"procedural matters" by less than the two-thirds majority which the terms of the Rio Treaty might appear to require.

The program of the Fourth Meeting of Consultation has been fixed as follows, as approved by the Council of the Organization:

I. Political and military coöperation for the defense of the Americas, and to prevent and repel aggression, in accordance with inter-American agreements and with the Charter of the United Nations and the resolutions of that organization.
II. Strengthening of the internal security of the American Republics.
III. Emergency economic coöperation:
  (a) Production and distribution for defense purposes.
  (b) Production and distribution of products in short supply and utilization of necessary services to meet the requirements of the internal economies of the American Republics; and measures to facilitate insofar as possible the carrying out of programs of economic development.[2]

CHARLES G. FENWICK

JURISDICTION OVER THE SEA BED AND SUBSOIL BEYOND TERRITORIAL WATERS

A noteworthy *Memorandum on the Regime of the High Seas* prepared by the United Nations Secretariat for the International Law Commission[1] suggests that the problem of reconciling the freedom of the seas with disciplined exploitation of the resources of the high seas and its subsoil

> does not appear insoluble provided the extension of the jurisdiction of littoral States to the high seas in the vicinity of their coasts does not develop into a territorial jurisdiction, similar to the rights of sovereignty formerly claimed over the high seas, but is confined to a special jurisdiction over one or more of the natural elements distinguishable in the high seas: the stratosphere or atmospheric area, the surface of the sea, the sea depths, the bed and the marine sub-soil.[2]

Stressing the "essentially negative" nature of the doctrine of the freedom of the seas as a reaction against claims to sovereignty over the high seas, the *Memorandum* points out that, although the rule of non-interference with foreign-flag vessels on the high seas has assured freedom of navigation, it does not provide a regime for the utilization of the high seas as a source of wealth, since it fails to prescribe means for conserving the resources of the sea or to proscribe acts *contra bonos mores*. The inadequacy of the rule of non-interference is seen when it is used to justify acts imperiling the conservation of limited resources such as fisheries or the disciplined exploitation of submarine resources of untold value.

[2] For further details of the Meeting, see *Organization of American States, Fourth Meeting of Consultation of Ministers of Foreign Affairs, Washington, D. C. March 26, 1951: Handbook.*

[1] U.N. Doc. A/CN.4/32, July 14, 1950, pp. vi, 112.

[2] *Ibid.*, p. 15.

With particular reference to the sea bed and its subsoil, the problem is one of establishing a legal regime which, while safeguarding the use of the high seas as a means of communication, furthers the regulated exploitation of its submarine resources. Efforts to derive a theory as to the legal status of the sea bed from traditional concepts of the high seas as *res communis* or as *res nullius* are of little practical value.[3] If the sea bed is to be regarded as *res communis,* practical problems arise of persuading states to abandon recently asserted claims to jurisdiction, control or sovereignty,[4] and of reaching international agreement for the common exploitation of its resources. If the sea bed is to be regarded as *res nullius,* the conclusion might follow that title depended upon effective occupation or exploitation. It might, as Jonkheer P. R. Feith has observed, "allow such countries as have reached the highest technical progress to take possession of areas where—to put it bluntly—they have no business." It might mean

> that America could, without the consent of the United Kingdom, explore the continental-shelf region around Great Britain outside the 3-mile zone and could start the exploitation of that region if valuable minerals were found. Russia might consider it necessary to occupy the continental shelf [*sic*] of the Persian Gulf . . . while Swiss geologists might insist on Switzerland occupying the shelf area of Australia.

To avoid reversion to "the law of the jungle" Jonkheer Feith suggests "general recognition by international law of the principle that the continental shelf belongs to the coastal state."[5]

In its preliminary discussions on the Regime of the High Seas, the United Nations International Law Commission distinguished problems of jurisdiction over the surface of the high seas and control of its fishery resources from jurisdiction and control over the resources of the sea bed and subsoil,[6] but apparently saw no compelling reasons for distinguishing the legal status of the sea bed from that of the marine subsoil.[7] The views of the Commission on the legal status of the sea bed and subsoil are indicated by its replies to questions posed by Judge Manley O. Hudson:

> Is the submarine area (sea-bed and subsoil) of the continental shelf off the coast of a littoral state and outside the area of its territorial waters
>
> (1) *res nullius?*
>
> (2) *res communis?*

[3] *Ibid.*, pp. 10 ff.

