International Fishery Problems in the Western Hemisphere: Recent Developments

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Recent Developments*

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Within the Western Hemisphere, the problem of international fisheries appears to be steadily gaining in importance, economic as well as diplomatic. While the United States adheres, in principle, to the traditional three mile zone as applicable to territorial waters, Latin American countries compete in expanding their national sovereignty beyond these limits far into the high seas, some of them, e.g., Peru, as far as 200 miles (1947). Against such unilateral acts Great Britain, like the United States, both staunch supporters of the principle of freedom of the seas, immediately protested, denying their recognition on grounds of international law. Nevertheless, the countries controlling tuna fisheries along the west coast of South America, namely Chile, Ecuador and Peru, went ahead. In 1952, at their conference in Santiago, they declared that a maritime zone within a minimum distance of 200 miles off shore, including the underlying shelf and subsoil, is “subject to the exclusive sovereignty of each of these countries”, this to be a “rule of their international maritime policies”. The only concession to the principle of freedom of the seas is the added proviso that “innocent and inoffensive passage” will be permitted. Countries adhering to the principle of freedom of the seas, specifically, Denmark, Great Britain, the Netherlands, Sweden and the United States, filed notes with the governments involved denying their recognition to such unilateral acts as contrary to accepted rules of international law. These notes have been answered in 1955 by identical notes from the three countries, stating, in essence, that they acted within their rights.

Soon these new policies were put into operation and incidents on the high seas followed in rapid succession. Vessels were seized within the 200 mile zone, brought to port and heavily fined. As examples, the

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*This survey is based on the author’s report submitted during the Legal Institutes Week of the University of Miami School of Law, March 22, 1956.

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2. For documentation prior to 1951, see 1 United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas (1951).
3. Note of February 6, 1948, and July 2, 1948, in Memoria del Ministro de Relaciones Exteriores 128, 131 (Lima, 1955). The notes remained unanswered until 1955 when they were included by reference in the identical notes mentioned infra, note 5.
5. For diplomatic documentation, see Memoria, op. cit. note 3, 180.
cases of the Onassis fleet sailing under Panamanian flag (December, 1944) and the American tuna clippers (January, 1955), both involving seizures by Peru, may be mentioned. In March, 1955, Ecuador seized and fined the Arctic Maid and Santa Ana, both of the United States registry. Diplomatic intervention has been without success.

To alleviate the predicament of its nationals, fishing in waters considered by the United States to be high seas, Congress adopted palliative measures* promising to reimburse** such fishermen for their losses out of public funds.

In the meantime, the United States tried hard to reach a reasonable agreement by direct negotiations with some of the countries involved, e.g., with Ecuador, but without success.

On the contrary, the determination of the CEP countries to maintain their position became even more evident at their second conference held in Lima (December, 1954). There the idea of a common juridical defense of the expanded territorial sea was adopted and consultation planned in case protests should be received. In addition, the participating countries promised not to sign any treaty that would impair the zone established in Santiago. They also agreed that effective sanctions should be imposed upon violators, the zone effectively policed and a system of licensing alien fishermen instituted.

Still the United States persisted in its efforts to reach a mutually acceptable solution. In May, 1955, a proposal was submitted to the CEP countries to have the dispute over territorial waters adjudicated by the International Court of Justice and, in addition, to start immediate negotiations on conservation problems. Yet the CEP countries declined the first part of the United States initiative, namely that proposing international adjudication of the dispute. This attitude seems to indicate lack of confidence on the part of the CEP countries that the 200 mile zone would pass a test by standards established in the Anglo-Norwegian Fish-

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7. Diplomatic documentation in Memoria, op. cit. note 3 at 174.
9. An Act to protect the rights of vessels of the United States on the high seas and in territorial waters of foreign countries, 68 Stat. 883 (1954). The accompanying Senate Report (No. 214, H.R. 9584) pointed out that "The traditional policy of the United States is to support the principle of the freedom of the seas, and to this end this country does not recognize claims to jurisdiction over alleged territorial waters greater in breadth than three miles from the coast since it is the view of the United States . . . that under international law it is not required to recognize such claims . . . . Specifically . . . the need for this legislation at this time has developed from seizures of American-flag fishing vessels which have taken place in the last several years as the result of extravagant territorial claims by foreign countries".
10. This language was adopted to "avoid appearance of recognizing to any extent the validity of foreign claims by thus subjecting itself to the jurisdiction of foreign courts" (ibid.)
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cries Case (1951). However, they agreed to meet on the conservation issue which could be handled, under the United States view, mainly along lines adopted by the United Nations International Technical Conference on Conservation of the Living Resources of the Sea (Rome, April-May, 1955).12

