurisdiction.

3) The continental shelf is *res nullius* capable of occupation by means of a proclamation, without effective occupation being necessary.

4) The continental shelf is not a *res nullius* but vests *ipso jure* in the coastal state.

In seeking light on this point by going to the actual practices of the States in their declarations, the arbitrator states "Most often, though not invariably, the proclamation was in a 'declaratory' form, that is in a form asserting or implying that the proclamation was not constitutive of a new right but merely the statement of a pre-existing one."[24] Lauterpacht, in discussing this phase of the proposed doctrine, rejects the traditional view that the principles

[23]Young, *supra* note 19; INTERNATIONAL LAW COMM'N [hereinafter I.L.C.], *Report of the Sub-Comm. on Rights to the Sea-bed and its Subsoil* (Feith, rapporteur, 1950); I.L.C., *Report of the Comm'n* (2d Session 1950); I.L.C., Supp. No. 12 (a/1316) (5th Session); U.K. White Paper, *The Continental Shelf* (U.E. 1271/34).

[24]*The Award, supra* note 2, at 254. In a footnote on the same page he states: "Declaratory: see for instance the proclamations of Saudi Arabia, May 28, 1949, of the Trucial States including Abu Dhabi of June 10, 1949; the Truman Proclamation of 1945, though its language is not on this point wholly free from ambiguity: and contrast with these

applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. Modern international practice does not invariably consider effective occupation to be a condition of acquisition of title. "To say that a proclamation amounts to occupation, or that it constitutes the first step to occupation giving an 'inchoate title' is, in fact, to deny that occupation is necessary. A proclamation is a means by which a title, claimed or acquired, is announced. It is not a source of a title nor a means of acquiring it."[25]

'Notional occupation' (the third theory advanced) is criticised by Richard Young, Professor Lauterpacht and the International Law Commission, using the following arguments. This condition does not do away with the problem of 'land grabbing' States going after desirable areas remote from their shores before the near-by State can act. By making the unilateral declaration an essential element it may appear to sanction unlimited power in the declaring State to decide the scope and nature of its claims. The idea of a fictitious occupation as a valid basis of title which has in the past been such a source of dispute is re-introduced into international law. To insist that occupation is necessary under a general rule and then to admit a spurious variety is poor legal reasoning if not also poor policy.[26]

The notion of 'contiguity' or the physical relationship between the claimant territory and the territory claimed is frequently applied and would appear to be the basis of the fourth of the theories above stated. The right to issue such a proclamation in relation to its contiguous submarine areas would be restricted to the coastal state. Lord Asquith, favouring this view, finds:

> Whether there ought to exist a rule giving effect to the doctrine in one or other and, if so, which of its forms is another question and one which, if I had to answer it, I should answer in the affirmative. There seems to me much cogency in the arguments of those who advocate the *ipso jure* variant of the doctrine. In particular:— (1) it is extremely desirable that someone, in what threatens to become an oil-starved world, should have the right to exploit the subsoil of the submarine area outside the territorial limit; (2) the contiguous coastal Power seems the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control, and the alternatives teem with disadvantages; (3) there is

proclamations the language of the United Kingdom proclamations in the case of the Bahamas, Nov. 27, 1949; Jamaica, Nov. 26, 1948; and of the Falkland Islands, Dec. 21, 1950, all of which employ somewhat annexatory language such as the "'boundaries" of the Colony are hereby 'extended': language constitutive of rather than merely declaratory of the rights involved". Lauterpacht, *supra note* 19, at 415-416, for a discussion of the effect of the judgments in the *Legal Status of Eastern Greenland* and the *Clipperton Island* cases where this problem is exhaustively treated. Lauterpacht feels that it is demonstrated that the notion of occupation, as traditionally understood, is rendered valueless, in relation to some areas for the purpose of acquiring title.

[25]Lauterpacht, *supra* note 19, at 418.

[26]See Young, *supra* note 19, at 230; Lauterpacht, *supra* note 19, at 419, for both his own views and those of the International Law Commission.

