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Possible Solutions to the 200-Mile Territorial Limit†

The law of the sea boasts no more important current topic than the question of the manner in which the resources of the sea are to be exploited by the nations of the international community.[1] Because the resources of the sea are not unlimited, there is an ever-increasing need for international cooperation with respect to their exploitation. Directly in the path toward such international cooperation stands the record of recent attempts by some nations to assert control unilaterally over the exploitation of the resources of the sea within maritime zones contiguous to their territorial waters.[2]

Such unilateral attempts to control the exploitation of the sea's resources represent a precedent which threatens to subvert the need for international cooperation in this vital area. This paper accordingly undertakes to suggest methods by which bilateral or multilateral agreements might be substituted for these unilateral declarations with an eye toward eventual international agreement concerning the exploitation of the sea's resources.

Concern for the exploitation of the resources of the seabeds and their superadjacent waters is by no means a recent phenomenon, but the history of the current controversy over unilateral control of these resources beyond the limits of the territorial seas, can be traced to the issuance by the President of the United States of a proclamation regarding the Policy of the United States with respect to Coastal Fisheries in Certain Areas of the High Seas.[3] The proclamation, issued in 1945, announced that the govern-

*J.D., Univ. of Georgia Law School (1972).

†This paper was the winner of the 1972 Henry C. Morris International Law Contest.

[1]Even the current controversy and concern over ocean dumping and the pollution of the oceans is, at its core, directed at the preservation of the resources of the sea so that they might be fully utilized for the benefit of mankind.

[2]*See* Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 6449 (1959) for a listing of the nations which have asserted claims over maritime zones of 200 miles or greater.

[3]Exec. Proc. 2667, Sept. 28, 1945, 10 F.R. 12303.

ment of the United States regarded itself as empowered to establish conservation zones in areas of the high seas contiguous to the coasts of the United States and to regulate and control fishing activities in these zones.[4]

Although the proclamation did not itself establish any such zones, it prompted responses from several Latin American nations concerning their rights in waters contiguous to their coasts. Eventually, El Salvador memorialized its claim to a territorial sea of 200 marine miles in its Political Constitution, and Chile, Ecuador and Peru proclaimed their exclusive sovereignty and jurisdiction over a maritime zone whose breadth was stated as being at least 200 miles from the coasts of the respective countries.[5]

The Republic of South Korea in addition claims "national sovereignty" over a zone extending up to 200 miles from its coast.[6] Because each of these claims appears to be based on a concern by the declarant nation for the conservation of the resources of the sea in the contiguous zone,[7] it would be convenient to consider the declarations of Chile, Ecuador and Peru as representative of the group and as epitomizing the problem of the 200-mile maritime zone.

The formal statement of Chile, Ecuador and Peru (the "CEP" nations) was made in Santiago, Chile in 1952 and purported to extend the "exclusive sovereignty and jurisdiction . . . over the sea that bathes the shores of their respective countries, to a minimum distance of 200 nautical miles from the above-mentioned coasts."[8] The declaration goes on to refer to this area as a "maritime zone," and emphasizes that the nature of the jurisdiction being asserted was not intended to interfere with the recognized right of innocent passage through these waters.[9] Though the declaration speaks of "sovereignty," it is interesting to note that it also refers to the area as a "maritime zone" and not as territorial waters.

Moreover, a subsequent interpretation of the purposes underlying the declaration made by a Peruvian official indicates that the aim of the exten-

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[4]*Id.*

[5]*See* Heinzen, *supra* note 2, at 644.

[6]*Id.*

[7]*See* F. AMADOR, THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA 76–93 (1963) for a discussion of the text of the Santiago Declaration, the declaration in which Chile, Peru and Ecuador proclaimed their sovereignty and jurisdiction over the 200-mile maritime zone. As Amador indicates, the text of the statement, and the gloss placed on that text by subsequent statements of the delegates of the signatory nations indicates that the sole purpose of the declaration was to secure the right to regulate the exploitation of resources in the coastal and contiguous waters.

[8]Agreement Between Chile, Peru and Ecuador, Aug. 18, 1952, Declaration on Maritime Zones, art. 3(II), in LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA 724 (1957).

[9]*Id.*

sion of the maritime zone was solely the conservation of the resources in the seas adjacent to Peru.[10] It appears, then, that the area claimed, at least by the CEP nations, cannot be considered territorial waters in the traditionally understood sense.[11] As Garcia Amador has suggested, the zone might best be considered *sui generis*.[12] What is significant is that the claim of exclusive control, whatever the label attached to it, has been asserted.

