ON THE PROBLEMS OF CONTINENTAL SHELF THEORY IN CONNECTION WITH FISHERIES IN THE HIGH SEAS

by Seiji KONDA

公海漁業から見た大陸棚理論の問題

今　田　清　二

The International Law Commission of the United Nations adopted at its third session, held in 1951, the Draft Articles on the Continental Shelf and Related Subjects. All the Member Governments of the United Nations were invited to submit their comments thereon, and those comments submitted by some of the Governments were already made public, thus proceeding the steps of codification of the regime of the high seas.

However, there are serious problems involved in the continental shelf theory in connection with fisheries in the high seas. It is the aim of this report to point out such problems and to explaine the opinions thereon of the author.

I. Contradiction of the Continental Shelf Theory

It is provided in Part I of the Draft Articles on the Continental Shelf and Related Subjects adopted by the International Law Commission of the United Nations at its third session, 1951, as follows:

Article 1. As here used, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the areas of territorial waters where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil.

Article 2. The continental shelf is suject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.

Article 3. The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas.

When the Draft Articles on the Continental Shelf and Related Subjects was under discussion, Mr. Yepes thought there was a serious contradiction between Article 1 and Article 3. "The continental shelf was defined in Article 1 as consisting of the sea-bed and the subsoil of the submarine areas contiguous to the coast. But according to Article 3, the waters covering the continental shelf were subject to the regime of the high seas. Hence there were two completely different regimes involved. Under which regime then would sedentary fisheries come? While the notion of sedentary fisheries was bound up with the notion of the sea-bed, it was also bound up with that of the high seas. He considered that the question of the continental shelf could not be dealt with separately from that of sedentary fisheries."(I)

The discussion by the International Law Commission on this point of

contradiction between the regimes of the continental shelf and of the high seas was one of the most serious. Mr. Scelle suggested "the Commission should remove all distinction between the sea-bed and sea itself," saying that "the notion of a continental shelf was entirely incompatible with that of the high seas. The more deeply the question of the continental shelf was studied, the more evident it would become that the notion of the continental shelf destroyed the notion of public property. A choice would have to be made either to regard the high seas as public property, or to apply the regime of the continental shelf, and it was inpossible to forecast what the consequences of the latter course would be."(2) And later, when the first reading of the report on the Regime of the High Seas was completed, he abstained from voting on it on the ground that he was opposed to the continental shelf doctrine which was contrary to the freedom of the sea.(3)

The International Law Commission seems to have given itself a solution to the problem of contradiction between the two regimes by means of making distinction of the kinds of material of natural resources, i.e., mineral and fisheries resources. The right of control and jurisdiction is to be recognized as regards to mineral resources only, and not in connection with fisheries resources. According to the words used by the International Law Commission: "The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas in the case of sedentaryfi sheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g., stakes embedded in the sea-floor. This distinction justifies a division of the two problems."(4)

However, is it reasonable to make a distinction between the rights in accordance with the difference of the kinds of material of natural resources on which such rights are to be recognized ? Is it possible to distinguish the right to be recognized with regards to mineral resources from that to be recognized with regards to fisheries resources ?

As a matter of fact, since 1945 when the President of the United States issued proclamations asserting control and jurisdiction for certain purposes over the continental shelf and over areas of the high seas, a number of Latin American nations asserted claims to the continental shelf as well as the superjacent waters, e.g. the Presidential Proclamation of Mexico (October, 1945), Do. of Argentine (October, 1946), Do. of Chile (June. 1947), the Proclamation of the Government of Peru (August, 1947), Do. of Costa-Rica (July, 1948). All of these were claiming sovereignty over the continental shelf and the waters covering it or to a distance of 200 maritime miles from coast.(5)

On January 18, 1952, the Korean President issued a proclamation in which it is stated that "Government of Republic of Korea holds and exercises natio-

(1) UN Document A/CN4/SR 114
(2) Do.
(3) A/CN4/SR 132
(4) Commentary 1 on Art. 3, Part II, of the Draft Articles.
(5) American Journal of International Law, Oct., 1950

nal sovereignty over shelf adjacent to peninsular and insular coasts of the National Territory, no matter how deep it may be, protecting, preserving and utilizing, therefore, to best advantage of national interests, all natural resources, mineral and marine, that exist over said shelf, on it and beneath it, known, or which may be discovered in the future."