> no reason in principle why the subsoil of the high seas should, like the high seas themselves, be incapable of being the subject of exclusive rights in any one. The main reasons why this status is attributed to the high seas is (i) that they are the great highways between nations and navigation of these highways should be unobstructed. (ii) that fishing in the high seas should be unrestricted (a policy approved by this country ever since Magna Carta abolished 'several' fisheries). The subsoil, however, of the submarine area is not a highway between nations and the installations necessary to exploit it (even though sunk from the surface into the subsoil rather than tunnelled laterally) need hardly constitute an appreciable obstacle to free navigation nor does the subsoil contain fish. (4) To treat this subsoil as *res nullius,* fair game for the first occupier, entails obvious and grave dangers so far as occupation is possible at all. The doctrine that occupation is vital in the case of a *res nullius* has in any case worn thin since the East Greenland Arbitration and more especially since that relating to Clipperton Island.[27]

Contiguity, as applied to land territory, has been and still is regarded as a dangerous principle upon which to depend without effective occupation as a supplement. However, most of the continental shelf proclamations invoke in some form or other the principle or fact of contiguity and geographical unity. In the United States proclamation the continental shelf is spoken of as an "extension of the land mass of the coastal nation and thus naturally appurtenant to it." The Mexican proclamation says: "As is well known, the lands which constitute the continental masses do not as a rule rise steeply from the great ocean depths, but rest upon a submarine base called the continental platform . . . This platform obviously constitutes an integral part of the continental countries."

> Contiguity in such cases (where effective occupation is limited to the conclusion of treaties and conferment of concessions by an authority situated in a narrowly circumscribed part of the territory or even outside it) may be an essential which gives the only element of substance to such otherwise abstract occupation. In that sense contiguity is a factor more potent than effectiveness reduced to the very shadow of its natural self. Conversely, the claim to contiguity is *pro tanto* much stronger when there is only a remote possibility of occupation by rival states to oppose it, as is the case with submarine areas . . . In fact, both practice and principle suggest that, unless we fall back upon 'notional' occupation, contiguity, in particular such as that which occurs in relation to submarine areas, constitutes a proper basis of law and reasonableness for the assumption of title over them. Contiguity may be, on occasion, a transparently eccentric figure of speech when made the basis of claims to distant territories . . . This does not mean that in a case such as that of adjacent submarine areas it does not represent the only solution consonant with convenience, economic necessities, and requirements of international peace. There is no inconsistency in the action of a state which rejects it in one sphere and adopts it in another.[28]

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[27] *The Award, supra* note 2, at 256-257.

[28] Professor Lauterpacht, *supra* note 19, at 429-430. On pp. 424-425 he summarizes the objections to contiguity in relation to the continental shelf. The doctrine of contiguity, although occasionally enunciated, has never become part of international law and has

Richard Young suggests that the simplest and most effective way of dealing with the submarine areas would be to make them analogous to the marginal sea, which, on principles quite different from those of the acquisition of land territory, is assigned automatically to the coastal state. It is not necessary to occupy its territorial waters or even to proclaim control over them for they are inseparable appurtenances of the littoral state. This same notion can be applied to submarine areas. In this view the sea-bed and subsoil outside would be placed on the same basis as those regions inside territorial waters. The regimes of the superjacent airspace (a major point in the field of international air law), and waters would retain their previous character. The equation of the submarine areas inside and outside the edge of the marginal sea would also make superfluous any fine distinction between sovereignty and exclusive jurisdiction.

Lord Asquith, in stating on page 256 'there seems to me much cogency in the arguments of those who advocate the *ipso jure* variant of the doctrine, favours the views of Lauterpacht, Young and the International Law Commission (see above for his discussion of this point). This would, several years ago, have been classed as an unwarranted conclusion. But in the past three years opinion has marched, as was shown above, toward this view with considerable consistency.[29]

9. Has the New Doctrine Become a Rule of International Law?

It is the Arbitrator's view:

> that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet

been rejected by international tribunals. It represents a theory, which because of its vagueness and comprehensiveness, is full of dangerous implications and ought therefore to be discouraged. He demonstrates that contiguity has played a not inconsiderable role, in particular as regards the 'watershed' and 'middle distance' rules, citing numerous international disputes in which it was prominent. The Award by the King of Italy given in 1904 in the controversy concerning the boundary between British Guiana and Brazil stated: "the effective possession of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*". Contiguity is also stated to underlie in a measure, the Arctic and Antarctic claims of a number of States.

[29]An interesting comment on the position taken in regard to the four theories listed above is found in the United Kingdom White Paper (UE 1271/34): "The committee of the International Law Association appears to favour the (third) theory *de lege lata* and the

> to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.[30]

However the matter cannot easily be dismissed in a sentence especially when the words of Professor Lauterpacht are considered.

