THE INCORPORATION OF CONTINENTAL SHELF RIGHTS INTO UNITED KINGDOM LAW

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I. INTRODUCTION

On 9 September 1958 the UK government signed the Convention on the Continental Shelf, which had been concluded in Geneva on 29 April 1958 following a UN conference on the law of the sea at which three other conventions were concluded. On 11 May 1964 it ratified the Convention, which came into force on 10 June 1964. Meanwhile, on 15 April 1964, the Continental Shelf Act received the royal assent. Although the Act’s long title indicates that it gives effect to certain provisions of the Convention on the High Seas, it does not expressly mention the Continental Shelf Convention. Yet the relationship between this Convention and the Act is more than a mere coincidence of time and title. It is the purpose of this article to investigate only one of the many important problems to which this relationship gave rise, namely how the basic concept of continental shelf rights as embodied in Article 2(1) of the Convention was incorporated into UK law. Other problems, such as the application to the shelf of UK civil and criminal law, will have to await discussion elsewhere.

At the outset, it is convenient to set out those provisions of the Convention on the Continental Shelf and of the Continental Shelf Act 1964 which are of particular relevance to this investigation.

Article 2(1) of the Convention reads: “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.” Paragraph 2 of Article 2 provides that these rights are exclusive to the coastal State and paragraph 3 that they do not depend on occupation or proclamation. Paragraph 4 defines “natural resources” to be the mineral and other non-living resources together with living organisms belonging to sedentary species. Article 1 of the Conven-

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1. The archival material cited, which is the subject of Crown copyright, is taken from the Public Record Office groups FO (Foreign Office), CO (Colonial Office), CRES (Crown Estate Office), POWE (Ministry of Power), PREM (Prime Minister’s Office) and CAB (Cabinet Office). The departmental file number, where available, has been given in square brackets after the Public Record Office reference. The records of the Office of Parliamentary Counsel are not open to public scrutiny.

2. These were the Convention on the High Seas, the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on Fishing and Conservation of the Living Resources of the High Seas.


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tion defines the continental shelf as the seabed and subsoil adjacent to the coast but outside the territorial sea, to a depth of 200 metres or, beyond that limit, to where exploitation of the natural resources may be carried out. One further provision should be mentioned, namely Article 7, which preserves the right of the coastal State to exploit the subsoil by means of tunnelling.

Section 1(1)–(3) of the Continental Shelf Act 1964 provided in material part:

1. Any rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and their natural resources, except so far as they are exercisable in relation to coal, are hereby vested in Her Majesty.

2. In relation to any coal with respect to which those rights are exercisable the Coal Industry Nationalisation Act 1946 shall apply as it applies in relation to coal in Great Britain, but with the modification that the National Coal Board shall not engage in any operations for the purpose of working or getting the coal without the consent of the Minister of Power, which may be given on such terms and subject to such conditions as he thinks fit.

3. In relation to any petroleum with respect to which those rights are exercisable sections 2 and 6 of the Petroleum (Production) Act 1934 (which relate to the granting of licences to search and bore for, and get, petroleum) shall apply as they apply in relation to petroleum in Great Britain, ...

The Act does not enumerate which rights are "exercisable by the United Kingdom" nor does it define in spatial terms the area of the seabed and subsoil in which they are exercisable, except to the extent that the area must lie "outside territorial waters". Section 1(7), however, provides a means of clarification:

Her Majesty may from time to time by Order in Council designate any area as an area within which the rights mentioned in subsection (1) of this section...

5. Art.77(1) of the UN Convention on the Law of the Sea 1982, which is in force but to which the UK is not yet a party, is identical to Art.2(1) of the 1958 Convention. The other provisions of the 1958 Convention mentioned here have substantially similar counterparts in the 1982 Convention, with the notable exception of Art.1, since Art.76 of the 1982 Convention defines the extent of the shelf in a radically different way.

6. Subs.1 remains unamended. Subs.2 has been repealed by the Coal Industry Act 1994 which by its s.8(1) and (2) deems the interests in unworked coal and coal mines "outside Great Britain and the territorial sea adjacent to Great Britain" which were vested in the British Coal Corporation to be "the exclusive right" of searching or boring for coal; by s.7(3), such interests are "vested" in the Coal Authority.

7. The expression "territorial waters" is no longer used in international instruments, being replaced by the term "territorial sea". Its use in UK legislation raises the question whether it refers only to the belt of uniform width now called territorial sea in international law, or whether it refers to the entire maritime area out to the seaward limit of the territorial sea, thus encompassing, in international law terminology, both territorial sea and internal waters.
are exercisable, and any area so designated is in this Act referred to as a designated area.

Relevant provisions in two other statutes should be mentioned at this point. First, section 1(1) of the Petroleum (Production) Act 1934, which covered both oil and natural gas, provided:

The property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty, and His Majesty shall have the exclusive right of searching and boring for and getting such petroleum.

Second, section 1(1) of the Coal Industry Nationalisation Act 1946 had established the National Coal Board with a duty of "working and getting the coal in Great Britain" and under section 5(1) of and Schedule 1 to the Act "interests in unworked coal" were vested in it.

II. THE UNITED KINGDOM'S PERCEPTION OF THE LEGAL NATURE OF THE CONTINENTAL SHELF PRIOR TO SIGNATURE OF THE 1958 CONVENTION

A. In International Law

For many years prior to 1958, the official UK view was that the seabed and subsoil up to the seaward limit of the territorial sea, assumed in the United Kingdom's executive practice to be a belt of three nautical miles in breadth, was, as a matter of international law, under the sovereignty of the coastal State. Indeed, it was the UK delegation at the UN Conference on the Law of the Sea in Geneva which proposed, as a true reflection of existing customary law, the formulation which became Article 1(1) of the Convention on the Territorial Sea and the Contiguous Zone, 1958, which the United Kingdom likewise signed on 9 September 1958. This reads: "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."

Beyond the territorial sea, however, the United Kingdom's perception of the international legal status of the seabed and subsoil passed through at least four different stages prior to its signature of the Continental Shelf Convention in 1958. The stages reflected a shift from regarding the shelf as...
a territorial concept, capable of ownership like the dry land, towards regarding it as an extraterritorial area in which there was an exclusive coastal State management regime over the natural resources. They evolved from initial British concern, expressed mainly by the Foreign and Colonial Offices, to secure coastal State control of exploitable oil resources located off the coasts of certain overseas territories, towards an appreciation by the Ministry of Power and the Crown Estate Office that similar problems could arise in respect of a range of mineral resources off the coasts of the United Kingdom itself.

1. The res nullius/occupation/sovereignty stage

When the legal nature of the submarine area beyond the belt of territorial sea began to become a subject of interest, the official view which came to prevail was that it was a res nullius, with the implication that sovereignty over it could be acquired by State acts of effective occupation, provided that the freedom of the superjacent waters was not impaired. It was Sir Cecil Hurst, the principal legal adviser to the Foreign Office and later a judge of the Permanent Court of International Justice, who expressed influential academic views to this effect, first in an article published in 1923 which dealt mainly with the surface of the bed of the sea and, two years later, more specifically in the context of international law, in a contribution to the Hague meeting of the Institut de Droit International in 1925. Shortly after this, Arnold McNair, who later became a judge of the International Court of Justice, in his 1928 edition of the first volume of Oppenheim's International Law, considered that sovereignty over the surface of the bed of the high seas could be acquired by local occupation; its subsoil, furthermore, was "no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial sea". It was to these writings that Foreign Office legal advisers turned when they had to express the British view of contemporary international law to those interested in offshore oil exploration by means of drilling rigs located outside the territorial sea.

In response to interest from oil companies, the British government put this view to practical use on 6 August 1942 when, having first concluded a treaty with Venezuela to recognise each other's claims to sovereignty over defined parts of the submarine land of the Gulf of Paria, it promulgated

12. "Whose is the Bed of the Sea? Sedentary Fisheries outside the Three-mile Limit" (1923-4) 3 B.Y.I.L. 34.
15. See Marston, op. cit. supra n.10, at pp.231-235; also Foreign Office to Anglo-Iranian Oil Company, 29 Nov. 1938 (FO 371/21896 [E 7138/201/34 of 1938]).
16. 205 L.N.T.S. 121.
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under the royal prerogative the Submarine Areas of the Gulf of Paria (Annexation) Order 1942, by which parts of the submarine area in the Gulf of Paria outside the territorial sea of the colony of Trinidad and Tobago were “annexed to and form part of His Majesty’s dominions and shall be attached to the Colony of Trinidad and Tobago for administrative purposes”. This “paper occupation” was far removed from the tunnelling which Arnold McNair regarded as necessary.

2. The res nullius/proclamation/sovereignty stage

After the Second World War the United Kingdom had to respond to relevant commercial influences in two overseas areas: first, a continuing pressure to establish a regime for oil exploration and exploitation off the coasts of certain British colonies; and, second, similar pressure in respect of the Persian Gulf, on one coast of which were a number of coastal sheikdoms under treaties of protection with the United Kingdom, together with Saudi Arabia which, though not a protected State in the formal sense, was dependent upon legal and political advice from US sources, both governmental and commercial. On the opposite coast was Persia.

The Foreign and Colonial Offices were considering the possibility of action similar to that taken in the Gulf of Paria in respect of submarine areas beyond the territorial seas of the Bahamas and Jamaica colonies, to be preceded by a treaty of mutual recognition with the United States, when in May 1945 the US State Department gave early warning to the British Embassy in Washington of the United States' intention to proclaim, inter alia, that the natural resources of the bed and subsoil of the shelf beneath the high seas contiguous to its coasts appertained to the United States and were subject to its jurisdiction and control. The United States' proposed action produced mixed feelings among the British government legal advisers. On the one hand, it was considered that unilateral action was inappropriate and that title to such areas could be built up only through recognition by other States of the coastal State's claim, as the United Kingdom had sought to do through the treaty with Venezuela. Furthermore, the proposed proclamation was considered to be far too imprecise in the area it covered and to dispense with what was considered by the British advisers to be the necessity for effective occupation. On the other hand, the proposed proclamation had the merits of avoiding a need for effective occupation and of preventing a State other than the coastal State from gaining sovereignty over the shelf adjacent to the territorial sea by pre-emptive occupation.

17. 144 British and Foreign State Papers 970–971.
The decision was taken to maintain an official British silence and to adopt a policy of "non-association" with regard to what became known as the Truman Proclamation of 28 September 1945. Behind the scenes, however, there was much activity. On 19 September 1945 the Foreign Office Legal Adviser, W. E. Beckett, minuted:

20. It is now necessary ... that the policy of His Majesty's Government with regard to the sub-soil beneath the sea immediately adjacent to territorial waters should be determined. This declaration of the United States is now a fact. It may be right in law or wrong in law, but the declaration has been made by a great and very determined power. We have got to be careful that we do not get the worst of both worlds ... It is a fact, moreover, that the United States are doing (improperly no doubt as we think) by unilateral declaration, the same thing as we wanted to do by agreement in the case of the Bahamas. It therefore is a matter for serious consideration whether our policy should not be one of making reservations to the United States declaration but in fact of adopting it ourselves in cases where it suits us.