This, then, is the problem of the 200-mile limit. Equally significant, in terms of the solution to the problem, is the fact that the concern of the countries asserting control over the 200-mile zone appears to have been exclusively with the natural resources of the sea.[13] The question then becomes: Given the interest of the coastal states of the CEP group, in regulating the exploitation of the resources of the sea in the zone contiguous to their coastline, by what methods can these nations be persuaded to exchange their present system of unilateral control over the maritime zone for a system of bilateral or multilateral control?

Broadly conceived, the answer to this question involves balancing the interests of the coastal states claiming jurisdiction over the 200-mile zone against the interests of the other nations of the world community in maintaining freedom of the seas, including freedom to fish on the high seas. More narrowly speaking, the problem involved is the balancing of the interests of small coastal states, many of which have no developed fishing fleets in the modern sense, against the interests of those countries with highly sophisticated fishing fleets capable of harvesting, processing and canning seafood without ever having to return to a home port. Whatever solution is posited to the problem of the 200-mile limit must provide assurances to the small coastal states, that they will be accorded some measure of preferential rights with respect to the marine resources in the seas contiguous to their coastline.

Bringing about a solution to the 200-mile limit might properly be conceived as involving three phases. First, it must be decided what substantive rights are to be accorded to the coastal state with respect to the waters contiguous to its coastline. Second, a mechanism by means of which these rights can be determined, on a nation-by-nation basis, in other than unilateral fashion, must be posited. Finally, a practical plan for gaining acceptance of the mechanism must be considered.

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[10]Statement of Peruvian Delegate at the 486th Meeting of the Sixth Committee, Nov. 29, 1956, U.N. Doc. No. A/C 6/SR.486, at 84, 86 (1956).

[11]One commentator has suggested that it is difficult for one to determine the exact breadth of the territorial sea claimed by any of the three nations—Chile, Ecuador or Peru. Heinzen, *supra* note 2, at 644 n.214.

[12]AMADOR, *supra* note 7, at 77.

[13]*See supra*. note 7.

It must be assumed, given the current status of international affairs that the coastal state is entitled to some superiority of rights with respect to the exploitation of the resources in the seas contiguous to its coastline. Unilateral declarations regarding these preferential rights have been made over the years and have been accepted, willingly or otherwise, by the members of the international community.[14] Moreover, the Rome Convention of 1955 had recognized the notion that the coastal state had special interests in the contiguous waters, virtually without debate.[15] The question, then becomes: What is the nature of these rights and to what extent do they extend?

Basically, a coastal state could be accorded rights either over a specific territory in its contiguous waters, or over specific types of resources to be found in those waters. Given that the primary interest of the states claiming the 200-mile limit is evidently in the resources of their adjacent waters, it would seem, without more, that the preferred method would be to define the rights of the coastal state in terms of specific species of fish or other marine fauna. Ideally, such a scheme, if extended to include all the species of fauna in the sea, would allow a balancing of the interests of the coastal state in the fauna in its contiguous waters, against the needs of the greater world community without resort to extensive claims of sovereign jurisdiction.

Practically speaking, however, it must be conceded that the extent of man's knowledge concerning the abundance and habits of marine fauna, render such a scheme unworkable at the present time.[16] What might be possible, given the current level of knowledge, would be bilateral or multilateral agreements between the coastal state and other states, concerning the extent to which certain species of marine fauna will be exploited in the seas contiguous to the coastal state. In essence, the coastal state would be granted the privilege of asserting a special interest in certain resources found in the waters contiguous to its coastline.

The question then arises: To what distance should the coastal state be allowed to assert its special competence? Past attempts to define limits of competence in the waters contiguous to a coastal state have emphasized arbitrary limits expressed in terms of nautical miles.[17] The most popular of

[14]Two examples are the proclamation by the President of the United States, *supra* note 3, and the Santiago Declaration, *supra* note 8.

[15]AMADOR, *supra* note 7 at 155.

[16]While it is indisputable that the range of man's knowledge concerning marine life is rapidly expanding, recent revelations in estimates of the world tuna population suggest that this knowledge is by no means complete. *See* T. WOLFF, PERUVIAN-UNITED STATES RELATIONS OVER MARITIME FISHING: 1945-1969 (1970) at 22.