> It will be submitted in this article that the application of these tests leads to the result that there is no existing principle or rule of international law which is opposed to what, for the sake of brevity, may be called here the doctrine and the practice of the continental shelf and that the latter has now, in any case, become part of international law by unequivocal positive acts of some States, including the leading maritime powers, and general acquiescence on the part of others.[31]

There have been issued some 31 different acts of appropriation by more than 20 states, among them the major maritime powers — the United States and the United Kingdom. The content of the acts and the nature of the rights claimed have varied considerably. Where these claims have interfered with such principles as freedom of navigation or of access to the resources of the sea, protest has been made. The United States and the United Kingdom have denied the legality of Argentine and Chilean claims, saying they were at variance with international law inasmuch as they extended national sovereignty over the epicontinental seas beyond generally acceptable territorial water limits, and interfered with the right to fish in these waters. However, as to the other proclamations there was general acquiescence as evidenced by lack of protest. The United States, on April 26, 1946, made known by official correspondence its action to the governments of the United Kingdom, Canada, Mexico and Soviet Russia. No objection has since been raised by these Nations.

Lauterpacht in discussing the customary formation of new rules of international law writes "what matters is not so much the number of States participating in its creation and length of the period within which that change takes place, as the relative importance, in any particular sphere, of States inaugurating the change."[32] The reconciliation of the various interests of the

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(fourth) theory *de lege ferenda,* whilst the International Law Commission appears to favour the (fourth) theory even *de lege lata.*

"In contrast with the attitude of these international bodies, His Majesty's Government has so far adopted the (second) theory, whilst admittedly interpreting the requirements of 'effective occupation' rather liberally. President Truman's Proclamation on the other hand is an amalgam of propositions (two, three and four). Position (one) has virtually no support." However, the action taken by the United Kingdom with respect to its colonies and the British Protected States (*supra,* note 24) is at variance with this White Paper statement.

[30]*The Award, supra* note 2, at 256.

[31]Lauterpacht, *supra* note 19, at 376-77.

[32]*Id.,* at 394. For further comment on this derogation from the basis principle of *state equality,* see 1 SCHWARZENBERGER, INTERNATIONAL LAW 14.

States, in the submarine areas, in freedom of navigation and in fisheries has come about with no great damage done to the canons of the regime of the high seas (apart from certain extravagant national claims which have been protested). Absence of protest itself may be a source of legal right when it is viewed from the point of view of estoppel or prescription. Of particular interest to Canada (and especially in view of the above mentioned notice given by the United States) is the following statement by Professor Lauterpacht:

> any such duty to protest is especially incumbent upon States directly interested — in the case of these proclamations relating to submarine areas in particular upon neighbouring States — though there would be nothing improper, and might be prudent, for other States to assert their legitimate interest in upholding, through protest, a legal principle of general application.

Thus the presumption of acquiescence thrust upon Canada, by the failure to protest its southern neighbour's action, is in terms of Professor Lauterpacht's views greatly augmented.[33]

According to one view then, there is sufficient justification for holding that the doctrine of the continental shelf forms part of 'International custom, as evidence of a general practice accepted as law' (Article 38 of the Statute of the International Court of Justice). However this is not the view of the International Law Commission or of Lord Asquith (see above). Indeed the *ratio decidendi* of the Abu Dhabi Award was as follows:

> Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even today admitted to the canons of international law. (page 253).

Another argument of the Arbitrator based on the continental shelf notion appears as follows:

> Again if I am right in rejecting that premise, the second way in which they put their case also fails; here they rely on the proviso to Article 2 which says that 'If in future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area (of the Concession) shall coincide with the limits specified in this definition'. The argument is that the Concession is by these words expressly to extend to any after-acquired area of Abu Dhabi, and that the effect of the proclamations of 1949, if not retrospective, cannot be less than to add the Shelf to the area originally covered as from the date when the proclamations were promulgated. This argument also fails if I am right in thinking that the premise on which it rests is invalid; but I thing it would fail independently of that since there has been no definition of anything 'by agreement with other States'. (page 259).

[33]Lauterpacht, *supra* note 19, at 397.

It is suggested that, in the light of differences of opinion, it would be questionable whether the doctrine should be accepted as being in force. The writer feels that it would not be "climbing too far out on a limb" however to say that, if it is not now a part of the general body of customary international law, it will soon be admitted to that position.