Beckett convened an inter-departmental meeting on 16 January 1946. Its conclusions read in part:

21. That it appears that the policy for His Majesty's Government to adopt would be publicly to recognise that the principles contained in the United States proclamation with respect to natural resources of the sub-soil and seabed of the continental shelf are sound and of general application.

The meeting also agreed that the Governors of the Bahamas and Jamaica should make proclamations applying these principles.

The Secretary of State for Foreign Affairs, Ernest Bevin, considered that the matter had to go to Cabinet, particularly in view of the implications for the Persian Gulf. Beckett accordingly began to draft a memorandum for Bevin to present to Cabinet. On 16 October 1946 he submitted a draft to Bevin, who minuted upon it:

22. I have never felt difficulty so far as the Bahamas or West Indies is concerned, but the Persian Gulf is political dynamite. It will have to be handled carefully. I must have a little more time to study it. See me about it but you can go ahead with the rest.

On the basis of Bevin's authority, which was not countermanded by the Cabinet when the final memorandum was put before it at its meeting on 4 November 1948, the boundaries of a number of British colonies were extended by Orders in Council promulgated under the Colonial Bound-

20. FO 371/50390 [W 15262/1276 of 1945].
21. FO 371/54741 [W 1075/39176 of 1946].
22. FO 371/51708 [AN 3286/307/45 of 1946].
23. CAB 128/13 [CM. (48) 68th Conclusions, item 5].
aries Act 1895 so as to incorporate the bed and subsoil of the continental shelf within the colony. These were the Bahamas (Alteration of Boundaries) Order 1948 (S.I. 1948 No.2574), the Jamaica (Alteration of Boundaries) Order 1948 (S.I. 1948 No.2575)—which included that colony’s dependencies of Turks and Caicos Islands and Cayman Islands—the British Honduras (Alteration of Boundaries) Order 1950 (S.I. 1950 No.1649) and the Falkland Islands (Continental Shelf) Order 1950 (S.I. 1950 No.2100). The practical reason for these extensions was the commercial interest in offshore oil extraction, except for the Falkland Islands where the extension was a diplomatic tactic to counter a claim by Argentina in 1946 to a continental shelf and “epicontinental sea”.

The Foreign Office, with Cabinet authority, in March 1949 advised the Persian Gulf sheikdoms under British protection to issue continental shelf proclamations on the basis of a model provided to them which followed the lines of the Truman Proclamation. One of the model’s preambular recitals was of particular note. It read: “Whereas the right of a littoral State to exercise its control over the natural resources of the seabed and subsoil adjacent to its coasts has been established in international practice by the action of other States;...”. The rulers adopted the model text, translated into Arabic, as the content of their proclamations made in June 1949.

3. The inherent right/proclamation/sovereignty stage

Although the policy of the UK authorities was now to follow the principles of the Truman Proclamation, they thought that the basis of that instrument was the annexation of a res nullius notwithstanding the view of the State Department’s lawyers to the contrary. Beckett, in particular, minuted on 11 August 1948 that “we cannot as a matter of public international law, understand how a state can acquire jurisdiction and control over the continental shelf outside its territorial waters except by annexing it as res nullius”. That the res nullius theory was still alive was illustrated by a remark in the House of Commons by the Secretary of State for the Colonies on 22 November 1950. When asked to whom did the shelf off British Honduras belong before the Order in Council extended its boundaries, he replied: “I understand that it belonged to nobody.”

In March 1951, however, Beckett attended a conference with State Department and Department of Justice lawyers in Washington on the
subject of the law of the sea at which he radically realigned his earlier views.\textsuperscript{29} Substantially at Beckett's initiative, the meeting agreed on a concept of the shelf which was not based on a \textit{res nullius} theory but on that of an "inchoate right" which a coastal State might perfect through declaration or similar formal instrument.

The deliberations in the International Law Commission on the subject of the shelf gave the United Kingdom the opportunity to advance the revised view.\textsuperscript{30} At its third session, in 1951, the special rapporteur, J. P. A. François, put forward a draft Article 2 as follows: "The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources."\textsuperscript{31} The Commission wrote in a note accompanying the draft Article:\textsuperscript{32}

It would seem to serve no purpose to refer to the sea-bed and subsoil of the submarine areas in question as \textit{res nullius}, capable of being acquired by the first occupier. That conception might lead to chaos, and it would disregard the fact that in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which the submarine areas are contiguous.

It went on:

Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters.

In a letter to the Secretary-General of the United Nations dated 2 June 1952 the UK government commented on the draft articles. With regard to draft Article 2, the comments read:\textsuperscript{33}

Her Majesty's Government would prefer to say that "the continental shelf is subject to the sovereignty of the coastal State". In the opinion of Her Majesty's Government there is no sufficient reason for substituting for the familiar concept of "sovereignty" the new and undefined expression "control

\textsuperscript{29} FO 371/93296 [GW 1/7 of 1951].
\textsuperscript{30} On 24 Apr. 1951 the Foreign Secretary, now Herbert Morrison, distributed to British diplomatic missions a memorandum on the subject of the shelf, prepared by the Foreign Office legal advisers, which stated that the government had so far adopted the position that the shelf was \textit{res nullius}, "capable of occupation so long as such occupation is effective, i.e., real physical exploitation"; the memorandum here added that the requirement of effective occupation was interpreted "rather liberally" (FO 371/91892 [UE 1271/34 of 1951]). The Foreign Office as late as 11 Mar. 1963 in a memorandum submitted to the Law Officers of the Crown stated that "in customary international law the sea-bed and the subsoil of the high seas are generally regarded as being capable of occupation as \textit{res nullius}" (FO 371/171092 [GW 1/15 of 1963]).
\textsuperscript{31} (1951) II Y.B.I.L.C. 141.
\textsuperscript{32} \textit{Idem}, p.142.
\textsuperscript{33} (1953) II Y.B.I.L.C. 267.
... even though the two expressions are probably intended to have the same meaning.

In the opinion of Her Majesty's Government the rights of the coastal State over the continental shelf are of the same nature as its rights over its land territory, and it would be desirable to state this precisely in the draft. Her Majesty's Government agree that it is for the time being impracticable to develop submarine areas internationally; that the continental shelf is not res nullius; and that the right to exercise sovereignty over the continental shelf is independent of the concept of occupation.

In its practice, the United Kingdom continued to promulgate instruments under the Colonial Boundaries Act 1895 extending colonial boundaries to embrace the adjacent shelf, that is, to act on the basis that the shelf was the subject of sovereignty. The instruments promulgated after the date of the above letter of June 1952 were the North Borneo (Alteration of Boundaries) Order 1954 (S.I. 1954 No.838), the Sarawak (Alteration of Boundaries) Order 1954 (S.I. 1954 No.839) and the British Guiana (Alteration of Boundaries) Order 1954 (S.I. 1954 No.1372). Although the wording of these instruments was substantially similar to that of the 1948 and 1950 Orders, the legal theory underpinning them might have been different. Whereas the earlier Orders had been considered necessary both to convert the shelf from its former res nullius status to that of British territory and to ensure that such territory fell within the boundaries of a colony, the 1954 Orders might have been considered necessary only for the latter purpose, since British sovereignty over the shelf was considered already to exist, at least in an inchoate form. This change can be clearly seen in some practice in 1957 when the Colonial Office was faced with a request that the continental shelf off Nigeria might be annexed by Order in Council. On 8 August 1957 the Colonial Office notified the Governor-General of Nigeria that "it is now fairly settled law that the shelf adjacent to any territory is appurtenant to it in much the same way that territorial waters are". These words were taken verbatim from a letter of 16 May 1957 sent to the Colonial Office by the Foreign Office. The Colonial Office notification to Lagos went on: "But appropriation of the shelf by means of an Order-in-Council is considered necessary in municipal law so that there can be no doubt about the power of the local legislature or legis-

34. On 30 June 1954 the British Resident in Brunei, a State under British protection, promulgated a proclamation by command of the Sultan by which the continental shelf "beneath the high seas contiguous to the territorial waters of Brunei, is hereby annexed to and shall form part of the State of Brunei" (Laws of Brunei, rev. edn, 1984, Vol IX, supp.II).
35. But not identical in that the 1948 and 1950 Orders described the relevant shelf as "contiguous to the coasts" whereas the 1954 Orders used the words "contiguous to the territorial waters".
36. CO 1029/256 [PMD 138/14/07].
37. Ibid.
atures to make law for the shelf.” The despatch referred to the articles adopted by the International Law Commission at its 1956 session and continued:

These articles are acceptable to Her Majesty’s Government though, inter alia, Her Majesty’s Government take the view that the coastal state has sovereignty not merely sovereign rights for the purposes of exploring and exploiting.

4. The exclusive and inherent sovereign rights stage

The International Law Commission’s draft article, whereby a coastal State had exclusive sovereign rights for the exploration and exploitation of the natural resources of the shelf, continued, as Article 68, into the Commission’s articles of 1956 on the law of the sea which provided the basis for the deliberations of the UN Conference on the Law of the Sea in 1958. At the Conference the UK delegation did not seek to support the concept of sovereignty for the shelf and voted for the text which became Article 2 of the Convention on the Continental Shelf. In reporting to Parliament in November 1958 on the work of the Conference, the Secretary of State for Foreign Affairs wrote:

The Convention does not provide that the coastal State has “sovereignty” over the continental shelf; the concept of full sovereignty over the continental shelf outside territorial waters was considered to be inconsistent with the concept of the legal status of the superjacent waters as high seas and that of the air space above those waters, a concept which is specifically affirmed in Article 3 of the Convention.

B. In United Kingdom Law

The prevailing executive opinion in the period prior to the signature of the 1958 Conventions was that the seabed and subsoil at least up to the seaward limit of the territorial sea of the United Kingdom were part of the Crown Estate and under the management of the Crown Estate Commissioners established by Crown lands legislation. This view derived not so much from the rule of customary international law whereby coastal States possess sovereignty to this limit, but from a perception of the his-

40. Cmnd.584, pp.11–12.
41. See Marston, op. cit. supra n.10, at chap.VIII. There was little if any practice beyond that limit apart from the sale to the Earl of Lonsdale, in 1880, of the Crown’s rights and interests in unworked mineral substances to a distance of 10 miles from the coast of Cumberland. A century later, this transaction, which might be explicable on the assumption that the locus was within the Solway Firth, led to litigation (Earl of Lonsdale v. Attorney-General [1982] 1 W.L.R. 887).
historical claims of ownership by the Crown in both England and Scotland. The history of these claims had been described in his 1923 article by Sir Cecil Hurst, who concluded that as regards Great Britain “the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea”.42 A similar view was taken in respect of British dependent territories, or at least those in which the English common law ran.43 The Commissioners, who had the statutory duty of administering the Crown Estate, considered that their jurisdiction extended at least to the seaward limit of the territorial sea and acted accordingly in making grants, leases and licences for purposes of construction and of mineral dredging and extraction. The Commissioners’ contemporary view of the extent of Crown ownership is indicated in a memorandum on the subject of foreshore and seabed which they issued on 7 August 1958:44

Not only the foreshore (excluding foreshore under the control of the Duchies of Lancaster and Cornwall...) but also the bed of the sea below the seaward limit of the foreshore and within territorial waters, and of every channel, creek, estuary, and of every navigable river as far up as the tide flows, are vested in Her Majesty The Queen, in right of Her Crown, except in so far as Her Majesty or Her royal predecessors has or have granted part thereof to any person or corporation.