[17]*See* INTER-AMERICAN JURIDICIAL COMMITTEE, OPINION ON THE BREADTH OF THE TERRITORIAL SEA (1966), for a historical discussion of attempts to fix a limit to the extent to which a state could claim territorial waters.

these schemes would establish a limit of twelve miles, to be apportioned between territorial waters and contiguous zone.[18]

The shortcoming of such an approach is that it fails to account for the peculiar characteristics of the ecosystem upon which the species essential to the welfare of the coastal state depends. For example, the 200-mile limit claimed by the CEP nations is purportedly based on scientific data indicating that such an extent of protection is necessary to prevent destruction of the ecosystem upon which the economy of the coastal states is partially dependant.[19] Accordingly, the limits to which the coastal state should be allowed to assert a special interest should be related to the nature of the interest to be protected, and not based on some arbitrary notion of limits to be applied uniformly to all countries.

In summary, then, the substantive rights of the coastal state to the resources in the contiguous waters, should be expressed in terms of a special interest of the coastal state in the conservation and use of the resources in the waters contiguous to its coasts. The range over which the coastal state should be permitted to claim its special interest should be determined with respect to the nature of the interest to be protected. It should be noted that these suggestions are compatible with the nature of the interest asserted by the CEP nations, as indicated by the Santiago Declaration and subsequent clarifying statements made with respect to that declaration.[20]

The crux of the matter concerning the 200-mile limit—and the point on which there seems to be the most vehement controversy—is the way in which the special interest of the coastal state is to be balanced against the interests of other nations, in the free use of the high seas for resource exploitation. This raises the second question of the phases that must underlie the solution to the problem of the 200-mile limit: By what mechanism are the rights of the coastal state with respect to the resources of the contiguous sea to be determined?

The most obnoxious aspect of the declaration of sovereignty and jurisdiction over the 200-mile maritime zone by the CEP nations, is the manner in which that sovereignty and jurisdiction is exercised: unilaterally. The CEP nations have not attempted to negotiate with other states which have been in the past, or are currently, interested in fishing the waters within the limits of the 200-mile zone to determine the extent to which the resources in that area will be exploited.

Rather, the CEP nations have established themselves as sole licensing

[18] *Id.* at 91.
[19] AMADOR, *supra* note 7, at 75–6.
[20] *See supra* notes 8 and 10 and accompanying text.

agents for fishing rights in the zone; any nation desiring to fish in the zone must do so at the pleasure of the coastal state and at the price unilaterally fixed by the coastal state; otherwise, he fishes at his own risk. What is needed is an alternative method or mechanism for determining the extent to which the coastal state can assert its control over the contiguous sea—a method that involves consultation and mutual agreement among all involved parties.

Alternative methods for arriving at such a non-unilateral approach to the determination and denomination of special interests in the contiguous zone might include: (1) bilateral agreements between the coastal state and other states wishing to exploit resources in the contiguous sea; (2) multilateral or regional agreements concerning the exploitation of resources in a given territory, and involving all of the nations interested in exploiting those resources; (3) international conventions regarding the exploitation of resources on a worldwide basis; and (4) the establishment of an ocean-régime[21] or govenment to determine the ways in which the resources of the sea are to be exploited and allocated among the various nations of the world.

From the standpoint of encouraging a rule of law governing the use of the ocean resources, the adoption of an international convention or the establishment of an ocean-régime would be the preferable approach. Although an ocean-régime statute has been suggested, one has not been considered for implementation on an international scale.[22] Moreover, the approach by international conventions has been unsuccessful with respect to any agreement concerning the method by which ocean resources are to be exploited.[23] Significantly, the Cuban-Mexican draft proposal for an international convention, submitted at the Rome Conference of 1955 and defeated there on procedural grounds, proposed a method for controlling the exploitation of ocean resources and received the support of the CEP nations.[24]

It is unfortunate that the subsequent Geneva Conferences of 1956 and 1960 deadlocked on the question of the breadth of the territorial sea, and made no significant progress toward reaching agreement on the use of ocean resources, a matter whose settlement must precede any hoped-for agreement on the breadth of the territorial sea. In any event, most commentators seem to be of the opinion that the experiences at Geneva in 1956, lessened rather than increased the chances for international agree-

[21]*See* E. BORGESE, THE OCEAN RÉGIME (1970) for a discussion of proposals for the creation of such a government of the sea.

[22]*Id.*

[23]*See* INTER-AMERICAN JURIDICIAL COMMITTEE, *supra* note 17.

[24]For a discussion of the Cuban-Mexican draft, *see* AMADOR, *supra* note 7, at 151-57.

ment concerning the extent of coastal-state competence to assert special interests in the contiguous sea.[25]

The most fertile ground for agreement, therefore, would seem to be at the level of bilateral or multilateral-regional agreements concerning the exploitation of the resources of the sea, especially in the areas over which the CEP nations currently assert sovereignty and jurisdiction. Such agreement might be based on the Cuban-Mexican draft proposal from the Rome Conference of 1955 and be adapted for use on a regional basis rather than an international one. Indeed, in all matters save those of dispute settlement, the Cuban-Mexican draft purported to rest on regional settlement of questions concerning resource allocation.