10. PRELIMINARY NEGOTIATIONS OF THE PARTIES

Lord Asquith considered whether the negotiations attending the Agreement, and the subsequent correspondence, as evidence of the parties' intentions, would operate to alter the 'bare' construction given it. His discussion turned about the meaning attributed by the parties to the phrase "the sea waters belonging to that area". The Company representatives said the Sheikh claimed he ruled the waters leading out from the coast to islands, fifty, or one of them even a hundred, miles out from the shore. Lord Asquith doubted that it was "either intended or treated at the time as a sober contractual stipulation".[34] It was found that the Company representatives mentioned an extended interpretation of the Agreement for the first time in March 1949. "If (Company representatives) had had a clear express promise of a contractual order from the Sheikh of rights in respect of the subsoil in the sea for fifty or a hundred miles out from the coast, no halting tentative and *ex post facto* recourse to the Shelf doctrine would have been needed." Thus the *prima facie* (bare) interpretation of the contract holds. This minor issue introduced by the parties appears perhaps more as an after thought, towards the close of the award and is presented in this discussion for the sake of completeness.

11. CONCLUSIONS

In the dispute the Company's "primary contention is (1) that the doctrine of the Shelf is settled law, (2) that it always was so, and therefore that it was so in 1939; ergo, the meaning which some of the expressions in the contract would or might otherwise have borne is enlarged by the inclusion therein of the Shelf . . . The argument falls to the ground if I am right in rejecting the premise on which it rests, namely, that the doctrine of the Shelf has

[34] *The Award, supra* note 2, at 260. This is a most interesting phase in the interpretation of the intent of the parties each being separated by time and space in mentality, character and tradition. Lord Asquith adds an enlightening paragraph as follows: "I think it more probable than not that the Sheikh did not claim to rule coastal seas outside the three mile limit. It is not the custom of oriental potentates to minimise the extent of their dominions; but having regard particularly to subsequent correspondence it seems to me far more probable that this was, and was taken by the claimants to be, a rhetorical flourish."

become and, indeed, was already in 1939, part of the corpus of international law".[35]

The Arbitration considered at length the question of the nascent continental shelf doctrine. While rejecting it for the past and present, Lord Asquith was of the opinion that its adoption into the corpus of international law was an imminent future possibility. The writer will attempt to sum up very briefly the place and the importance of the award in this new field. It is the first practical demonstration of possible legal effects consequent on its adoption. It is a demonstration notable for its common sense, sound in its restraint and competent in its legal analysis. If the Award is not as detailed in its study of the growth, background and consequences of the new doctrine as the works of acknowledged specialists in the field, it none the less forms a valuable addition to the literature on the subject; both from the point of view of the examination of the state of the law and for its practical application to a dispute of some importance. It is not likely that the practising lawyer has heard the last of the Continental Shelf.

The Continental Shelf has occupied a formidable place in the last few years in the annals of international law. It has been held that if it was not the most important matter before the International Law Commission of the United Nations then it was second only to the formulation of the principles of the Nuremberg Charter. Though the intrinsic importance of the proposed doctrine is high, due in measure to the unknown, but suspected great economic potential of the geographical shelf, and to the imaginative pulls associated with the discovery of new worlds, it is, however, in relation to the development and present position of the high seas, of which it is only a part, that we must primarily consider the Continental Shelf. Not the least, it is an example of the laborious and uncertain process by which international law, in the absence of effective legislative organs, is created in response to new or changing needs of nations.

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[35] *The Award, supra* note 2, at 258-59. The most important articles in the literature (cited by Lord Asquith) are as follows: Lauterpacht, *Sovereignty over Submarine Areas* in 27 BRITISH YEAR BOOK OF INTERNATIONAL LAW 376-433 (1950); Waldock, *The Legal Basis of Claims to the Continental Shelf* in 36 TRANSACTIONS OF THE GROTIUS SOCIETY (1950); Young, *The Legal Status of Submarine Areas beneath the High Seas* in 45 AM. J. INT'L L. 225-229 (1951); Young, *Recent Developments with respect to the Continental Shelf* in 42 AM. J. INT'L L. 849-857 (1948); Sir Cecil Hurst, *The Continental Shelf* in 34 TRANSACTIONS OF THE GROTIUS SOCIETY 153 (1948); Boggs, *National Claims in Adjacent Seas* in 41 GEOGRAPHICAL REV. 185-209; François, *First Report on the High Seas* in U.N. Doc. A/CN. 4/32 (I.L.C., 2d Session 1950); François, *Second Report on the High Seas* in U.N. Doc. A/CN. 4/42. (I.L.C., 3d Session 1951); U.N. Secretariat, *Memorandum on the High Seas* in U.N. Doc. A/CM. 4/32 (I.L.C., 2d Session 1950).