Even assuming that there had been, in Hurst’s words, a “silent abandonment” of a property claim to submarine areas beyond the territorial sea in general, at least one legal ground was perceived to support Crown proprietary rights in specific areas. In his 1923 article Hurst wrote as follows: “where effective occupation has been long maintained of portions of the bed of the sea outside the three-mile limit, those claims are valid and subsisting claims, entitled to recognition by other States”.45 As long ago as 1875, the British members of a joint Anglo-French Commission on the Channel Tunnel had given its view that if a tunnel were driven out from shore in Kent beyond three miles it would be situate in England, and would belong to the Crown (and become subject to the jurisdiction of the British Parliament), if by no other title, at all events by the title which would be derived from the first occupancy and

42. (1923-24) 4 B.Y.I.L. 34, 43.
44. CRES 58/1020 [Foreshores 25316]. A copy of this memorandum was provided to Sir Jocelyn Simon S.-G. for his use in the Committee debates on the Crown Estate Bill in the House of Commons in July 1961 (ibid.).
45. (1923-24) 4 B.Y.I.L. 34, 43.
46. C.3358, p.87. When the problem arose in practical terms more than a century later, it was resolved statutorily by incorporating the land comprising the tunnel system “so far as not comprising part of the United Kingdom” into England “as it becomes occupied” (Channel Tunnel Act 1987, s.10(1)) and vesting it in the Secretary of State (s.7(1)).
possession of that which would be practically a prolongation of, or an addition to, the territory of the country from or in which the mine or tunnel was driven.

It was even considered within the Crown Lands Office that although the seabed beyond the territorial sea was "the property of no person", the issue by the Crown of leases and licences to mine coal there would allow the Crown to register itself as "owner" of such unworked coal under the Coal (Registration of Ownership) Act 1937.47

In the years immediately before the conclusion of the Convention on the Continental Shelf there were a few examples of practice in respect of the submarine area beyond the three-mile limit which raised relevant legal questions within government departments. In November 1954 the National Coal Board, which wished to carry out boring operations from fixed towers erected within three miles of the low-water mark in the Firth of Forth and on the coast of Durham, requested the Ministry of Fuel and Power to obtain an assurance from "the appropriate Department" that these proposed operations were situated "within Great Britain". The Board wrote that it had received counsel's opinion that there was "a slight doubt" on this. The Ministry of Power, however, advised the respective Minister in the Home Office and the Scottish Office "not to make a declaration which, apparently could involve him and the Courts in grave embarrassment".48 It later emerged that operations beyond three miles were also envisaged. On 31 August 1956 a legal adviser in the Treasury Solicitor's branch in the Ministry of Fuel and Power, G. E. Johnstone, minuted that he had consulted the Foreign Office's first legal adviser, Sir Gerald Fitzmaurice, who had told him that whereas the seabed and subsoil exceeding the three-mile limit "could be said to constitute a sort of projection under the sea of Great Britain" the sea itself beyond three miles could under no circumstances be held to be within Great Britain.49 Consequently, as the proposal would have involved activity in the water column, Johnstone considered that an order under section 2 of the Coal Industry Act 1949 would be necessary to authorise the proposed operations. This section prohibited the National Coal Board from carrying on any activity "outside Great Britain" without authority conferred by a ministerial order. Accordingly, the National Coal Board (Overseas Activities) (Amendment) Order 1957 (S.I. 1957 No.389) was promulgated on 11 March 1957, permitting "searching and boring for coal in the North Sea outside international waters but not beyond a distance of ten miles from the coast".

47. Minute dated 21 Oct. 1938 by Crown Lands Office's solicitor (CRES 36/85 [GEN 509]). See also Marston, op. cit. supra n.10. at pp.186-191.
48. POWE 37/325 [B 25/34/1].
49. Ibid.
The Crown Estate Office was involved in a further piece of significant practice in October 1957 when the Welsh Office asked it whether it had jurisdiction beyond the territorial sea in respect of the licensing of the removal of sand and gravel.\(^{50}\) A legal adviser in the Crown Estate Office, J. G. Allan, who had been provided with a typescript copy of Hurst’s 1923 article, minuted on 7 November 1957:

The Crown’s claim to the bed of the sea was formulated before the doctrine of the three mile limit was propounded. It follows therefore, in my opinion, that, although there may have been a non-enforcement of the Crown’s rights to the soil of the sea beyond the three mile limit, those rights can be reasserted by the successful exercise of acts of ownership. Such Crown ownership is implicit in the Sea Fisheries Acts and was specifically recognized in assessing the compensation paid to the Crown under the Coal Act, 1938, since some of the Crown’s undersea mines (e.g. at Whitehaven) in respect of which compensation was paid extended beyond the three mile limit.

The Crown Estate Office accordingly informed the Welsh Office that “we are advised that there is no reason why the Crown should not exercise acts of ownership over the bed of the sea beyond the three-mile limit, especially in a case where such acts are carried out in conjunction with the occupation of the soil beneath territorial waters”.

These were isolated incidents and it appears that official interest in the submarine area beyond the territorial sea of the United Kingdom was low even up to the eve of the conclusion of the 1958 Convention. Thus, in a parliamentary reply on 23 April 1958, the Minister of State at the Foreign Office observed: “I understand that, with the possible exception of the Channel Tunnel, the development of the Continental Shelf of the United Kingdom is not a burning question, and so far as I am aware no plans have yet been made to deal with it.”\(^{51}\)

Likewise, in a memorandum to Cabinet of 16 June 1958 which recommended that all four Geneva Conventions and the optional protocol on the settlement of disputes “should be signed with a view to ratification in due course”, the Secretary of State for Foreign Affairs saw no immediate interest in the shelf adjoining the United Kingdom when he wrote:\(^{52}\)

The United Kingdom has a special interest in respect of the continental shelf lying off the shores of a number of Colonial territories and of the Sheikhdoms in the Persian Gulf; it may also become important for the exploitation of the sea bed surrounding Great Britain and the Channel Islands.

\(^{50}\) CRES 37/1534 [Foreshores 25073].
\(^{51}\) *HC Hansard*, 5th ser., Vol.586, col.926.
\(^{52}\) CAB 129/93 [C. (58) 126].
C. Conclusion on Pre-Signature Position

It would appear that the UK government, having come to support the concept of the legal nature of the continental shelf which became expressed in Article 2 of the Convention, had earlier purported to acquire areas of shelf adjacent to certain colonies on the basis of a view of international law which was not embodied in the Convention and was probably incompatible with it. Furthermore, while the Crown considered that the bed and subsoil to the limits of the territorial sea were Crown land, it was not clear whether it had made an unequivocal and general "silent abandonment" of its historical claims to ownership of submarine land beyond the limits of the contemporary territorial sea, as opposed merely to the non-enforcement of them.


A. The Colonial Boundary Extensions

The Colonial Office initially adopted a wide interpretation of the words "sovereign rights" in Article 2(1). In a circular dated 22 October 1958 sent to the governments of all the dependent territories with a sea coastline, the Secretary of State for the Colonies stated:53

Article 2 provides for the sovereignty of the coastal state over the continental shelf for the purposes of exploring it and exploiting its natural resources. This is a restricted sovereignty but the main intention of the drafting was to ensure that no claims to sovereignty over its superjacent high seas (which might have led to indefinite extensions of the territorial sea) could be based upon it.

About the time that the Geneva Conference was adopting the final text of the Convention on the Continental Shelf in April 1958, the government of the colony of Trinidad and Tobago raised with the Colonial Office the possibility that a boundaries extension Order in Council might be promulgated to include within the colony certain parts of the submarine land south-west of Tobago and south-east of Trinidad where oil companies were interested in having licences for drilling. The areas lay outside those covered by the Gulf of Paria Order of 1942. Within the Colonial Office, D. G. Gordon-Smith, one of its legal advisers, minuted on 18 June 1958 that in the light of the Convention's use of the term "sovereign rights" it seemed doubtful whether the Crown could in future annex the shelf or maintain that it was under its complete sovereignty.54

53. Circular 1137/58 (CO 1029/256).
54. CO936/590 [IRD 313/269/01].
Gordon-Smith’s minute was sent to the Foreign Office under cover of a letter dated 7 August 1958 asking whether annexation of the shelf would be precluded by international law in the light of Article 2(1) of the Convention.\textsuperscript{55} In a reply dated 30 October 1958 the Foreign Office must have intimated that annexation was no longer an option.\textsuperscript{56} The reply was not satisfactory to Gordon-Smith. In a minute dated 15 December 1958 he wrote:\textsuperscript{57}

A country has sovereignty over the seabed and subsoil under its territorial waters because it is under those waters; it has sovereignty, or as the case may be, sovereign rights over the continental shelf for different reasons. If nevertheless the distinction between sovereignty and sovereign rights for certain purposes is as important as the Foreign Office thinks it is, the question arises what should we do about colonial continental shelves which have already been annexed. To undo the annexation may not be as easy as the original annexation since, at first sight, it seems possible that Parliament’s approval, given by Act of Parliament, might be necessary.

By a letter dated 23 December 1958 the Colonial Office again referred the matter back to the Foreign Office, this time telling them that the Trinidad authorities now wanted the submarine areas in the Gulf of Paria, which had been administratively attached to the colony, to be brought within the colony’s boundaries.\textsuperscript{58} In Nigeria, too, there was interest in the possibility of annexation of the continental shelf for the facilitation of oil exploration.\textsuperscript{59} It would appear that this time the Foreign Office reply made it clearer that annexation was out of the question. Indeed, the Colonial Office told the Governor-General of Nigeria on 10 March 1959: “The Foreign Office have concluded that the wording of article 2(1) of the Convention on the Continental Shelf precludes incorporation of the Shelf adjacent to Nigeria within the boundaries of Nigeria.”\textsuperscript{60}

Consequently, the option of a boundary extension order being excluded, the Colonial Office put to the Law Officers of the Crown the question whether the legislature of a colony or protectorate might, by virtue of its power to make laws for the peace, order and good government of the territory, enact laws governing the exploration and exploitation of the natural resources of the continental shelf outside the territorial sea. The question raised not only an issue of international law, given the terms of Article 2(1) of the Continental Shelf Convention recently concluded, but also, in view of the perceived doctrine of colonial extra-colonial legislative

\textsuperscript{55} Ibid.
\textsuperscript{56} The Foreign Office reply is not found on file CO 936/590 and may be located on a file which is still subject to closure.
\textsuperscript{57} CO 936/590 [IRD 313/269/01].
\textsuperscript{58} Ibid.
\textsuperscript{59} CO 554/2109 [WAF 1029/3/01].
\textsuperscript{60} Ibid.
incompetence, one of imperial constitutional law. In the letter to the Law Officers, dated 13 March 1959, the Legal Adviser to the Colonial Office, Sir Kenneth Roberts-Wray, wrote in part: 61

It is... clear that it would be inconsistent with the Convention to which the United Kingdom is likely soon to be a party, to maintain that the continental shelf is part of Her Majesty's dominions and that Her Majesty exercises full sovereignty over it.