In the author's opinion, there is no difference between the mineral and the fisheries resources in that they are both natural resources of serious concern among nations, and there is no reason to prevent the confusion of these natural resources as the objectives of control and jurisdiction. Moreover, the continental shelf and the waters covering it may also be confused without inconsistency, because the effective occupation of the submarine areas and the superjacent waters as well, would be practically impossible.(6) Thus the continental shelf theory has given rise to the claims over the high seas by coastal States in recent years as mentioned above.

In so far as the control and jurisdiction over the continental shelf for the purpose of exploiting its mineral resources meets the present-day needs of the international community, it may be asserted by some countries that the control and jurisdiction over the waters covering continental shelf for the purpose of exploiting its fisheries resources also meets the same international needs. And the concept of control and jurisdiction is not far removed, as Mr. Brierly said, from that of sovereignty. (7) Therefore, by reason of what the author stated above, the continental shelf theory, justifying the exercise by a coastal State of control and jurisdiction over the continental shelf, contradicts the provision that "the exercise by the coestal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas." This is the most serious problem of the continental shelf theory in connection with the high seas fisheries.

II. Special Position of Fishing Areas as the Basis of Special Rights to undertake Regulation of the High Seas Fisheries

The Draft Articles on the Continental Shelf and Related Subjects contains in its Part II, entitled as Related Subjects, the following Article according to which a coastal State may undertake regulation of sedentary fisheries in areas of the high seas under the conditions stipulated by the Article.

Article 3. The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities in an equal footing with nationals. Such regulation will however, not affect the general status of the areas as high seas.

According to the commentaries of the International Law Commission on the above Article, "sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental

(6) Commentary 5 on Art. 2, Part I, Draft Articles.
(7) UN Document A/CN4/SR 113

shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g. stakes embedded in the sea-floor."(8) In other words, the right to regulate the sedentary fisheries is a right independent of the control and jurisdiction over the continental shelf.

The right to regulate sedentary fisheries in areas of the high seas contiguous to territorial waters have been regarded by some coastal States as the sovereignty. But the International Law Commission avoided referring to the banks where there was sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, as "occupied". And the Commission considered that "the special position of such areas justifies special rights being recognized as pertaining to coastal States whose nationals had been carrying on fishing there over a long period."(9) And "the special rights which the coastal State may exercise in such areas must be strictly limited to such rights as are recognized." Therefore, "except for the regulation of sedentary fisheries the waters covering the sea-bed where the fishing gronnds are located remain subject to the regime of the high seas."(10)

However, the problem should be pointed out that what is the meaning of the term "special position" of fishing areas in the high seas contiguous to territorial waters as the basis of special rights to undertake regulation of high seas fisheries. One condition is mentioned in the above Article 3 that "such fisheries have long been maintained and conducted by nationals of that State." But it is difficult to clarify the meaning of the special position of fishing areas by the commentaries on the Article or by the summary record of discussions of the International Law Commission.

In order to find the meaning of special position of fishing areas in the high seas as pertaing to a State, it would be appropriate to mention here the principle of conservation zone which was developed in the International Convention for the High Seas Fisheries of the North Pacific Ocean signed at Tokyo on May 9, 1952, among Canada, Japan and the U.S.A. By the articles of this Tripartite Fisheries Convention, specific areas of the high seas is to be closed for conservation purpose to the nationals of a contracting Party or Parties, thus reserving such areas exclusively for nationals of the other Party or Parties with regard to exploitation of stocks of fish specified to respective areas.

Two conditions, at least, should be simaltaneously satisfied to establish such a conservation zone. (1) With regard to stock of fish: Evidence based upon scientific research indicates that more intensive exploitation of the stock will not provide a substantial increase in yield which can sustained year after year (Article IV, 1, i). The conservation zone is to be established with respect to such stock of fish regardles of the nature of such stock whether pelagic, demersal or sedentary fisheries.

