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THE CONTINENTAL SHELF AND THE EXTENSION OF THE TERRITORIAL SEA

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International Law, influenced by the progress of modern armaments, as well as by the discovery of new natural resources, has had to consider claims tending to modify the traditional determination of the territorial sea, incorporating a new and important element: the so-called continental shelf.

It is well to remember that the concept of the “territorial sea” was the subject of a long and arduous discussion. In this inflamed theoretical dispute, several theories were advanced, based upon the opposite principles of the “closed sea” and the “free sea”; the concept of the sea being “res nullius” (belonging to nobody) was advanced against the concept of the sea as “res communis” (common to all). The doctrine of “mare nostrum” as belonging to a single nation also was advocated. Various nations made pretentious claims founded upon more or less justified conclusions; for example, in 1432 Denmark claimed the exclusive right to fish in the Icelandic Sea. During the 17th century James I of England alleged privileges in the North Sea; and Alexander of Russia, in 1812, promulgated his famous “ukase” (ordinance) prohibiting foreign vessels, under penalty of confiscation, to fish in the Bering Straits up to 51 degrees of latitude north, to a distance of 100 English miles from the Asiatic and American continents.

As one can appreciate, at first a bona fide issue existed among the nations with regard to the extent of territorial waters, but shortly, as Dr. Antonio Sanchez de Bustamante noted, when the sea became decisive for political or economic purposes, nations resorted to force.

Still, disputes were argued on an academic and scientific level. The internationalists, in their opinions on the extent of the territorial sea, quoted Grotius, Bynkershoek, Bartolus de Saxoferrato, Baldo of Ubaldis, Bodin, Selden, Gerominio Barcia, Galliani, etc. In current times, we may add the following names: Ortolan, Martens, Bonfils, Pezeril, Sanchez de Bustamante, Antokoletz, Linares-Fleytas, Fauchille, Kluber, Anziloti, Imbar-Latour, Halleck, Lapradelle and many others. A number of valuable opinions have been expressed since the theory was first advanced that the possession of a maritime belt ought to be extended as far as control is possible from the land; under this theory, even though there may not be

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continual navigation, a kind of possession, provided it has been legally acquired, is maintained and defended. For the most part, the principle suggested by Bynkershoeck was adopted that a territorially based power ends where there ceases to be the possibility to defend it by force of arms. It happened that in 1740, a precedent was set in the controversy involving the Government of Copenhagen over the confiscation by a Danish frigate of seven Dutch fishing boats. There, the distance was fixed by range of a cannon fired from the shore, namely three miles.

The zone of the territorial sea fixed at three miles has remained unaltered for many years, despite the fact that some nations continually enlarged the extent of their territorial waters farther into the high seas. However, as time passed, the measure of the cannon ball became illogical, being no more than a historically conditioned yardstick.

The progress of ballistics on the one hand, and the necessity for a more effective defense on the other, started the trend toward modifying the extent of the territorial sea immediately after World War II. The starting point of territorial waters on the coast, namely the low-tide mark, was not disputed; on the contrary, the question was where it ended. This became a very important problem of international law. It was recognized particularly by Dr. Sanchez de Bustamante in his opinion that not only does this problem affect relations among the nations—their defenses, security and development as well as their economic, military and other interests—but it likewise affects individuals, who may act collectively and individually, as, for example the various interests concerned with fishing privileges.

The modification of the three miles zone has been affected in an indirect way, by incorporating into international law a new element: the continental and insular platform, that is the base upon which the continents rest, which extends under the sea for distances so variable that, in some cases, it is only a matter of meters and in others of many miles. The efforts to find a common solution to this problem have so far been unsuccessful. The extension of the problem has increased tension among nations directly interested in the exploitation of the riches of the sea. The earlier Conference for the Codification of International Law (Hague, 1930) did not succeed in drafting a uniform rule concerning territorial water, because it was impossible to reach an agreement on the extension of these waters.

In recent years the trend toward extending the territorial sea has assumed an importance difficult to ignore. It has been suggested that a solution of the problem might lie in the acceptance of a contiguous zone in which the nations could adopt certain measures of control. In this regard, the Preparatory Commission of the Conference of Codification of 1950 adopted the following basis for discussion: 1) determination, in
principle, of the extension of the territorial sea at three miles; 2) recognition of a more extended zone of the territorial sea for the benefit of certain nations; 3) acceptance of a contiguous zone not to exceed 12 marine miles.