On 2 June 1959 the Law Officers, Sir Reginald Manningham-Buller A.-G. and Sir Harry Hylton-Foster S.-G., having regard in particular to Article 2(1) "which would, in our view, be regarded by the courts as embodying the relevant rule of public international law", wrote: 62

It seems to us to be clear that as against the States ratifying that Convention, colonial legislation relating to the exploration of the continental shelf and the exploitation of its natural resources would be valid in public international law.

On the point of the extraterritorial competence of colonial legislatures, the Law Officers advised: "In the present state of the authorities it is not possible to advise with complete confidence, but it seems to us that the risk of a successful challenge to the validity of such legislation is so insubstantial that the Colonial Governments concerned can properly be advised to accept it."

The Colonial Office thereupon drafted a circular despatch for the information of dependent territories and sent a copy to the Foreign Office for advice and clearance. A paragraph of the draft concerned the question whether the existing boundary extension orders should be amended or revoked. The Foreign Office's advice was given by J. A. C. Gutteridge, a legal counsellor.  63 She expressed the view that, with the exception of the Gulf of Paria Order, none of these orders had expressly purported to annex the continental shelf and their purpose was to extend the jurisdiction and control of the governments of the colonies over it for the purpose of the exploitation of its natural resources. 64 She thought that the orders should be left as they stood. The Colonial Office sent the final text as a circular, dated 5 November 1959, to all dependent territories with a sea coast. 65 Having stated that further "annexations" by Order in Council must be ruled out as inconsistent with the Convention and having set out

61. CO 936/590 [IRD 313/269/01].
62. Ibid. Original signed opinion.
63. Ibid. Transmitted in letter from K. J. Simpson to Aldridge dated 3 Sept. 1959.
64. The Colonial Office's principal legal adviser at this time, Sir Kenneth Roberts-Wray, writing later in retirement, remarked generally of the colonial boundary Orders in Council: "They did not use the word 'annex' but they must in fact have amounted to annexation" (Commonwealth and Colonial Law (1966), p.108).
65. Circular 1176/59 (CO 936590).
the gist of the Law Officers’ opinion, the circular contained a paragraph redrafted by Gutteridge which ran as follows:

It is not proposed to alter or revoke existing Orders relating to continental shelves, and if asked by other States how they are reconciled with the Convention, it would be said “... that the Orders were made before the nature of the coastal States rights under international law in respect of the Continental Shelf had been clarified by the Convention; that the purpose of the Orders made under the Colonial Boundaries Act, 1895, was to extend the jurisdiction of the Governments of the Colonies concerned so as to give them control over the seabed and subsoil contiguous to their coasts with a view to the exploitation of its natural resources; and that any rights now exercised under these Orders, or under the Submarine Areas of the Gulf of Paria (Annexation) Order, 1942, would be the rights recognised by the Convention”.

The later practice relating to this policy will be outlined later in this article.

B. Industry Interest in the United Kingdom Shelf

On 26 June 1958 the Cabinet, on the recommendation of the Foreign Secretary, had authorised the signature of all four Geneva Conventions, and the Optional Protocol, “with a view to ratification in due course”. The immediate departmental reaction to the signature of the Convention on the Continental Shelf on 9 September 1958 was that as it required 22 instruments of ratification or accession before coming into force some time would elapse before the United Kingdom would have to decide whether or not to become a party to it. This complacency was threatened, however, when the Shell Petroleum Company wrote on 19 May 1959 to the Petroleum Division of the Ministry of Power applying for an exclusive right to explore for and develop petroleum within an area in the North Sea extending from the seaward limit of the territorial sea between Flamborough Head and Lowestoft outwards to the outer limit of the shelf appertaining to the United Kingdom, which the company took for the purposes of its application to be the median line between the coasts of the United Kingdom and those of the opposite States. The area of the application, which was depicted on an accompanying map as extending northwards to include the Dogger Bank, was calculated by the company to cover some

66. CAB 128/32 Part 1 [C.C. (58) 50th Conclusions, item 5].
67. POWE 33/2487 [PE 1244/3/1].
21,620 square miles, to which it later added two more applications for areas further north covering 14,000 and 26,000 square miles respectively. The company expressed the view that the Petroleum (Production) Act 1934 and the regulations of 1935 made under it, being confined to "Great Britain", might not be applicable to such an area and that in any case their terms were not altogether suitable.

The Foreign Office, consulted by the Ministry of Power, distributed on 11 June 1959 a "preliminary study" relating to ratification of the Geneva Conventions. The document read in part:*

*The Continental Shelf Convention might require some amendment of existing United Kingdom legislation in respect of e.g. applications for permission to explore and exploit the "natural resources" (as defined in paragraph 4 of Article 2 of the Convention) of the Continental Shelf around the United Kingdom.*

The Foreign Office called an inter-departmental meeting on 26 August 1959 under the chairmanship of Sir Gerald Fitzmaurice to consider Shell’s application for North Sea prospecting rights. On the table was a letter of the same date from F. E. J. Behn in the Crown Estate Office which read (in full) as follows:*

*The Crown Estate Commissioners* are advised that, except in so far as it has been sold or granted away, foreshore (i.e. the land lying between high water mark and low water mark of tides) and the bed of the sea below the seaward limit of the foreshore and within the territorial sea, are in the Crown and under the management of the Commissioners under the powers conferred by the Crown Lands Acts 1829 to 1936, the Coast Protection Act 1949, and the Crown Estate Act 1956. For this purpose the Commissioners—and their predecessors before them—have restricted their management of the bed of the territorial sea to the present accepted limit of three miles, but they are of the opinion that, if by international agreement or otherwise the present limit were to be extended, the bed of the territorial sea*

68. FO 371/141783 [GW 11/10 of 1959]. The document was drafted by Butcheridge.
69. CRES 58/1020. The legal advice initiated in a minute dated 10 July 1959 by the Crown Estate Office’s legal adviser, Sir Francis Enever, in which he considered that it would be necessary for the statute implementing the Convention “to appropriate the Continental Shelf to the realm of England” and that it should be specifically provided that the management of the land so vested should be in the hands of the Commissioners under the Crown Lands legislation. The compatibility of this suggestion with the Convention’s provisions was, however, doubted within the Office. In a minute dated 25 Aug. 1959 Behn considered that it might not be expedient to seek by legislation to secure Crown ownership and management by the Commissioners of the submarine area beyond the present limit of the territorial sea, since this would focus attention on the fact that there was no existing legislation declaring Crown ownership of the bed of the sea below low-water mark (ibid).
as so extended should equally be regarded as belonging to the Sovereign in right of the Crown and would come under the Commissioners' management.

As regards the Continental Shelf the Commissioners note that the concept of full sovereignty over the Shelf outside territorial waters was considered to be inconsistent with the concept of the legal status of the superjacent waters as high seas, and that, therefore, only sovereign rights of exploration and exploitation of the natural resources in the Shelf are to be exercised. The Commissioners assume that when consideration is given to the question of the allocation of responsibility for the management of such rights, due regard will be paid to the facts that the seabed beneath adjacent territorial waters is regarded as being vested in the Sovereign in right of the Crown and consequently under the Commissioners' management.

Referring to this letter at the meeting, Fitzmaurice stated that whereas the Crown's rights in the land under the territorial sea were clear, there remained doubts over the submarine area beyond; although the Crown had probably lost such rights by desuetude it might be possible, though by no means certain, to maintain that the Crown still had prior rights in respect of the bed and subsoil outside territorial waters, as a continuation of historical claims. He went on:

Furthermore, under the Convention, the coastal State had sovereign rights for certain limited purposes, but not full sovereignty over the continental shelf. Legislation was therefore likely to be required to control the exploitation of the natural resources of the Continental Shelf adjacent to the United Kingdom, but outside the territorial sea. Such legislation would, presumably, provide for the granting of licences.

The meeting decided, inter alia, that in principle it would be preferable first to initiate discussions with the other North Sea riparian States with a view to division of the area; meanwhile, the Ministry of Power would coordinate discussions with other departments as to what type of legislation would be necessary.

The following day Johnstone, who had been at the meeting, wrote to Fitzmaurice. He expressed the opinion that the Petroleum (Production) Act 1934 did not apply to any petroleum resources on the shelf since he considered that the shelf lay outside Great Britain. As for coal, an order under section 2 of the Coal Industry Act 1949 could empower the National Coal Board to carry on activities on the shelf though he wondered whether the Board would even then have a monopoly outside territorial waters. He

70. Ibid.
71. FO 371/141805 [GW 13/13 of 1959].
concluded by speculating whether Article 7 of the Continental Shelf Convention removed tunnelling from the land from the effects of the other provisions of the Convention, so that a coastal State could tunnel through the shelf up to the territorial sea of an opposite State.

In Fitzmaurice's absence, the reply to Johnstone's letter was written and signed on 8 September 1959 by Gutteridge, who had also attended the meeting. She remarked that "we entirely accept your view that the continental shelf adjacent to, but outside, our territorial waters does not constitute an extension of Great Britain, and therefore that the Act of 1934 does not affect the position of such areas of the Continental Shelf and any petroleum resources which there may be within its strata". As for tunnelling, Gutteridge considered that this was still regulated by customary international law.

The Foreign Office called a further inter-departmental meeting, which met on 8 September 1960. It was there agreed that a comprehensive statute was needed, as contrasted with piecemeal amendment of existing statutes, though there was still "no desperate urgency".

IV. THE LEGISLATIVE INITIATIVE

Respectively for handling possible future legislation regarding the shelf was assumed reluctantly by the Ministry of Power in March 1961. It was not until 11 April 1962 that the matter came before the Cabinet's Future Legislation Committee. The outcome of their deliberations was summarised as follows:

The Government had taken the unusual step of ratifying the Geneva Convention on the High Seas (dating from 1958) without being in a position to implement its provisions. The Convention was likely to come into force during the 1962/63 Session, and the necessary United Kingdom legislation ought to be passed by then. It was also likely that the Geneva Convention on the Continental Shelf would soon be ratified by the other governments who had signed it. The possibility of combining these two Bills in a single Bill should be considered before a decision was reached on their place in the programme.