In compliance with these limited objectives of the Conference, the United States submitted to the CEP countries at the Santiago Conference (September-October, 1955) its own proposal; however, it was found by the CEP countries to be unsatisfactory. Then the CEP block reciprocated with its own “bases for an agreement” containing, from the point of view of the United States, provisions prejudicing the issue of territorial waters. This became even more apparent after the second proposal by the CEP countries was studied, whereupon the United States determined that nothing remained to be done but to agree “to suspend the conversations”.13

At this stage of the conflict it became apparent that the question could not be solved by bilateral negotiations. A promising way to try for a solution, perhaps, was to bring the issue before the Organization of American States. This was particularly evident because the O.A.S. has, since 1950, shown considerable interest in this problem. Its Juridical Committee even prepared a draft (adopted by a split vote of seven against three) and submitted it to the Inter-American Council of Jurists, then in session in Buenos Aires (1953). The Caracas Conference (1954), in its Resolution LXXXIV, recommended that a specialized conference of the O.A.S. be called to discuss the problem. Preparatory to this, the Inter-American Council of Jurists included the question now styled “System of territorial waters and related questions” in its agenda in order to prepare a preliminary study of the problem for the specialized conference to follow.14

The meeting of the Council of Jurists took place in Mexico (January-February, 1956).15 After having heard, by way of a general discussion, declarations by the attending delegations, a draft of final acts was submitted, by a few countries, which did not pass through any drafting committee and was not even communicated to all delegations present. This made the draft, as the United States delegate put it, a fait accompli.16 It appears that the Council, in its zeal, apparently overlooked that only a preliminary study was to be prepared. Instead, what is termed “Principles on the

12. U.N. publication A/Conf. 10/6 (1955); note reservations by the CEP countries ibid., Annex A, 10.
legal regime of the seas”, an “expression of the juridical conscience of the continent” was proclaimed to be “applicable between the American States”.

Basic tenets of these Principles may be summarized as follows:

(A) As to territorial waters, the Principles declare that the “distance of three miles . . . is insufficient” and, moreover, “does not constitute a rule of general international law”. Therefore, an “enlargement . . . is justifiable”, within “reasonable limits”, i.e., by taking into consideration geographical, geological, biological, economic and military interests of the coastal states. The determination of such a zone is declared to be within the power of “each State”, implying that no other country may have legitimate interests in this part of the hitherto high seas. At this point it is to be noted that the Preamble contains a rather weird proviso to the effect that the acceptance of these Principles “does not and shall not have the effect of recognizing or weakening the position maintained by the various countries of America on the question of how far territorial waters should extend”.

(B) With regard to the continental shelf, the Principles, in fact, extend the regime generally applicable to territorial waters, far into the area termed the continental shelf, by claiming not only its sea bed and subsoil but also “all marine, animal and vegetable species” living in constant relationship with this area; all this is to be within the exclusive power of the coastal state excluding any interests vested in other nations.

(C) The Principles go even further and declare that outside of their territorial waters, and beyond their continental sea and shelf, states may, by unilateral action, impose conservation measures applicable on the high