The recommendation of this Commission does not represent an innovation since many years ago introduction of the idea of a 'contiguous zone' was attempted without success. Since 1790 the United States has had a comparable zone for purposes of customs, which zone became of even greater importance after the passage of the 1920 Volstead Law, prohibiting importation of alcoholic beverages. Great Britain adopted a contiguous zone in regard to customs in the different Hovering Acts, the first of which dated from 1718, the last abandoned in 1853. With regard to fishing, a number of laws also established limits different from those applicable generally to territorial waters. The same Codification Commission, in response to statements made by some governments concerning fishing, decided that it would be impossible to reach an agreement to fix a special contiguous zone for purposes of fishing. Instead, the Commission limited its draft to a zone established exclusively for purposes of customs, health and security.

In analyzing the problem, a new element of great importance arose requiring a revision of all prior considerations—the continental shelf. It was in 1916 that the concept was launched to a claim of the territory below the high sea. So, the importance of the continental shelf in the sense of a boundary for submarine natural resources belonging to the coastal country emerged. On February 26, 1942, a treaty was signed with regard to the submarine zones of the Gulf of Paria between Great Britain and Venezuela, mutually allocating submarine areas to both contracting countries, with particular emphasis on the exploitation of mineral resources there.

It was in 1945 that, by virtue of the Proclamation of President Truman (September 28th), the United States announced the protection of the natural resources of the subsoil and the maritime bed of the continental shelf that extends under the high sea along the coasts of the United States, as within its interests and subject to its jurisdiction and control. Simultaneously, the President promulgated a second Proclamation in which he established a 'conservation zone' in which the fishing would be subject, where United States nationals are involved, to its regulation and control. In the first Proclamation, the continental shelf was mentioned. However, the character of the high sea over the continental shelf, and the right to navigate freely, were not to be affected. In the event that the continental shelf extended to the coast of an adjacent country, the delimitation would be agreed upon by the United States and the country interested, in conformity with equitable principles.

The recognized authority in international law, Dr. Gustavo Gutierrez of Cuba, observed in regard to these Proclamations that although they
did not attempt to interfere with the right of free navigation on the waters of the sea above the continental shelf, nor actually extend the boundaries of the territorial waters of the United States, there was no doubt that this would be the result, de facto if not de jure. He also pointed out that even if structures were raised only for the purpose of extracting minerals, or if pontoons were laid in this area for industrial purposes, these objects would definitely impede navigation.

A month after the United States Proclamation, the President of Mexico, Avila Camacho, made a declaration claiming the Mexican continental shelf, pointing out that foreigners had continually exploited and exhausted the riches of the sea and that, for the common welfare of the nation, the Government claims all the continental shelf adjacent to its coasts, and all of the natural wealth, either known or to be discovered there. The Mexican declaration was more specific than the one by the United States, not only because it made no exception with respect to free navigation and to the extent of the territorial sea, but because it expressly claimed fishing interests, justifying this by the fact that fishing grounds are of extraordinary fruitfulness (opposite lower California and Campeche) and ought to be protected as well as developed.

Almost all Latin American countries followed suit. Argentina contributed the doctrine favoring the sovereignty of the state over the continental shelf as well as the sea above it, which doctrine was advanced to support Argentina's claims against British occupation of the Malvina Islands (Decree 772 of the 11th of October, 1946).

The Panamanian Constitution (1946) established that the air space and the continental shelf belong to that nation, for public use, and, consequently, may not be privately appropriated. Subsequently a decree regulated the exploitation of fishing grounds by foreign vessels, including the waters above the continental shelf.

In Chile, President Gabriel Gonzalez Videla issued a Declaration (June 23, 1947) containing the following rules: a) that the Government of Chile proclaims national sovereignty over the continental shelf adjacent to the continental and island coasts of the national territory, regardless of depth; claiming, consequently, all the natural wealth that might exist above, in, or under said shelf; b) that the zones for the protection of maritime gaming and fishing in these continental and insular waters under the control of the Government of Chile, will be determined as the Government should deem it desirable; said demarcations to be confirmed, expanded or modified to conform to the best interests of Chile within the perimeter formed by the coast with a parallel projected into the sea 200 marine miles from the coast of Chile.

The proclamation of Peru (1947) stated in effect that inasmuch as the right to proclaim the sovereignty over the whole continental shelf, as
well as over the epi-continental sea, and over the sea adjacent to it has been declared by other countries (mentioning the declarations by the Presidents of the United States, Mexico, Argentina and Chile), Peru reserved the right to establish zones of control and protection of the national resources in the continental and insular seas. The Proclamation also declared that the government would exercise such control and protection over the sea adjacent to the Peruvian coast within a parallel running at a distance of 200 marine miles off the coast. This declaration met with the approval of Dr. Aramburu de Menchaca, professor of international law of the University of San Marcos, who pointed out that the necessity of expanding control over fishing waters to a distance of 200 miles was justified by fundamental rights.