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72. Ibid.
73. FO 371/150847 [GW 13/14 of 1960].
74. POWe 33/2518 [PD 1146/30/28, Part 1]. See in particular Scholes to Crofton, 27 Mar. 1961, Crofton to Flett, 7 Apr. 1961, Flett to Crofton, 13 Apr. 1961, Procter to Scholes, 24 Apr. 1961, Scholes to Cabinet Office, 2 May 1961. At this time, further industry interest was manifested by the Natural Gas Development and Transportation Company, which expressed interest in gas prospecting on the Dogger Bank. In a letter to the company dated 30 May 1961 the Ministry of Power responded (FO 371/158729 [GW 13/10 of 1961]): "We are advised that the Government would have no authority to grant rights for exploration and development of petroleum resources beyond the three-mile limit until they obtain statutory powers to that effect." The Foreign Office concern with such interest was the possibility of "squatter's rights".
75. CAB 134/1925 (F.L.(62) 2nd Meeting) (original emphasis).
A possible future bill covering both high seas and shelf was allocated to an “in reserve” list of future measures.

In commencing the preparation of a paper for the Cabinet’s Home Affairs Committee, the Ministry of Power officials were faced with views advanced by the National Coal Board and the Crown Estate Office which required reference to the legal advisers in the Foreign Office.

It was found that the Coal Board had been working submarine mines, driven from the land, beyond the three-mile limit. Order in Council No.389 of 1957 empowered it to “search and bore” for coal in the North Sea outside territorial waters but not beyond a distance of ten miles from the coast. The Ministry of Power pointed out that in order to work coal in this extended area, as opposed to searching and boring for it, a further statutory order was necessary. The Deputy Secretary of the Coal Board, P. W. E. Currie, replied on 15 October 1962 that “the lawyers tell me that the extent of territorial waters is undefined” and, having contended that the Territorial Waters Jurisdiction Act 1878 did not impose a maximum distance for all purposes, he concluded that “we do not regard our operations beyond the three mile limit as being carried on outside of Great Britain”, but even if Great Britain were to end at three miles, underground operations beyond this distance would “extend the territory of Great Britain.”

In a letter to Sir Francis Vallat, Legal Adviser to the Foreign Office, dated 24 October 1962, Johnstone set out the Coal Board’s arguments and put the question to Vallat: “Where does Great Britain end?” Having pointed out that the question was relevant both to coal and to oil and gas, he concluded:

> It seems to me that we must endeavour to get it settled one way or the other, and since I have failed totally to discover any authoritative statement upon the exact point now in issue I feel that I must seek your assistance as the matter is essentially one of International Law, and if any one were able to speak with authority upon the point it would clearly be yourself.

When the Ministry of Power consulted the Crown Estate Office on the powers which the Office would require over the shelf, H. A. C. Gill, Deputy Commissioner in the Crown Estate Office, replied in a letter dated 4 September 1961, arguing that any sovereign right of exploration and exploitation on the shelf, other than for coal and petroleum, should be placed under the Crown Estate Commissioners’ management. He went

76. POWE 33/2550 [PD 1146/30/26].
77. POWE 37/492 [B 98/19].
78. POWE 33/2250 [PD 1146/30/26].
79. POWE 33/2552 [PD 1146/30/31]. The letter, which reproduced the first sentence of Allan’s minute of 7 Nov. 1957 mentioned above, was based on a minute by Enever dated 10 Aug. 1961 (CRES 58/1020) which had discussed the “conflicting decisions” relating to Crown property rights below the low-water mark.
on: “To achieve this, it would seem necessary that any prospective legislation should declare that such rights form part of the Crown Estate within the meaning of Section 1(1) of the Crown Estate Act 1961.” A year later, however, on 31 October 1962, Gill wrote to the Ministry of Power: 80

our view is that upon the ratification of the Convention relating to the Continental Shelf, the submarine areas covered by the extension of Sovereign rights will become part of the realm of the United Kingdom. The Sovereign is, under the feudal system which still exists, the ultimate owner of all land in the United Kingdom. The Continental Shelf must therefore vest in Her Majesty in right of Her Crown... Any rights exercised over the Continental Shelf can only be the acts belonging to the Crown’s rights of ownership and, therefore, are properly exercisable by the Crown Estate Commissioners.

The Ministry of Power officials were alarmed at this view, which they considered to be inconsistent with the position which they had adopted to date on the advice of the Foreign Office. Accordingly, Johnstone brought the letter to the attention of Vallat, stating 81

it would be to our considerable advantage if we could adopt the view of Gill and the [National Coal Board], because if it was certain that the Shelf became part of Great Britain it would automatically fall within the relevant provisions of the relevant Acts relating to petroleum and coal and it might well prove in the end that we did not need a Bill at all.

If, however, we adopt the other view which we have hitherto held, that there is a distinction between “Sovereignty” and “Sovereign Rights” in relation to certain specified matters, i.e. the exploration and exploitation of the Shelf, then we cannot I think accept the bulk of the propositions contained in Gill’s letter any more than we can those put forward by the Coal Board.

On 8 November 1962, Vallat replied to Johnstone’s letters on the two matters above. 82 He stated that although the distinction between “sovereignty” and “sovereign rights” was a fine one it was important to maintain it. He went on:

While I think that the position under the convention is clear, namely that Sovereignty does not extend beyond the territorial sea, it appears that there may be a number of complications under our domestic legislation for your Ministry, for the National Coal Board and for the Crown Estate Office.

He suggested that there should be a joint Foreign Office/Ministry of Power reference to the Law Officers of the Crown.

The Minister of State for Power, Richard Wood, submitted a memorandum on the subject of the Convention on the Continental Shelf, dated

80. CRES 58/1020. The letter was based on a minute by Enever dated 26 Oct. 1962 (ibid).
81. POWe 33/2550 [PD 1146/30/26].
82. Ibid.
26 November 1962, to the Cabinet's Home Affairs Committee.\(^{83}\) Having pointed out the substantial economic advantages through import replacement which might accrue on ratification of the Convention, he observed that, although the Convention could be ratified as a prerogative act without parliamentary approval, legislation was unavoidable, not only to impose duties on individuals to respect the prohibitions and obligations in the Convention but particularly to enable the government to assure oil companies of security of tenure in their operations. He continued: “I am advised that when the Crown acquires sovereign rights over the appropriate part of the Shelf the latter does not thereby in law become part of the United Kingdom.” After proposing that the legislation relating to petroleum and coal should be extended to the shelf, he stated that as regards the management of other resources “the Crown Estate Office propose, and other Departments agree, that the Crown Estate Commissioners should, with minor exceptions, be made responsible”. The Minister also remarked that it was expedient to implement provisions in the Convention on the High Seas, already ratified by the United Kingdom, by including in the same proposed legislation provisions for punishment and civil responsibility for those who damaged submarine cables and pipelines.

The Home Affairs Committee considered the memorandum at their meeting on 30 November 1962 and approved in principle its proposals for legislation in connection with the two Conventions.\(^{84}\)

Further pressure for speedy legislation occurred at this time when sand- and gravel-dredging companies operating off the coasts of Sussex, Essex and Suffolk asserted that no legal powers existed to control dredging outside the three-mile limit. The report of an inter-departmental meeting held on 8 January 1963 to discuss the matter stated\(^{85}\)

> the [Crown Estate] Commissioners had been advised that the Crown's claim to the bed of the sea was older than the doctrine of territorial waters

\(^{83}\) CAB 134/1992 [H.A. (62) 132]. Up to this time, there was little overt government perception of the prospective magnitude of the economic resource later to be exploited under the North Sea. Thus in his memorandum Wood wrote: “We cannot count on the discovery of worthwhile reserves of natural oil and gas there.” As late as 17 Apr. 1964, the Minister of Power told the Prime Minister that “only drilling could establish whether oil was present” (PREM 11/4812). It is likely, however, that the North Sea's potential was perceived by the oil industry, which was the major stimulant to government action.

\(^{84}\) CAB 134/1989 [H.A. (62) 18th Meeting]. During the audience which the Earl of Perth, First Commissioner of the Crown Estate, had with the Queen on 28 Nov. 1962, Her Majesty remarked that “she had seen something about the Crown Estate taking over rights on land under the sea”. The Earl of Perth reported afterwards that he feared that he was not very well informed and had to seek information from his office which he passed on to the Queen's Private Secretary for the further enlightenment of Her Majesty (Perth to Adeane, 5 Dec. 1962 (CRES 59/1020)).

\(^{85}\) POWe 33/2533 [PD 1146/305].
and could be revived beyond the present limits of territorial waters by acts of possession, and it was on this basis that the Commissioners had proposed to grant licences and had, in fact, already done so in other areas.

In a letter to the Ministry of Power dated 13 February 1963, Gill in the Crown Estate Office wrote:

At present the dredging companies are inclined to accept a measure of voluntary control outside the three mile limit, but the longer the legislation is delayed the more difficult it will be to stop them adopting a free-for-all attitude.

V. THE CASE TO THE LAW OFFICERS OF ENGLAND AND SCOTLAND

The Case to the Law Officers of the Crown in both England and Scotland was signed on 18 March 1963 by Vallat and Johnstone, who had prepared it with the assistance of K. Newman of the Lord Chancellor's Department. In his first draft Johnstone had wished to include a question relating to tunnelling from the land through the subsoil of the territorial sea into the shelf beyond, but Vallat suggested that this might be the subject of a separate reference “with a much fuller examination, at least of the international legal aspects”.

The questions posed to the Law Officers ran as follows:

(i): Are the “sovereign rights” under the Convention something less than sovereignty under international law?
(ii): Upon entry into force of the Convention for the United Kingdom would the United Kingdom become entitled to enjoy and exercise the “sovereign rights” under the Convention without further action on the part of the Crown or Parliament?
(iii): On the assumption that the answers to questions (i) and (ii) are in the affirmative would the entry into force of the Convention for the United Kingdom
(a) make the area of the Continental Shelf part of Great Britain for the purposes of the Coal Industry Nationalisation Act 1946 (as subsequently amended) and the Petroleum (Production) Act 1934; and
(b) result in the automatic application of the relevant law of the constituent parts of the United Kingdom to the Continental Shelf, or would special legislation be required for these purposes?
(iv): Would the United Kingdom be entitled under international law to rights under the Convention against States not parties to the Convention?

Attached to the Case was a memorandum dated 11 March 1963 prepared by the Foreign Office headed “International legal aspects”. Having mentioned the Orders in Council for colonies and the Truman Procla-

86. CRES 58/1020 [Foreshores 25316].
87. POKE 33/2550 [PD 1146/30/26].
88. FO 371/171092 [GW 1/15 of 1963].
The Convention seems to depart from the old concept of the seabed and subsoil as *res nullius* capable of acquisition by occupation. The intention of the Convention that the seabed and subsoil of the Continental Shelf is not to be regarded as part of the territory of the coastal State is clear from the deliberate use of the expression "sovereign rights for the purpose of exploring it and exploiting its natural resources" rather than "sovereignty".

The memorandum took the view that the United Kingdom's ratification would cover all territories for whose international relations the United Kingdom was responsible, "with the exception of the Persian Gulf Shaikhdoms, in respect of which an express reservation was made"; thus if the Convention did not confer full sovereignty on the coastal State, the Orders in Council for territories which were still dependent ought to be revoked, and the Sultan of Brunei should be advised to revoke his proclamation purporting to annex the adjacent shelf.