Specifically, the draft proposed: That conservation measures be regional in character; that the measures relate to species of marine fauna rather than to territories of the sea; that the coastal state be empowered to take unilateral action with respect to marine fauna if such action was based on scientific and technical data indicating that the limitation of exploitation of the fauna was necessary to the economic and social welfare of the coastal state, and, if such action did not discriminate against foreign fishermen; and, finally, that disputes concerning the exploitation of resources be settled by an international body.[26]

To the end of implementing such a plan, a conference could be called to include all nations which are now or plan to be fishing in the waters affected by the declarations of the CEP nations, and in the other waters of the South Pacific off the coast of South America.[27]

Such a conference might address itself to the problem of securing adequate scientific and technical data concerning the marine fauna found in this regional area; such a study, endorsed by all of the members would be an important pre-requisite to the consideration of claims of special competence by coastal states over species of marine fauna. In addition, the conference could formulate principles, similar to those contained in the Cuban-Mexican draft, to govern the maritime activities of the member nations in the region; based on these principles, consideration could then be directed to existing practices by coastal states in the region, and a regional council could be established to adjudicate disputes over claims of right by coastal states. This, then, would provide a mechanism for the handling of resource allocation in the seas contiguous to coastal states.

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[25]M.McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 14 (1962).

[26]*See* AMADOR, *supra* note 7, at 151-52.

[27]The history of attempts to convene such a conference and the current appraisal of prospects for agreement on principle between the CEP nations and other interested parties are detailed in WOLFF, *supra* note 16, at 13-20.

Coupled with an approach to the substantive issues of the type outlined earlier, such a mechanism should logically satisfy the needs of the coastal state to protect the marine fauna in the contiguous sea from over-exploitation and, at the same time, by means of the non-discrimination provision, strike a balance between the interests of the coastal state and other maritime nations. Moreover, the non-discrimination provision coupled with the right of any state to appeal actions by the coastal state to a regional body, would eliminate the offensively unilateral character of the rights currently asserted over the maritime zone by the CEP nations, without calling for a direct confrontation with those nations over the nature of their declaration of interest.

The question then remains: What are the realistic chances of success for such an approach? Procedurally, there would seem to be no reason why such a conference could not be convened within a short period of time. Substantively, the major stumbling block to such an agreement might be the willingness of the maritime powers to concede the rights of small, non-maritime states to impose limitations on the extent to which the resources of the sea are to be harvested.

Politically speaking, however, the small nations, such as the CEP nations, must be handled gingerly on the subject of resource exploitation. These countries, many of them feeling that their land based resources have already been over-exploited by the incursions of the large industrial nations of the world, are doubtless going to be sensitive to the question of the extent to which the resources in the contiguous sea are to be exploited in similar fashion.[28]

Accordingly, the maritime powers should be prepared to make concessions, for example, with regard to the composition of the dispute-settling tribunal to assure the smaller nations that the purpose of a regional agreement concerning the exploitation of the resources of the sea, is not merely a device for imposing their own views about the exploitation of these resources on the less powerful nations. If the suspicions of the CEP nations can be overcome, there would seem to be no practical barriers to the establishment of a regional convention governing the exploitation of the resources of the South Pacific. And such an agreement should provide a precedent for the solution of the problem of the 200-mile limit elsewhere.

In summary, then, the problem of the 200-mile territorial limit is at heart a problem concerning the allocation of the resources of the oceans. Any

[28]Recent developments in Chile regarding the nationalization of foreign industries, lend support to the proposition that the psychology of the Latin American countries with respect to foreign exploitation, is of paramount significance for the settlement of disputes over resource-exploitation in the contiguous seas.

attempt to solve the problem of the 200-mile claim by the CEP nations and others must address itself to the question of resource allocation. Substantively, the special interests of the coastal state in the resources of the contiguous sea must be recognized, and must be allowed to the extent that scientific and technical information indicate that such claims are justified. Procedurally, however, the coastal state cannot be allowed to establish itself as a unilateral regulatory agent for the exploitation of resources in the contiguous sea in a manner that discriminates against other maritime nations.

Accordingly, a regional agreement based on the Cuban–Mexican draft presented to the Rome Conference, should be adopted as the mechanism for regulating resource allocation in the areas currently affected by the assertion of the 200-mile limit. The adoption of such an agreement would provide the solution to the current controversy over that limit and would lay the foundation for eventual international agreement on the exploitation of marine resources according to a rule of law.