(8) Commentary 1 on Art. 3, Part II, of the Draft Articles.
(9) Do. 3
(10) Do. 4

(2) With regard to State concerned: A State has not conducted substantial exploitation of the above stock of fish at any time during twenty-five years next proceeding the entry into force of this Convention (Article IV, 1, Proviso). Fishing of such stock of fish in an area in the high seas is to be abstained by the above State, thus establishing a conservation zone. On the contrary, the State, coastal or non-coastal, whose nationals have maintained and conducted substantial exploitation of the stock of fish, may continue the exploitation of such stock of fish within the limits of the conservation zone. It is provided in the above Tripartite Fisheries Convention that no recommendation shall be made for abstention by a Contracting Party concerned (coastal or non-coastal) with regard to any stock of fish which has been under substantial exploitation by that Party (Art. IV, 1, Proviso).

Conservation zone would be needed for protection of sedentary fisheries more keenly than any other fisheries in the high seas, because of the nature of sedentary fisheries which is apt to be most promptly exhausted. However it is not only sedentary fisheries but also any other fisheries as well that the protection of their resources against extermination is called for in the interests of safeguarding the world's food supply. As a matter of fact, conservation zones are established by the Tripartite Fisheries Convention for the protection of stocks of salmon, halibut and herring. It must be unreasonable to restrict the special rights of undertaking regulation to the effect of protection only of sedentary fisheries which is the case of the Draft Articles on the Continental Shelf and Related Subjects.

In the next place, a right to exploit, within the limits of a conservation zone, a stock of fish for which such zone is being established, would be more frequently justified as pertaing to a coastal State. Because it is usual that nationls of a coastal State to have long been maintained and conducted sedentary fisheries in the high seas contiguous to its territorial waters. But such right of exploiting a specific stock of fish within the limits of a conservation zone should be justified as pertaining to a non-coastal State, on an equal footing with a coastal State, when nationals of non-coastal as well as of coastal State have long been maintained and conducted the exploitation of such stock of fish in areas where the conservation zone is to be established. As already mentioned, the Tripartite Fisheries Convention is providing that no recommendation shall be made for abstention by a Contracting Party concerned (whether coastal or non-coastal) with regard to any stock of fish which has been under substantial exploitation by that Party.

Such rights of non-coastal State is not specified in the above Article 3 of the Draft Articles. Moreover it is provided that non-nationals of a coastal State shall be "permitted" by the coastal State in the fishing activities in the high seas contiguous to the territorial waters. It must be without reason to justify such priority as pertaining to a coastal State.

Conclusions

The contradiction involved in the continental shelf theory gives rise inevitably to the claims over the high seas by coastal State, affecting seriously the freedom of high seas fisheries.

Confining the argument within the provisions of Part II of the Draft Articl-

es, the meaning of "special position" of fishing areas as the basis of special rights to undertake regulation of the high seas fisheries have to be examined. And the solution seems to have been given by the theory of conservation zone as established by the Tripartite Fisheries Convention, 1952.

It is provided in Article 2, Part II of the Draft Articles, that a permanent international body (FAO is expected) should be empowered to make regulations for conservatory measures to be applied by the State whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree amongst themselves. The author believes that one of the foundamental principles in making such regulations by the international body, will be given by the above solution of the meaning of the "special position" of fishing areas in the high seas.

摘　　要

国際連合の国際法委員会は 1951 年「大陸棚及び関係事項についての条項案」を採択し，国際連合加盟各国の意見を求め，他の事項と共に公海制度の国際法々典化の歩を進めている．然るに公海漁業に関する範囲において，前記条項案の理論には二つの重大な問題がある．本文はその問題を指摘し且つこれに関する私見を明らかにすることを目的とする．

I. 大陸棚理論の矛盾

大陸棚及び関係事項についての条項案の第一部は大陸棚と題し，次の規定を含んでいる．

第1条　こゝにいう大陸棚とは沿岸に連接する海底区域の海底及び下層土であつて領海の区域外に在り，その上部水域の深さが海底及び下層土の天然資源を利用し得る範囲のものを指す．

第2条　大陸棚はこれを探査し及びその天然資源を利用する目的のため沿岸国の管轄に属する．

第3条　沿岸国による大陸棚の管轄は，その上部水域の法的地位が公海であることに影響を及ぼさない．

国際法委員会の意見は，(1)沿岸国による大陸棚の管轄は「海底の鉱物を採取する」ためのものであり，(2)「国際社会の現実の要請」である．また(3)大陸棚の上部水域は，第3条の規定の通り公海であり，沿岸国が水産資源を採取するためその管轄権を及ぼすことはない．