In sending the Case and memorandum to the Law Officers' Department, Johnstone pointed out that the legal adviser to the Crown Estate Office, Allan, had recently told him that he would be content for the shelf to be regarded as outside Great Britain provided that it was made clear in whatever legislation was enacted that the Crown would have the same rights therein as it had in the bed and subsoil of the territorial sea and the foreshore. The National Coal Board, on the other hand, were still adamant that "wherever their shafts go beyond the three mile limit they must be considered as taking the law of Great Britain, or rather the law of England or Scotland, according as to the geographical position, with them".

In sending the documents to the Lord Advocate's Department, Johnstone wrote:

In connection with the present position of the Crown in relation to the bed and subsoil, I would particularly refer you to the second paragraph of the Judgment of Lord Watson in *Lord Advocate v. Wemyss*: "I see no reason to doubt that, by the law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown." The real question which we are now upon might perhaps almost be boiled down to a query as to whether or not his Lordship would have regarded the

89. This was a misapprehension. Although declarations were made by the UK to exclude the Persian Gulf sheikhdoms under British protection from the application of the other three 1958 Geneva Conventions, no declaration to this effect was made either on signature of the Continental Shelf Convention in 1958 or on its ratification in 1964, an oversight which caused embarrassment within the Foreign Office (see FO 371/176337 [GW 4/59 of 1964]).

90. Johnstone to Dudman, 18 Mar. 1963 (POWE 33/2550 [PD 1146/30/26]).

passage which I have quoted from his Judgment as automatically extending to the Continental Shelf off the coasts of Scotland or not.

The English Law Officers, Sir John Hobson A.-G. and Sir Peter Rawlinson S.-G., gave their opinion on 29 April 1963. They replied to the first two questions in the affirmative. To question (iii)(a) and (b) they replied negatively, adding that it would be necessary to extend the Coal Industry Nationalisation Act 1946 and the Petroleum (Production) Act 1934, and that special legislation would also be required to regulate the exploration and exploitation of the shelf and to extend to it the relevant law of the constituent parts of the United Kingdom. As to question (iv) they replied:

The question whether the rights conferred by the Convention will be enforceable against States which are not parties to it is difficult. In view of the number of States which are not parties to the Convention, and having regard in particular to the importance of some of those States, we think it would not be safe to assume that these rights will, on the coming into force of the Convention, become immediately enforceable against States which are not parties to it.

The Scottish Law Officers, I. H. Shearer, Lord Advocate, and D. C. Anderson, S.-G. for Scotland, gave their opinion a week or so later. They, too, gave affirmative answers to questions (i) and (ii). Like their English counterparts they replied in the negative to question (iii)(a), adding that in their view the term “Great Britain” in a statute was the statutory concept defined in 1706, meaning the kingdom formed by the Union of England and Scotland. Question (iii)(b) was also answered in the negative, the Scottish Law Officers adding that since the shelf would not be part of the United Kingdom legislation would be required to extend the law which it was wished to apply.

There was a conflict of opinion over the answer to question (iv). The Lord Advocate was of the opinion that “when the Convention comes into force under Article 11 it appears safe to assume that under international law the United Kingdom would be entitled to exercise the rights which the Convention offers as against any other States”. The Solicitor-General’s views, however, were stated to be in accord with the cautious views expressed on this question by the English Law Officers.

In a minute dated 30 April 1963 Vallat wrote that the answers to the first three questions were “as anticipated” and were “entirely acceptable”.

92. POWE 33/2550 [PD 1146/30/26]; there is a printed text of the Case and Opinion on FO 371/171092 [GW 1/15].
93. Ibid.
94. FO 371/171092 [GW 1/15 of 1963].
but that he had doubts about the answer to the fourth question. In Vallat's view there was "still room for a political decision that we should attempt to maintain our rights... under the Convention against States not parties to it".

VI. THE CONTINENTAL SHELF BILL

On 15 May 1963 Johnstone wrote to the First Parliamentary Counsel, Sir Noel Hutton, enclosing instructions for the drawing of a Bill. He pointed out that if the effect of ratification of the Convention were to integrate the shelf into Great Britain little in the way of legislation would be necessary; the Law Officers, however, had rejected this view. Johnstone summarised what the Ministry of Power had in mind for the content of the Bill:

A. Provision should be made for the Bill to apply (except where specially noted below) to such areas of the sea as may from time to time be prescribed by Order in Council. This is intended to enable the Government to place its own interpretation for the purposes of municipal law on the language used to define the relevant areas in different parts of the Shelf Convention, notably Articles 3 and 6.

B. It should be provided: (a) that the Petroleum (Production) Act, 1934, shall extend to the prescribed areas, (b) that interests in un-worked coal in the prescribed areas shall vest in the National Coal Board, (c) that there shall be placed under the management of the Crown Estate Commissioners for the purpose of Section 1(1) of the Crown Estate Act, 1961, such other of the natural resources defined in Article 2(4) of the Shelf Convention as are situated in the prescribed areas and are non-living, and (d) that the Crown shall have power by Order in Council to vest in itself the remaining resources defined in Article 2(4) of the Shelf Convention and situated in the prescribed areas (which would be done only if occasion arises).

Hutton assigned the duty of drafting the Bill to one of his staff, H. B. Rowe, who convened an inter-departmental meeting on 21 June 1963 no record of which has been found. Rowe wrote to Johnstone on 28 June 1963:

It seems to us, subject to what the Crown Estate Commissioners may have to say, that it would not be necessary to have an express provision placing any

95. POWE 33/2619 [PD 1146/2032].
96. On the death of Sir Henry Rowe, who retired as First Parliamentary Counsel, one of his successors in office, Sir George Engle, wrote: "Perhaps the finest example of his work as a draftsman and as a lawyer is the Continental Shelf Act, 1964, a model of conciseness and lucidity in a very difficult area of the law" (Independent, 19 Feb. 1992).
97. POWE 33/2619 [PD 1146/30/32].
minerals under the management of the Crown Estate Commissioners. If the Bill ensures that the minerals concerned are vested in the Crown it seems to follow from the Crown Estate Act 1961 that the Commissioners have power to manage them and turn them to account, and an administrative direction that they should do so seems all that is needed.

In a letter to Johnstone dated 22 July 1963, Allan in the Crown Estate Office likewise considered that it would not be necessary to make an express mention of the Commissioners in the Bill. He went on:

98. "It seems to me that it would be sufficient if the Bill declared that these rights are vested in Her Majesty in right of Her Crown. They would then, in my opinion, automatically form part of the Crown Estate and, subject to the statutory provisions relating to coal and oil, would fall to be managed by the Commissioners. I do not think that even an administrative direction would be required.

Johnstone then sent a copy of the Law Officers' opinions to Allan, who on 7 August 1963 replied as follows:

99. "The Commissioners do not dissent from the Opinion expressed by the Law Officers, but there is one point which, I think, needs clarification. The Law Officers have said that no express proclamation or legislation is necessary to enable the United Kingdom to enjoy and exercise the rights over the Continental Shelf conferred by the Convention. This must, I think, mean that these rights are vested in the United Kingdom. It must, in my opinion, follow that these rights can only be regarded as being vested in the Sovereign in right of the Crown as ultimate feudal superior. If the Sovereign is constitutionally the ultimate owner of all land in the United Kingdom, it must, I think, follow that those rights in the Continental Shelf which are allocated to the United Kingdom must be vested in the Sovereign, and it is for the Sovereign to decide how they are managed. In default of any such provision, they must, in my submission, be regarded as part of the Crown Estate and managed in accordance with the Crown Estate Act 1961, under which the Crown Estate Commissioners are charged on behalf of the Crown with the function of managing and turning into account land and other property, rights and interests. To this extent I must, with respect, differ from the Law Officers' answer to Question [iii](b), since it seems that they have overlooked the provisions of section 1 of the Crown Estate Act 1961. I am, therefore, instructed to ask if it would be possible for a further Opinion to be

98. POWE 33/2533 [PD 1146/30/5]. It is clear from Allan's internal minute of 18 July 1963 that he regarded s.1(1) of the Crown Estate Act 1961 as applicable to those shelf rights which "would automatically fall into the Crown Estate bag" (CRES 58/1020).

99. CRES 58/1020 [Foreshores 25316]. In an internal minute dated 1 Aug. 1963 Allan had written: "it would also appear, although not expressly stated, that the Law Officers would not accept the view shared by us with Parliamentary Counsel that the provisions of the Crown Estate Act 1961 would apply to the United Kingdom's rights in the Continental Shelf, since these rights are not, in their opinion, to be regarded as forming part of the realm of Great Britain for statutory purposes" (ibid).
obtained from the Law Officers as to how the rights allocated to the United Kingdom are to be regarded as vesting.

Johnstone, who viewed the prospect of a further reference to the Law Officers “with some horror”, wrote to Vallat on 15 August 1963 as follows:

It seems to me that [Allan] has overlooked that passage in the Law Officers’ Opinion where they have given it as their view that the coming into force of the Convention would not, either under English law or Scottish law, have the effect of making the sea bed affected part of Great Britain and I much doubt myself whether the powers of the Crown Estate Commissioners extend outside the boundary of the United Kingdom, and the fact (if it be one) that the Sovereign is deemed to be the ultimate owner of all land in the United Kingdom, including of course the foreshore, seems to me irrelevant in view of the Opinion of the Law Officers quoted above to the effect that our share of the Shelf will not become part of the United Kingdom.

On 3 September 1963 Rowe wrote to Johnstone:

The Law Officers’ Opinion was expressed with customary brevity and too much should not I think be read into it. It did not say anything about the management of the rights conferred by the Convention and I should be surprised if the Law Officers themselves were inclined to construe their Opinion as requiring this matter to be dealt with in the Bill. I should certainly be content to draft on the assumption that silence on the subject would satisfy the Law Officers and to defend this assumption in the most unlikely event that they should raise the point.

Rowe’s first draft of clause 1(1), sent to the Ministry of Power on 16 September 1963, read:

The exclusive rights with respect to the seabed and subsoil and their natural resources which are exercisable by the United Kingdom in accordance with the Continental Shelf Convention are hereby vested in Her Majesty, except in relation to coal.

In his accompanying letter Rowe wrote:

Clause 1(1) will, I hope, be acceptable to the Crown Estate Commissioners … As I said in my letter of 3rd September I do not construe the Law Offi-
cers’ opinion as requiring the management of the rights conferred by the Convention to be dealt with except to the extent that the Coal Industry Nationalisation Act 1946 and the Petroleum (Production) Act 1934 have to be applied to coal and petroleum outside Great Britain. On the other hand I think there is some room for argument on the point made by Allan in his letter of 7th August that the rights must be vested in the Sovereign as feudal overlord of land in the United Kingdom. The Convention does not appear to vest the subsoil itself, as opposed to rights of exploration and exploitation, and even if it did I am not at all sure that there is any logical necessity for treating the United Kingdom state of affairs as automatically applying to areas outside the United Kingdom. However this may be, the need to vest the rights over coal in the National Coal Board affords an opportunity to point the contrast and vest other rights in Her Majesty.