On July 27th, 1948, the President of the Republic of Costa Rica also proclaimed national sovereignty over the whole continental and insular waters adjacent to the continental or island coasts of the national territory, regardless of depth; he also reaffirmed the inalienable right of the nation to all the natural resources existing above, in or below said shelf, this area to include the sea within a parallel projected into the sea at a distance of 200 marine miles from the coast.

Guatemala approved in August, 1949, a law concerning the rights of Guatemala over its continental shelf, especially with respect to oil-bearing resources.

In May of 1949, the Congress of Nicaragua approved a Declaration which 1) stated the continental shelf to be an integral part of Nicaraguan territory as far as 200 meters of sea depth; 2) declared that in case the continental shelf extended to the shores of another country, the dividing line shall be established in accordance with equity and justice.

By a decree of March 7th, 1950, the Constitution of Honduras introduced the concept of the continental shelf. It was provided that the continental and insular shelf, and the waters that cover it, in both the Atlantic and Pacific Oceans, regardless of the depth, are part of the national territory. Subsequently, by a decree of January, 1951, jurisdiction was extended over the adjacent sea to a distance of 200 miles.

In its Constitution El Salvador proclaimed that its national territory comprises also the adjacent sea to a distance of 200 marine miles off shore, including the air space, the subsoil and the sea. However, the Constitution states that freedom of navigation, in conformity with the accepted principles of international law, will not be affected (Art. 70).

On November 8, 1950, the President of Brazil declared the continental shelf integrated into the territory of Brazil and under its jurisdiction as an exclusive dominion of the federal government; the utilization and exploitation of products and natural resources therein to be granted, in all cases, by federal license.
These decrees demonstrate clearly that countries claim sovereignty over the continental shelf. They also demonstrate how insufficient the present concept of territorial waters has become. In the opinion of Dr. Flouret, it is impossible to avoid adjustment of international law to these new conditions and rapidly changing claims. Dr. J. P. A. Francois, a member of the United Nations Commission for International Law expressed his belief that even the principle of freedom of the high seas does not constitute a rigid rule admitting no restrictions, pointing out that new technical advances as well as economic interests justify such limitations.

It is evident that the sea and its subsoil contains incalculable natural resources. In its dark recesses there are found immense deposits of minerals, and the sea shelters in its depths the most various forms of life. It is therefore imperative for man's subsistence to defend his rights to these enormous resources. The fight over these riches already has started, and nations represented by their political organizations and their spokesmen are vying to increase or decrease sovereign powers in this area of new dimensions.

The continental shelf may be defined as an area of transition between the ocean and the continent, belonging to the adjacent land even if covered by the sea, and connecting both into one unit. The part of the sea that covers the platform is known as the "epicontinental sea," originally an exclusively geographical concept, but now becoming known in the legal field. The idea of the inexhaustiveness of the sea resources held sway for a long time. It was considered that the sea is an unlimited source of life, and it was believed that man's activities would never affect its fertility. Nevertheless, the effects of exploitation have been felt; fishing yields having diminished in quantity and quality. Thus it has been proved that exploitation may be so intense that even the productivity of the sea, with all its great biotic potential, may be seriously affected.

With regard to the solid minerals, such as coal and iron, exploitation has been performed by means of tunnels excavated from the coast and extending under the bed of the sea. Practical experiences show that, in many cases, mineral beds near the coasts continue into the subsoil of the adjacent sea; and day by day more efficient techniques are developed to exploit these riches. Therefore, it is considered to be the duty of each country to protect these natural resources against unlawful appropriation by strangers. The reason for such need lies in the fact that every state has to provide for its security and existence, through measures of a military, fiscal, sanitary, economic, etc., character; consequently, legal control by the riparian nation over the territorial sea is indispensable. To establish the scope of such regulation it is necessary to determine in advance the limits within which such powers should be exercised. Owing to the concept of the territorial sea as developed by medieval jurists, the idea was introduced of the power of the body politic over a determined area of the
adjacent sea. However, lacking precise international rules, it was left to each country to fix the boundaries of its own territorial sea.

In fact, we find that there are countries that have adopted the three mile rule, considering it to be the limit imposed by international law (e.g., Germany, England, Japan, Holland). Others have fixed their own limits: Denmark and Sweden, four miles; Uruguay, five; Yugoslavia, Spain and Portugal, six; Mexico, nine; Colombia and Russia, twelve. On the contrary, other nations have claimed their sea boundaries according to the nature of the interest affected; for example, France and Italy determine the extent of their territorial sea for each matter that arises. In South America, Ecuador, Chile and Peru have extended their “national sea” to 200 miles, in accordance with the recent tripartite pact, (Santiago 1952), as have El Salvador and Costa Rica.