然し私見によれば，鉱物資源と水産資源とは共に国際的関心の重大な天然資源である点に於て差異がなく，両者を管轄権の目的として混同することを妨げる理由はない．のみならず鉱物の存在する海底と水産資源の存在する水域とは，共に「有効な領有が不可能」な点において差異がなく，この点からも，大陸棚には沿岸国の管轄権を認め，その上部水域にはこれを認めないという差別を設けることはできない．

大陸棚理論は，1952 年 1 月のいわゆる李承晩宣言，またはこれと同様の主張に対し論拠を与えるものである．沿岸国が鉱物資源採取のため大陸棚を管轄するのは国際社会の要請であると認識するならば，その論理的必然の結果として，沿岸国が水産資源採取のため大陸棚の上部水域を管轄するのは国際社会の要請であるという主張を否定することができない．

国際法委員会の前記条項案は，大陸棚の上部水域が公海であることを明らかに規定して

いるにも拘わらず，海洋自由の原則と必然に矛盾することは，公海漁業から見た大陸棚理論の根本問題といわなければならない．

II. 公海漁業取締権の基礎たる公海漁場の特殊事情

大陸棚及び関係事項についての条項案の第II部は，関係事項と題され，公海の定着性水族漁業に対する沿岸国の取締権につき次のように規定している．

第3条　定着性水族漁業の取締は，自国領海に隣接する公海の区域において当該漁業を長期に亘り維持し実行してきた国が，当該区域についてこれを企図することができる．但し自国民と平等の立場で他国民が当該漁業に参加することを許すものとする．右の取締は．当該区域の一般的地位が公海であることに影響を及ぼすものでない。

国際法委員会の本条に対する註解によれば，この取締権は大陸棚の管轄権とは全く別個の権利であり，公海の定着性水族漁場の特殊事情に基づいて認められる特殊の権利である．（註解3）またこの取締権の内容は厳重にその目的の達成上本質的なものに限定され，従てこの取締権を沿岸国に対して認めることは，当該漁業区域の一般的地位が公海であることに影響しない．（註解4）

然し問題は，かかる取締権の基礎として認められる公海漁場の特殊事情とは如何なる事情であるかということである．前記第3条の規定には，沿岸国が公海の定着性水族漁業を長期に亘り維持し実行してきたことが右特殊事情の一条件であることを示しているが，特殊事情の内容の詳細は不明である．また国際法委員会の本条に対する註解並に同委員会の議事要録などによつても，その詳細を明らかにすることはできない．

私見によれば，公海漁業の取締権の基礎として公海漁場に認められることのある特殊事情の内容を明らかにしているのは，日米加漁業条約の資源保存水域の理論である．

定着性水族漁業については，他の公海漁業に比し資源保存水域の設定を妥当とする場合が多いであろう．何故ならば定着性水族は他の水族に比し速かに資源の限度まで漁獲され易いからである．然し人類の利益のため資源保存を必要とするのは，定着性水族のみでない．日米加漁業条約はベーリング海を含む北太平洋東部のサケ，オヒヨウ及びニシンにつき資源保存水域を設定した．大陸棚理論が公海漁場の特殊事情を定着性水族漁業の場合のみに限つているのは理由に乏しい．

次に沿岸国が，資源保存水域において保存の目的たる魚種を漁獲する権利を認められることは，非沿岸国の場合に比して多いであろう．何故ならば沿岸国は，その領海に隣接する公海の区域において当該保存魚種を実質的に漁獲している場合が多いと認められるからである．然し非沿岸国が，沿岸国と共に公海の一定区域において，一定魚種をその資源の限度まで漁獲している場合には，その非沿岸国に対しても，資源保存水域内において保存魚種を継続して漁獲する権利を認めるのは条理である．現に日米加漁業条約には，締約国が実質的漁獲を行つたことがあると認められる魚種については，その締約国の自発的抑止を勧告してはならないと規定している（第四条第1項但書）．国際法委員会の採択した条項案が，非沿岸国のかかる権利を明らかにしていないのは理由に乏しい．のみならずその条項案には，非沿岸国が領海に隣接する公海の定着性水族漁業を行うについては沿岸国の「許」を得なければならないことを規定している．沿岸国にそのような優先的権利を認めることは，更に理由に乏しいといわなければならない．