Rowe’s draft of clause 1 also contained sub-clauses relating to coal and petroleum along the lines of the provisions later enacted as section 1(2) and (3) of the Continental Shelf Act 1964. He made no express mention of minerals other than coal and petroleum or of the Crown Estate Commissioners.

In sending Rowe’s letter and draft clauses to Allan, Johnstone wrote on 18 September 1963:

I am not sure that I agree with Rowe (if I have rightly construed his views) that the Law Officers’ ruling on the question of the application of the Convention and the subsequent legislation must be regarded as limited to the coal and petroleum industries ....

Allan considered, however, that the draft envisaged the vesting of rights in the Crown. In a minute dated 20 September 1963 he wrote: “The effect of such a vesting is that the Crown Estate Commissioners would be responsible for the management of all minerals except oil and petroleum.” He continued:

If the rights in the Continental Shelf are vested in Her Majesty, they must be so vested in Her Majesty in right of Her Crown and, therefore, will be included in the words “land and other property, rights and interest” with the management of which the Commissioners are by section 1(1) of the Crown Estate Act 1961 charged. They will, therefore, be able, by section 1(2) of the same Act, to do all such acts as belong to the Crown’s rights of ownership. This would include the granting of Licences to subjects to exercise the rights over the Continental Shelf which the Act will vest in the Crown.

The Deputy Commissioner, Gill, submitted a report to the Commissioners for their meeting on 24 September 1963, stating: “I agree that we need have no objection to the proposed drafting, which should give the

104. Ibid.
105. Ibid.
Commissioners the management of all minerals except oil and petroleum.” The Commissioners “took note” of Gill’s report.  

On receipt of Rowe’s draft clauses, J. L. Simpson, a legal counsellor in the Foreign Office, wrote to him on 20 September 1963 encouraging him to delete the reference to the Convention, since “some of our neighbours in Europe will not ratify the Convention”. In reply, on 23 September 1963, Rowe stated that he felt confident that it would be possible to avoid mentioning the Continental Shelf Convention in the long title. As for clause 1(1), Rowe considered that the clause in its present form “sat on the fence” without committing itself to a view on whether the rights were conferred by the Convention or existed independently of it. He thought that it would be no great matter to change the wording to refer to any rights exercisable by the United Kingdom without mentioning the Convention.

The Minister of State for Power, now F. J. Erroll, then took the matter back to the Cabinet’s Legislation Committee. In a memorandum to the Committee dated 8 November 1963, submitting a fresh draft omitting in clause 1(1) any mention of the Continental Shelf Convention, the Minister wrote:

Since it is arguable that the Continental Shelf Convention is declaratory of international law on the subject, rather than the source of it, and since the wording is not in all respects apt for domestic legislation, the draft Bill avoids specific reference to the Continental Shelf Convention. No mention of the Continental Shelf Convention is necessary to permit ratification, which will be done under the Prerogative.

An appendix to the memorandum, after mentioning the proposal to extend to the shelf the legislative provisions relating to petroleum and coal, continued: “Other natural resources fall to be administered by the Crown Estate Commission by virtue of the provisions of the Crown Estate Act, 1961.”

The relevant minute of the Committee’s meeting on 11 November 1963 covering the outcome of the debate on clause 1(1) read:

It might be desirable to describe the rights exercisable by the United Kingdom as those under international law or any convention. But there were

106. Ibid. Commissioners’ document C.E. (63) 8th meeting, item 11.
107. Ibid.
108. Ibid.
109. CAB 134/2149 [L.(63)16].
110. Ibid. In an internal minute dated 11 Nov. 1963 Allan wrote: “No express provision is made for the management of resources [other than petroleum and coal] by the Crown Estate Commissioners, but this must, I think, follow from the vesting in Her Majesty” (CRES 58/1029).
111. CAB 134/2148 [L.(63) 6th Meeting].
arguments for not referring to the Convention and the word “exercisable” could be taken only as exercisable under international law; it would accordingly be better to leave this passage as drafted.

At a further meeting, on 19 November 1963, the Legislation Committee approved the draft Bill and authorised the Minister of State for Power to arrange for its introduction in the House of Lords.\(^{113}\) Clause 1(1) was now in the form in which it was later to be enacted.

VII. THE PARLIAMENTARY HISTORY OF THE BILL

It is not proposed to discuss in detail the parliamentary history of the Bill. An “Explanatory Memorandum” accompanying it stated in part:\(^{113}\)

Under clause 1 licences to search for and get oil and natural gas may be granted by the Ministry of Power, and the National Coal Board will have the sole right of getting any coal that may be found. Any other resources will be managed by the Crown Estate Commissioners under powers derived from the Crown Estate Act 1961.

Ministerial briefing notes prepared by the Ministry of Power began by observing:\(^{114}\)

Because the Government are advised that, in international law, the rights exercisable outside territorial waters with respect to the sea-bed and subsoil, and their natural resources, are not necessarily dependent on the Continental Shelf convention, neither the Long Title of the Bill, nor subsection (1) refers to the Convention as such.

With regard to rights in natural resources other than oil and coal, of which the most important were seen to be sand and gravel, the briefing notes went on to consider that the Crown Estate Commissioners, although not expressly mentioned in the Bill, would have the management of such rights under section 1 of the Crown Estate Act 1961.

In moving the second reading of the Bill in the House of Lords on 3 December 1963, the government minister, Lord Derwent, stated that its main purpose was to bring the law of the country into line before the United Kingdom asserted its rights and assumed its obligations in international law.\(^{115}\) In moving the Bill’s third reading in the House of Commons on 7 April 1964, the Minister of State for Power, F. J. Erroll, stated that the Bill’s main purposes were “to put the Government in a position to ratify the Continental Shelf Convention and to issue licences to those concerns which wish to explore and exploit the shelf”.\(^{116}\) During the second

\(^{112}\) Idem [L.(63) 7th Meeting].
\(^{114}\) POWE 33/2628 [PD 1202] (original emphasis).
\(^{115}\) HL Hansard, 5th ser., Vol.253, col.911.
\(^{116}\) HC Hansard, 5th ser., Vol.692, col.896.
reading debate in the House of Commons on 28 January 1964, the Minister of State for Power stated:  

7. I must emphasize that the United Kingdom’s rights in the matter do not amount to full sovereignty. The sea areas concerned are not added to the United Kingdom. If they were, we might not need the Bill at all, since our existing laws would automatically apply to our part of the Shelf, and they might well be enough.

It was during the debate in Standing Committee of the House of Commons on 12 February 1964 that the effect of clause 1(1) was discussed. A member of the Committee, T. Fraser, was of the view that, since in his opinion the effect of the clause would be to vest in the Crown the property in the natural resources of the shelf and not merely the rights to explore and exploit them, it would be more honest if the Bill was amended to make this “nationalisation” explicit by adding to the provisions of the Petroleum (Production) Act 1934 referred to in clause 1(2) a reference also to section 1(1) of that Act by which “the property in petroleum existing in its natural strata in Great Britain is hereby vested in His Majesty”. The Parliamentary Secretary of State for Power, John Peyton, did not agree with this view of the effect of clause 1(1). He stated:  

8. The legal position is that the United Kingdom’s rights are limited to exploring and exploiting the resources of the Shelf. In other words, until someone has taken possession of them, they do not belong to anybody and this country is quite incapable of taking the kind of action proposed by the Amendment. All my advice is that if we were to write the Amendment into the Bill, we would be exceeding the rights which we enjoy under the Convention.

The Minister asserted that the legal status of resources of the shelf was different from that of petroleum before the passing of the Petroleum (Production) Act 1934 in that during that period “who owned what rights was clearly established, the property was vested in somebody”, whereas in the shelf resources: “There are no prior existing rights and it is only when the minerals themselves are severed from the Shelf that they become somebody’s property.” The Minister concluded:  

9. Confining myself for the moment to the continental shelf, I repeat that we own nothing there at all. We have a right to exploit or to look for resources. When we have laid physical hands on those resources, the property passes,

120. Idem, cols.19-20. The minister might have been misinformed about the legal position prior to the 1934 Act. There was doubt during that period whether oil and natural gas in strata could be the subject of ownership. See e.g. the remarks of the Parliamentary Secretary, Mines Department, during the second reading debate in the House of Commons on 19 June 1934 (HC Hansard, 5th ser., Vol.291, cols.310-311) and see infra n.130.
121. Standing Committee A, supra n.118, at col.22.
but not until. We have no right in this country to annex any part of the continental shelf. This must be quite clearly established.

Fraser withdrew his amendment.

The Continental Shelf Act 1964 received the royal assent on 15 April 1964. The United Kingdom's instrument of ratification of the Convention on the Continental Shelf, without any declaration or reservation, was deposited with the Secretary General of the United Nations on 10 May 1964.122

During the drafting of the Bill and its parliamentary passage there had been suggestions within government departments to include a provision empowering dependent territories to legislate for the adjacent shelf or alternatively, as that suggestion was considered by the Law Officers to be "an undesirable complication", empowering the Queen in Council to define the limits of colonial shelves.123 In the event, the Act did not include any such provision. At the time when ratification of the Convention was near, the Colonial Office legal advisers reconsidered the position of the boundary Orders in Council and considered that they should be left unrevoked, for the reasons which had been agreed in 1959.124 Having received the advice of the Foreign Office,125 the Colonial Office circulated to all dependent territories a despatch dated 10 August 1964 which read in part:126

The question of these Orders in Council has been reviewed, and upon legal advice it has been decided they should be allowed to stand, but if there were complaints that the existence of such Orders was not consistent with the Convention it would be necessary to consider their revocation or amendment.

None of the orders has been subsequently revoked or amended.127

VIII. CONCLUSION

Lord McNair, formerly a judge of the International Court of Justice, remarked during the second reading debate on the Continental Shelf Bill in the House of Lords on 3 December 1963128

122. FO 371/176337 [GW 4/59 of 1964].
123. Second Reading Brief in House of Lords, item 15 (POWE 33/2636 [PD 1204/1]).
124. FO 371/176337 [GW 4/38 of 1964].
125. Ibid.
126. Circular 334/64 (FO 371/176338 [GW 4/61 of 1964]).
the continental shelf is such a new concept that it is difficult to say that there is any international law upon it. It is for that very reason that this Convention is being entered into; therefore we are now engaged in the process of making by agreement new international law to cover a new concept.