[4] *Ibid.*, pp. 59 ff.; Richard Young, "Recent Developments with Respect to the Continental Shelf," this JOURNAL, Vol. 42 (1948), pp. 849–857, and *ibid.*, Vol. 43 (1949), pp. 530–532, 790–792; see also *supra,* p. 225.

[5] P. R. Feith, "Rights to the Sea Bed and Its Subsoil," International Law Association, Report of the 43rd Conference, Brussels, 1948, pp. 168, 170, 173, 183 ff.

[6] See International Law Commission, 2nd Session, Summary Records, U.N. Doc. A/CN.4/SR. 66–69, July, 1950; J. P. A. François, Report on the High Seas, U.N. Doc. A/CN.4/17, March 17, 1950.

[7] U.N. Doc. A/CN.4/SR. 66, July 12, 1950, pp. 18 ff. *Cf.* Feith, *loc. cit.*, pp. 184 ff.

(3) subject *ipso jure* to the control and jurisdiction of the littoral state? or

(4) subject to the exercise of control and jurisdiction by the littoral state for the limited purpose of exploring and exploiting the natural resources? [8]

The Commission unanimously rejected concepts of the sea bed and subsoil as *res nullius* or as *res communis*.[9] The question whether the littoral state had jurisdiction *ipso jure, i.e.,* without formally claiming such rights, or merely in cases where it asserted or actually exercised control, was debated both before and after the Commission, by a vote of 6 to 4, gave an affirmative answer to Judge Hudson's third question. Judge Hudson, regretting the failure of the Commission to answer affirmatively his fourth question, "said that the Commission's vote meant that the right to explore and exploit did not depend on any claim to that right by a littoral state; yet the right should be conditional upon such a claim." Although states had jurisdiction over their territorial waters *ipso jure,* he questioned the desirability of recognizing that states had the rights of control and jurisdiction *ipso jure* over the continental shelf.[10]

Attempts to determine the legal status of submarine areas in terms of a "continental shelf" theory have encountered difficulties of a geographical and geological nature. Differing physical characteristics such as depth, slope, extent and the presence of submarine valleys suggest that the jurist has available no automatically applicable definition of a continental shelf. Moreover, areas like the Persian Gulf, the Sicilo-Tunisian plateau, the Northern Adriatic or the Aegean Seas, while not "continental shelves" according to the geographers, are shallow waters reputedly rich in oil or other natural resources and border states from which efforts may be made to extract submarine resources.[11]

It was considerations of this nature which led the International Law Commission to abandon attempts to define the legal status of submarine areas in terms of a continental shelf theory and to approve tentatively the following principles:

1. Control and jurisdiction over the sea-bed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral state for the exploration and exploitation of the natural resources therein contained. *The area for such control and jurisdiction will need definition but need not depend on the existence of a continental shelf.*[12]

[8] U.N. Doc. A/CN.4/SR. 68, July 14, 1950, p. 9.

[9] *Ibid.,* p. 13.

[10] *Ibid.,* pp. 13 ff.

[11] U.N. Doc. A/CN.4/32, pp. 102 ff.

[12] U.N. Doc. A/CN.4/SR. 67, July 13, 1950, pp. 7–24. The first sentence was adopted by a vote of 10 to 1. The italicized sentence was adopted by a vote of 6 to 4, with 2 abstentions, as a substitute for Judge Hudson's original proposal which had read: ". . . therein contained, to the extent to which such exploitation is feasible."

2. Such control and such jurisdiction should not substantially affect the right of free navigation of the waters above such submarine areas nor the right of free fishing in such waters.[13]

While it should be borne in mind that the principles were adopted, not as formal proposals or as a final text, but as general directives to the *Rapporteur,* M. François, it is interesting to note the significance of the principles so far accepted by the Commission.