17. Acta Final de la Tercera Reunion del Consejo Inter-americano de Jurisconsultos, Mexico . . . . 35 (1956).

18. For recent discussions, note Holland, El regimen juridico de la plataforma Continental, 3 Revista de la Facultad de Derecho 469 (Montevideo, 1952); Bustamante y Riveros, Las Nuevas Concepciones Juridicas Sobre Dominio Territorial del Estado y Soberana del Mar, 41 Revista del Foro 477 Lima, 1954); Vivaldi Quiroli, La Resurreccion del “Mare Clausum”, 23 Revista del Derecho, no. 91, 3 (Concepcion, 1955); also, Azarrraga, Regimen Juridico de los Espacios Maritimos, 5 Revista Espanola de Derecho Internacional 27 (1952) and Los Derechos sobre la Plataforma Submarina, 2 Revista Espanola de Derecho Internacional 47 (1949); also Aramburo, Character and Scope of the Rights Declared and Practiced over the Continental Sea and Shelf, 47 Am. J. Int’l L. 120 (1953). For the other side, Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), Riesenfeld, Protection of Coastal Fisheries under International Law (1942); Leonard International Regulation of Fisheries (1944) and numerous articles concerning continental shelf, as, for example, Lauterpach, Sovereignty over Submarine Areas, 27 Br. Yearbook Int’l L. 376 (1950); Young, The Legal Status over Submarine Areas Beneath the High Seas, 45 Am. J. Int’l L. 225 (1951); Mouton, The Continental Shelf (1952); Boggs, Delimitation of Seaward Areas under International Law, 45 Am. J. Int’l L. 240 (1951); Trigg, National Sovereignty over Maritime Resources, 99 Univ. of Pa. L. Rev. 82 (1950); Green, The Continental Shelf, 4 Current Legal Problems 54 (1951), and Colombos, The International Law of the Sea (1954).—For our law concerning continental shelf, see Benton, The Continental Shelf: International Aspects, 6 S.W.L.J. 488 (1952); and Christopher, The Outer Continental Shelf Lands Act: Key to a new Frontier, 6 STANF. L. REV. 23 (1953).
seas with no consideration given to interests of any other nation. Moreover, in this area, the Principles grant to coastal States "the right of exclusive exploitation of species related to the coast, the life of the country..." etc.

(D) and (E) of the Principles deal with base lines and bays, a problem of no specific interest to participating countries.

It is not surprising that the United States took exception to the manner in which the Principles have been adopted as well as to their contents, declaring them to be contrary to international law. Nevertheless, the Principles were adopted with every vote against that of the United States, with the exception of five abstaining countries (Dominican Republic, Cuba, Colombia, Bolivia and Nicaragua). Even after voting for the principles, some of the Latin American countries added important reservations.

The possible consequences of a final adoption of rules as indicated by these Principles drew an increasing public interest in this country. Newspapers published unfavorable comments, particularly criticizing the heavy-handed way the delicate problem was approached by the assembled jurists. Moreover, well organized fishery interests in the United States demanded to be heard. Even Congress took issue.

In this atmosphere, the Specialized Conference of the O.A.S. convened in Ciudad Trujillo after a move for postponement had been defeated.

This Specialized Conference (March 15-28) adopted a Final Act containing, among various recommendations, a Declaration of Ciudad Trujillo. Without even mentioning the unfortunate faux pas committed by the jurists gathered shortly before in Mexico, the Conference agreed upon certain principles acceptable to all member countries. At the same time, the Declaration also frankly pointed out areas of disagreement and recommended to the Organization of American States to "continue dili-

21. It is little known that an unofficial modus vivendi exists between United States and Mexican shrimp fishermen in regard of the Campeche area, by virtue of a United States - Mexican fisherman association. Moreover, it is interesting to note that during 1955 repeated attempts have been made, on the part of the United States, to enter into diplomatic negotiations on international fishery problems. After the Trujillo Conference the attitude of Mexico seems to have stiffened in view of the fact that on April 7, the Secretariat for Marine Affairs in Mexico, decided to take what it calls "energetic" action against all violators of its territorial waters and impose, according to the Mexican Fishing Act, fines up to $15,000 United States. In addition, new seizures of American fishing boats are reported.
23. Organization of American States, Agenda and Regulations, Approved by the Council of the OAS... (1956); Background Material on the Scientific and Economic Aspects of the Continental Shelf and Marine Waters (Ch. I and II on the Agenda) ... (1956); Background Material on the Juridical Aspects of the Continental Shelf and Marine Waters (Ch. III of the Agenda) ... (1956).
gently with the consideration” of these matters “with a view of reaching adequate solutions.”

Complete agreement was reached in regard to the subsoil of the continental shelf, which area includes, according to the Declaration, “the sea-bed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal state, outside of the territorial sea.” While the width of this latter area remained disputed, the Declaration expressed that all the areas included in the continental shelf “to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitations of the natural resources” appertain “exclusively to that state (i.e. adjacent coastal state) and are subject to its jurisdiction and control”. This agreement, basically in accord with the law in force in these United States in regard to its outer continental shelf,25 is questionable from the point of view that such an expansion of the territorial sovereignty of a coastal state is not a mandatory rule of international law but only a permissive one, in the sense that countries may, if they so decide according to their own constitutional and legislative procedures, claim such areas to be part of their national area. It follows that there is no rule of international law that would impose a duty upon coastal states to take and exercise jurisdiction over these areas. If there were such duty, then it could become the ground for claims arising out of omissions to perform such obligation. Of course, this is not meant by the Declaration.