Apart from its novelty in international law, the new concept was not easily adaptable into UK law for two major reasons. First, it is clear from the terms of the Convention in the light of the discussion in the International Law Commission and at the Geneva Conference that a coastal State does not enjoy sovereignty over the continental shelf; “sovereign rights” are not the same as sovereignty. This has the consequence that the shelf is not territory and cannot, consistently with the Convention, be statutorily incorporated within the United Kingdom or a dependent territory, or even be annexed to Her Majesty’s dominions. The shelf is an extraterritorial area in which the coastal State may exercise only certain functions in respect of certain resources. Had the shelf been regarded as a subject of coastal State sovereignty, English—and Scottish—law would have a ready-made mechanism for translating sovereignty into territory and into Crown ownership. This mechanism is that of the royal prerogative, which contains a foreign affairs power under which sovereignty over new areas, both dry land and maritime, may be declared, as well as a power to acquire new territory, both dry land and maritime. These two heads of the prerogative operate consecutively: the foreign affairs prerogative, of which the ratification of a treaty is a manifestation, declares sovereignty (imperium) over a spatially defined area whereupon the acquisitive prerogative secures the area as territory which the Crown might then hold allodially as Crown land (dominium).129

The second difficulty in converting the treaty concept into UK law is that the terms of the Convention do not in themselves create proprietary rights, whether ownership or something less, in the natural resources of the shelf. They merely permit a coastal State, as against other State parties, to exercise a monopoly in exploration and exploitation. But whether, and if so how, that monopoly is to be exercised is not prescribed by the Convention, or by international law in general, but by the internal law of each coastal State. Under UK law, the Crown, if authorised by statute, may exercise a monopoly over the exploration and exploitation of natural resources in which the Crown might not possess ownership. This might have been the situation in respect of unworked petroleum and natural gas under the Petroleum (Production) Act 1918 up to the enactment of the Petroleum (Production) Act 1934, which statutorily resolved the doubt over Crown ownership in these resources by vesting the property in them

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But the 1918 Act, like the 1934 Act, was restricted to petroleum located “in Great Britain” and in practice there is likely to be less difficulty in enforcing monopoly powers over intra-territorial resources, even though unowned, than over resources which are both unowned and outside the United Kingdom.

It is not surprising to find, therefore, that instead of simply extending management powers to the natural resources of the shelf, it was sought to overcome the above difficulties by inserting into the legislation a “vesting” provision in the form of section 1(1). From the terms of his letters of 28 June and 16 September 1963 to the Ministry of Power’s legal advisers, it appears that Rowe envisaged the vesting in the Crown of rights over all the shelf’s natural resources, other than those in coal, and that he intended that the clause which became section 1(1) should effect this.

Whether section 1(1) achieves this intention, however, may be questioned. First, the expression “any rights exercisable by the United Kingdom” is intelligible only if it means those rights which are exercisable in international law by the United Kingdom in its capacity as a subject of international law. Since the Crown may exercise international rights on behalf of the United Kingdom through its foreign affairs prerogative, the provision is therefore otiose as the Crown would hold such rights even without the existence of section 1(1). Quite apart from this point, however, as international law is not concerned with rights of ownership or property in spatially defined areas, leaving such matters to national laws, there are no rights of ownership or property flowing from the Convention for section 1(1) to vest in Her Majesty.

Turning to particular resources, section 1(3) of the 1964 Act applies certain sections of the Petroleum (Production) Act 1934 to petroleum in the shelf “as they apply in relation to petroleum in Great Britain”. The subsection, however, does not apply section 1(1) of the 1934 Act, which was the provision by virtue of which the ownership of petroleum in strata “in Great Britain”, hitherto uncertain, was vested in the Crown. It is doubtful, therefore, whether section 1(3) has the effect of vesting ownership in shelf petroleum in the Crown. As for shelf coal, section 1(2) of the 1964 Act applied to shelf coal the Coal Industry Nationalisation Act 1946 “as it applies to coal in Great Britain”. Before the 1946 Act the own-

130. In submitting the draft of the Petroleum (Production) Bill on 13 Dec. 1933, its draftsman, A. Stainton, wrote: “I cannot think, however, that the Bill is a Bill in respect of the property of the Crown; the whole purport of the subsection [i.e. what became s.1(1)] is to deal with something which is not now the property of the Crown and to say that in future it shall belong to the Crown” (POWE 33/485 [PD 794, Part 1]).

131. This was the view taken of s.1(1) of the 1964 Act by Slade J in Earl of Lonsdale v. Attorney-General [1982] 1 W.L.R. 887, 946-947. Having described the provision as “at first sight an odd one”, he went on to consider that it had divested in favour of the Crown any rights in shelf minerals which hitherto might have been vested in individuals under English law.
ership of coal in Great Britain was already vested in someone, namely in the Coal Commission under the Coal Act 1938. Shelf coal, however, was owned by no one, and remained unowned even after the 1946 Act. The 1946 Act, therefore, did not create ownership in coal where none had existed before. Thus it is doubtful whether section 1(2) of the 1964 Act had the effect of creating ownership where none had previously existed.

If section 1 of the Continental Shelf Act 1964 did not create ownership in any of the unworked natural resources of the continental shelf, it remains to be seen whether it nevertheless created new management regimes for shelf minerals, or extended existing ones.

While the 1964 Act provides expressly for the management of petroleum and coal in the shelf outside the territorial sea by extending to these resources the respective regimes already in existence for them “in Great Britain”, it neither creates any new regime nor extends any existing regime for other natural resources.

The archival papers show that the Crown Estate Commissioners were concerned from the start to ensure that their powers should extend to the shelf resources other than petroleum and coal. Under the Crown Estate Act 1961, the latest in a series of statutes for the management of the “Crown Estate” and which was in force at the time that the Continental Shelf Bill was passing through Parliament, the Crown Estate Commissioners are charged with the duty of managing and turning into account “land and other property, rights and interests” which constitute the “Crown Estate”. The Act does not contain any provision indicating expressly that the Crown Estate includes seabed and subsoil nor does it contain any indication of the spatial extent of either the Crown Estate itself or of the Commissioners’ duties and functions. The territorial ambit of statutes is not presumed to be unlimited. On the contrary, there is a well-established presumption of territorial limitation.

As a government minister wrote on 13 May 1986 in reply to a question in the House of Lords asking whether “the law of England” applied to the British continental shelf: “Statute law does not apply below low water mark unless express provision is made.” It appears from the archival documents, e.g. the Crown Estate Office letter of 4 September 1961 cited earlier, that at the time of the enactment of the Crown Estate Act 1961 the shelf
resources outside the territorial sea were not considered to be within the Crown Estate, that the Commissioners' powers did not extend thereover and that amending legislation was needed to apply the 1961 Act to the shelf resources. It appears, however, that the current official view is that the Continental Shelf Act 1964 constitutes such legislation, since the 1961 Act, the source of the Commissioners' powers, is now regarded as applying not only to the bed and subsoil of the territorial sea, currently 12 miles in breadth by virtue of the Territorial Sea Act 1987, but also to resources, mainly sand and gravel, in the UK shelf outside the territorial sea, notwithstanding the fact that the 1961 Act has itself not been expressly amended so as to bring about such an extension. Thus, in a parliamentary written answer in the House of Lords on 6 February 1979, a government minister, having referred to the provisions in the Continental Shelf Act 1964 concerning oil and gas and coal, stated: "So far as other minerals within territorial waters and the United Kingdom Continental Shelf are concerned these in general form part of the Crown Estate and are under the management of the Crown Estate Commissioners."\(^{136}\) Likewise, in a memorandum provided to the House of Commons Environment Committee on 5 February 1992, the Commissioners referred to section 1(1) of the Continental Shelf Act 1964 and went on: "These rights fall under the management of the Commissioners who exercise them by grants of licences for such activities as aggregate dredging and the laying of cables and pipes of various kinds."

The archival documents set out earlier, e.g. the Minister of State for Power's submission to the Cabinet's Legislation Committee and the Explanatory Memorandum accompanying the Bill, show that it was the belief of those who were responsible for the Bill that it would extend the management of the Crown Estate Commissioners to shelf minerals other than coal and petroleum as part of the Crown Estate notwithstanding the absence in the Bill of any amendment of the 1961 Act. Rowe's reason for declining to insert such a provision was that the Law Officers had con-

\(^{136}\) *Idem*, Vol.397, cols.931–932. As a term and condition of the extension of the territorial sea around the Isle of Man to 12 miles on 2 Sept. 1991, compensation was paid by the Manx government to the Crown Estate Commissioners for the loss of the latter’s interests in the bed of the 9-mile extension which hitherto had been part of the UK’s continental shelf (Home Office News Release, 1 Aug. 1991). See also the compensation payable to the Crown Estate Commissioners for land of the Crown Estate occupied by the Channel Tunnel (Channel Tunnel Act 1987, s.7(3)).

\(^{137}\) *Parliamentary Papers*, 1991–92, HC Paper 17–11, p.180. In a recent magazine article the Earl of Mansfield, First Commissioner of the Crown Estate, expresses himself more modestly: "The Crown Estate is the landed estate which the sovereign inherits 'in the right of the Crown'... Today it includes ... a marine estate comprising about half the UK foreshore, some beds of tidal rivers and estuaries, and almost all the sea-bed out to the 12-mile limit" (*The Field*, May 1995, p.52).
sidered that it was only the management regimes for coal and petroleum which had to be expressly extended in the new legislation. It is possible that this limitation to coal and petroleum occurred because the Law Officers had been referred to the legislation relating to these two minerals only, both minerals falling as they did within the responsibility of the Ministry of Power seeking the advice. It is clear from Rowe’s letter to Johnstone of 28 June 1963 that he intended to draft a clause to vest in the Crown the ownership in other minerals which, in his opinion, would thus come under the Commissioners’ powers in the 1961 Act. Clause 1(1) was the fruit of this intention and, indeed, it satisfied the Crown Estate Commissioners notwithstanding the fact that the minerals would not thereby be brought within the United Kingdom. But if section 1(1) was ineffective to vest ownership in the Crown, as is argued above, then both Rowe’s intention and the Crown Estate Commissioners’ satisfaction were unfulfilled. Furthermore, even if it is assumed that section 1(1) of the Continental Shelf Act 1964 vested in the Crown rights of a type which could properly fall within the term “property, rights and interests” in section 1(1) of the Crown Estate Act 1961, it is still doubtful whether, in the absence of express amendment, the Commissioners’ management powers under the latter Act were thereby expanded extraterritorially.138

So far, the basic concept of continental shelf rights in UK law has been judicially considered, obiter, in one case.139 If other questions of concern to the executive have arisen in respect of the basic legal concept they are concealed in archives which are still closed. Although the continental shelf concept is no longer a novelty in international law, its domestic manifestation in section 1 of the Continental Shelf Act 1964 is not so unambiguous as to make the possibility of future disputes and litigation unrealistically remote.

138. The questions whether there are property rights in unworked oil and gas in situ in the UK shelf, and the nature of the rights possessed by licence holders, have given rise to much academic debate. See e.g. T. Daintith and G. D. M. Willoughby (Eds), United Kingdom Oil and Gas Law (2nd edn, 1984), esp. paras.1-119, 1-203, 1-231/2; P. D. Cameron, Property Rights and Sovereign Rights: the Case of North Sea Oil (1983), esp. pp.42-56.

139. Earl of Lonsdale v. Attorney-General [1982] 1 W.L.R. 887; in June 1977 the nature of continental shelf rights was discussed during argument in the Scottish Court of Session in the valuation cases Shell UK Ltd v. Assessor for the Fife Region and BP Petroleum Development Ltd v. Assessor for the Grampian Region, but these cases did not proceed to judgment.