(1) Unanimous endorsement was given to the principle that the problem of the legal status of the sea bed and subsoil was distinct from problems of jurisdiction over a contiguous zone of the high seas for customs purposes or for controlling navigation or high seas fisheries.

(2) It was likewise unanimously agreed that the exercise of control and jurisdiction over submarine areas should not substantially affect free navigation or fisheries.

(3) Of great significance is the overwhelming endorsement of the principle that the littoral state has a legal right to exercise control and jurisdiction over the adjacent sea bed and subsoil for purposes of exploration and exploitation. Alternatives which would have branded as illegal—*i.e.,* as violations of existing international law—such extensions of jurisdiction by littoral states because the high seas belonged to all or because their resources could only be developed by international agreement were unanimously rejected. No lamentations over "the inequalities of geography" prevented the Commission, by a similar vote, from rejecting the concept of the sea bed as *res nullius* with a consequent license to all to engage in predatory competition for the exploitation of submarine resources off foreign coasts.

(4) There was general agreement in the International Law Commission that the area of control and jurisdiction by the littoral state for the exploitation of submarine resources must be limited. Judge Hudson's tentative proposal that such control and jurisdiction be limited only by the feasibility of exploitation did not find favor with the Commission. There was some support for limiting the area of control to the continental shelf, particularly in view of the recent proclamations of certain states and of the logic of regarding the continental shelf "as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it" and of regarding its resources as "a seaward extension of a pool or deposit lying within the territory."[14] However, the belief that the problem of exploiting submarine resources was not limited by the existence of a continental shelf led a majority of those voting to reject this particular criterion of limitation. Whether, where a continental shelf exists, it does not serve as a better criterion of limitation upon the area of control and jurisdiction

[13] *Ibid.,* pp. 24–26. Adopted by a vote of 9 to 0.

[14] United States, Proclamation with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12303.

than a limitation expressed in terms of miles, should be re-examined by the Commission. In areas where no continental shelf exists—as in the Persian Gulf—it would seem possible to suggest limitation by international agreement—as in the British-Venezuelan agreement of February 26, 1942, relating to the submarine areas of the Gulf of Paria [15]—or, perhaps provisionally, in terms of miles.

(5) Finally, there was sharp divergence of opinion in the Commission over the question whether the sea bed and subsoil vested *ipso jure* in the littoral state or whether title needed to be based upon a claim thereto or, perhaps, the actual exercise of control. The Commission has unanimously endorsed the principle that the littoral state may exercise certain jurisdictional rights over the adjacent submarine areas. What is the legal situation where a state because of negligence or lack of technological facilities fails to claim or exercise its recognized rights therein? Would those areas off its coasts be *res nullius*—a concept which the Commission decidedly rejected as undesirable? If a foreign state, without agreement with the littoral state, undertook expensive operations to exploit the resources, would they be "legal" until the littoral state objected? Would the littoral state be held to have lost its right of exploitation in those areas? The logic of the principles unanimously endorsed by the Commission suggests the desirability of regarding the submarine areas as vesting *ipso jure* in the littoral state rather than as a "right" which is unperfected until formally claimed or exercised.

Two objections may be raised to this thesis: The first—that the adoption of such a position would render proclamations such as those of President Truman unnecessary—may be accepted as true for the future, although at the time of the proclamation the legal situation was perhaps less clear than it will be if the proposals in process of formulation by the International Law Commission receive general acquiescence. The second objection—that the failure or inability of a littoral state to develop its natural resources would interfere with "the best possible utilization" of the resources of the sea bed—might also be admitted, although no comparable obligation rests upon states to exploit their land resources for the common benefit. The feasibility of developing submarine resources by international agreement can be re-examined from time to time as political conditions warrant. The positions so far assumed by the International Law Commission seem to accord with political realities and seem to provide a promising approach to a regulated utilization of the resources of the sea bed and subsoil. Problems of limits and of safeguarding the utilization of the high seas for communications and fisheries should not prove too difficult to work out in the near future.

HERBERT W. BRIGGS

[15] *Cf.* U.N. Doc. A/CN.4/32, pp. 57 ff.; F. A. Vallat, "The Continental Shelf," British Year Book of International Law, Vol. 23 (1946), pp. 333–338.