Another point of agreement contained in the Declaration concerns the necessity of cooperation between states in efforts to conserve living resources of the high seas in order to secure the continued productivity of all species. This part of the Declaration clearly disapproves the formula included in the Principles adopted in Mexico. On the contrary, the Declaration does not even mention any unilateral jurisdiction to be permitted in areas of the high seas, even for conservation purposes. Instead, the Declaration stresses the need for international cooperation among all “states directly interested in such resources”, adjacent or not. However, the Declaration recognizes, in principle, what it terms “special interest” of adjacent coastal states in regard of “the continued productivity of the living resources” in such an area of the high seas. However, it also is made clear by the Declaration that there is no agreement “either

25. Cf. 43 USC, Sec. 1331 ss., particularly the fact that the seaward limit of the continental shelf is not statutorily defined; it appears that both Houses of Congress adopted the description contained in the respective reports, namely that the continental shelves are “slightly submerged portions of the continents that surround all the continental areas of the earth . . . The outer boundary of each shelf is marked by a sharp increase on the slope of the sea floor. It is the point where the continental mass drops off steeply toward the ocean deeps. Generally, this abrupt drop occurs where the water reaches a depth of 100 fathoms or 600 feet, and, for convenience, this depth is used as a rule of thumb in defining the outer limits of the shelf.”
with respect to the nature and scope of this special interest of the coastal state or as to how the economic and social factors which such state or other interested states may invoke, should be taken into account in evaluating the purposes of conservation programs.\(^{26}\)

Another point of disagreement has already been mentioned here, namely that there is no agreement between the participating countries in regard to the width of the territorial waters. The third disputed question remains that of the legal regime of waters above the continental shelf, particularly "with respect to the problem of whether certain living resources belong to the seabed or to the superjacent waters" which would make them, in the first case an appurtenance of the continental shelf and subject to the principle stated above, or, in the second case, independent objects located within the area of high seas.

The United States made it amply clear that its position on problems discussed remained unchanged.\(^{27}\) The closest to its position came Cuba, while Mexico "reaffirmed with all its force and integrity, all aspects of (its previously taken) position . . . especially in Resolution XIII of the Final Act of the . . . Council of Jurists entitled Principles of Mexico on the Juridical Regime of the Seas". It may be easily observed, however, that the Principles of Mexico are not only irreconcilable with the basic tenets of the Declaration (adopted unanimously), but, in addition, had never had any binding legal effect. The CEP countries, now joined by Costa Rica, stated, in adopting the Declaration, that the latter does not "alter in any way whatsoever, their constitutional provisions, their national legislation, the agreements to which they are parties, or other international instruments they have approved." All this is self-evident since no declaration of this type, particularly one stating points of disagreement, could be construed in any other sense.

International problems created by the expansion of national sovereignties into the area of high seas, and particularly those affecting fisheries, are

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26. Cf. Sec. 1332 (b) 43 USC (1953) excluding from the effects of the act navigation and fisheries.
27. The United States (a) "does not recognize a right on the part of a coastal state, as claimed by certain Delegations, to exclusive control over the resources of the high seas. The United States maintains that, in accordance with international law, fishery regulations adopted by one state cannot be imposed upon nationals of other states on the high seas except by agreement of the governments concerned. Moreover, the United States Delegation also wishes to record the fact that it made a specific proposal for the Conference which would, if adopted, effectively meet the conservation problem that would be posed in the event of failure of the interested states, including the coastal state, to reach agreement on the need for and application of conservation measures. (b) The Government of the United States does not recognize that a state has competence to determine the breadth of its territorial sea apart from international law. (c) The Delegation of the United States also wishes to call attention to the fact that broader consideration having been given at this Conference than at any previous inter-American meeting, to the various aspects of the subjects on its agenda, the present Resolution . . . constitutes the latest and the most authoritative expression of the Organization of American States on the subjects discussed therein."
far from being solved. On the one hand, they have reached a significant impasse within the Western Hemisphere where both protagonists, the moderates on the one side, represented by the United States, and the extremists on the other side, led by the CEP countries, have clashed head-on. On the world wide level, however, the picture seems to be more promising since one may hope that there the moderates will receive a larger support than within the Western Hemisphere where many of the issues became imbued with political slogans for home consumption and only slightly camouflaged with alleged interests in conservation. The first test after the Trujillo Conference will come before the United Nations Commission for International Law meeting now (April 1956) in Geneva, and after this, in Fall 1956, before the General Assembly of the United Nations.