It is well recognized by international law that in a zone of the high sea, contiguous to territorial waters, a coastal country may exercise specific controls to protect its interests; the kind of interests protected and their recognition by international law will determine their effectiveness against other countries. Security of the nation requires, primarily, measures related to the military, health and customs. The range and capacity of modern arms and the swiftness of modern vessels make it evident that international law must allow a sufficiently broad zone to grant security to the territory and its population. It seems ridiculous today to maintain the limit once fixed by the range of a cannon of the eighteenth century. So it is understandable why the territorial sea, being a creation of the law, is the subject of great legal controversy, the farther it is into the open sea.

In this controversy, countries have supported their claims by important economic considerations. From this point of view, it does not seem proper to ignore a rich and easily accessible zone like the continental shelf. Consequently, and based upon this new interpretation of international policy, Ecuador attended in Santiago, with Peru and Chile participating, the Conference on exploitation and conservation of the maritime wealth of the South Pacific (1952). The declaration on the maritime fauna adopted at this conference stated that: 1) the geological and biological factors affecting the existence, conservation and development of the maritime fauna and flora in the waters off the coasts of the contracting countries, make the old concept of the territorial sea insufficient for the conservation, development and utilization of these resources to which the coastal countries have a just claim; 2) as a result, the governments of Chile, Ecuador and Peru proclaim as a standard of their international maritime policy, sovereignty and exclusive jurisdiction over the sea adjacent to their respective countries, up to a minimum distance of 200 nautical miles from their coasts.

With respect to this tripartite proclamation, the well-known Colombian internationalist, Dr. Jesus Maria Yepez, in his important work “La
Plataforma Continental Submarina", states that the only new element introduced in the Santiago Declaration was the fixing of the limit at 200 miles; and that these countries were compelled to fix an arbitrary boundary because they lack a continental shelf and have no other criteria to delimit their sovereignty. The situation is different in the case of Argentina, the United States and Mexico because these countries have wide submarine shelves over which they are able to exercise their jurisdiction, without having to create one by force of a governmental act. In the same work, Dr. Yepez also points out that it is particularly necessary to protect and conserve the marine species peculiar to those waters, for example, the cetaceans and the nutritive flora and fauna resulting from the displacement of the waters by the intervening cold currents and the great depth of the ocean.

The "Informe a la Nación" presented by the Ecuadorean Minister of Foreign Relations (when the present writer held this position) included a reference to this Tripartite Conference in Santiago, and pointed out the importance of international fishery agreements. In addition, this statement summarized the most important justification for such an agreement, namely, that 1) the governments had to assure to their nations all the necessary means of economic subsistence; 2) as a consequence, it was their duty to take charge of conservation and protection of natural resources and to regulate their use so as to obtain the greatest advantages for their respective countries; 3) it was also their duty to prevent the exploitation of these resources, outside of their jurisdiction, where this imperils their countries' best interests.

The Tripartite Pact of Santiago (1952) has been the subject of protests and complaints. However, these are without valid foundation. Dr. Jesus María Yepez has given his valuable and impartial opinion on the legal aspects of the Declarations and subsequent agreements entered into in Lima (1954), stating that from the point of view of international law the pact is irreproachable. It constitutes, he states, one of those "regional agreements" for the maintenance of peace recommended by the Charter of the United Nations; and that it has no less juridical value than the famous Proclamations of President Truman (September 28th, 1945) whose validity has generally been tacitly accepted. Dr. Yepez also points out the difference in approach; while President Truman's declarations were a unilateral act, Chile, Ecuador and Peru worked together to reach a regional agreement authorized by the Charter of the United Nations. Dr. Yepez expresses the hope that such regional agreements will constitute a new chapter, unanimously accepted, of the new American international law, such agreements to be one of the best foundations of continental solidarity.

To these arguments advanced by Dr. Yepez, it may be added that the problem at hand is even more serious for those countries like Ecuador, Chile and Peru, with no continental shelf but having, at the same time,
paramount interests in their adjacent seas. Therefore, it seems unfair to restrict these countries to the narrow zone of three miles. In the absence of a platform, they should be permitted to establish a zone in which they can exercise the same rights as other nations do over their continental seas. It must be admitted that, by virtue of their proclaimed extension of national sovereignty into the sea, these coastal countries have established their claims in accordance with their national sovereignty, their fundamental interests and, of course, in compliance with basic principles of international law.