International Law of Fisheries

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IN INTERNATIONAL LAW the question of fisheries did not arise as an independent problem but rather is found imbedded in a much broader and much more complex set of questions. This set of questions arises in an attempt to solve the problem of how far the powers of a nation reach into the seas. It is not difficult to establish the limits of powers on land; there they follow well defined landmarks dividing adjoining territories. Equally simple in its application is the present rule as to how high the control of a country shall reach into the space. However, the question of the extent of national sovereignty or of some limited national controls over the sea remains a controversial one, and this is where the question of fisheries comes in.

(I)

Between the coast which is under the complete sovereignty of a particular country and the area of the high seas which is under the sovereignty of none, various transitional areas have gradually developed. Starting from the coastal waters where the state exercises all, or almost all, powers vested in a sovereign nation, i.e. legislative, judicial and administrative, to the complete exclusion of all other nations, these powers taper off step by step through intermediate areas where only a limited amount of controls may be exercised by the coastal state, reaching finally the vanishing point in the area of high seas free to all nations.

Simplified, these subsequent areas of progressively decreasing powers may be illustrated by the following scheme. Immediately along the coast there may be a strip of the sea called "internal waters," which include the waters in bays, harbors or inside base lines.[1] Beyond this strip, or where there is none, directly from the coast, a maritime zone is situated, traditionally three miles wide, called the "territorial sea" (also marginal or littoral sea, or even tide-lands).[2] In regard to both of these areas, the internal as well as the territorial sea, it is generally recognized that the coastal state is entitled to exercise all the powers vested in a sovereign nation. Naturally, such exercise may be limited by treaties or the generally accepted rules of international law, as, for example, the right of innocent passage by foreign vessels. Consequently, all resources within these areas, including the sea bed, its subsoil and the superjacent waters (and all the fish therein) are within the exclusive control of the coastal state to the complete exclusion of any other power or its nationals.

As mentioned before, the traditional width of the territorial waters is three miles. Recently this rule has been abandoned by certain expansionist countries extending by unilateral acts what they call their "national territory" beyond the traditional three miles into the high seas.[3] Some have placed this extension as far as 200 miles from their coast.[4] This would mean that vast areas of the high seas would come under the exclusive control of these coastal states which would, in turn, entitle them to enact legislation therein effective, to exercise judicial powers, to tax or to administer (police) these areas in any way they please. To fishing this would mean the disappearance of the principle of freedom of fishing which the present regime of the high seas has always embodied. That traditional freedom would be replaced by one-sided controls

of the coastal state. This state would then have the freedom to license, fine, tax, pass discriminatory legislation and what have you.

These attempts have been immediately and strongly opposed by all the important maritime powers. The United States, for one, has lodged with the respective governments strong protests, pointing out that such unilateral acts are "at variance with the generally accepted rules of international law" and expressly reserving in regard to fishing "the rights and interests of the United States."[5]

Beyond these two zones, the internal and territorial waters, another area is now recognized. This new third zone found its origin in the Continental Shelf.[6] The Continental Shelf is that part of the sea bed and its subsoil beyond the limits of the territorial sea and still within such distance from the coast that exploitation is feasible. Such exploitation has extended the shelf to the point of maximum 100 fathoms in depth. Motivated by their interest in natural resources (oil, coal, minerals, etc.) and, to a smaller degree, by considerations of defense, adjacent countries therein claim, by means of unilateral declarations, what is generally termed "control and jurisdiction," but which amounts for all practical purposes to full sovereignty. Such claims to the shelf, generally acquiesced in by other countries, exclude, by definition, all other countries and their nationals from any control or activities in these submarine areas. However, the regime of the superjacent sea is unaffected and remains that of the high seas; consequently, navigation and fishing are free to all nations. This is the position taken by this country[7] in accordance with international law.

The expansionist movement is noticeable in this area as well. Some countries, grossly misreading[8] the Truman Proclamation[9] and, using such version as a precedent, extended claims from the continental shelf not only to the superjacent sea, the "epicontinental sea," but also to include full sovereignty beyond this area far into the high seas. Into this extension at some rough figure, let us say 200 miles, was included, along with the sea itself, the sea bed, its subsoil and even the airspace.[10]

However, this is not the end of the story. From the outer limits of the territorial sea an additional zone is situated, called the contiguous sea. It must be borne in mind, however, that this zone may cover different areas of the sea according to its line of origin. For countries adhering to the traditional three mile zone, the contiguous sea starts there. Countries that have pushed their "national territory" deep into the high seas, it will start at six, nine, twelve or even 200 miles. Regardless of the point to which the "territory" has been expanded, it is generally recognized that beyond this line the regime of the high seas prevails. And even here, coastal states claim certain additional controls.[11] For countries adhering to the traditional three mile zone such controls are reasonable. This country, for example, has established two kinds of areas beyond its territorial waters: one, as far as nine miles beyond the three mile zone, called "customs waters"[12] where custom controls may be exercised; and the other, the "conservation zones" provided by the Truman Proclamation.[13] Within this latter zone, the United States claims, in accordance with international law, the right to control fishing of its own nationals;[14] on the other hand, in areas where nationals of other countries are engaged in fishing as well, conservation measures may be established only by mutual agreement of the countries concerned. Accordingly, the Proclamation recognized "the right of any State to establish conservation zones off its shores in accordance with the above principles . . . provided that corresponding recog-

nition is given to any fishing interests of nationals of the United States . . . in such areas." In spite of such measures, these areas shall remain under the regime of the high seas, and "the right to their free and unimpeded navigation . . . (is) in no way thus affected."

It is, however, surprising to find that countries claiming the 200 mile territorial waters do not stop there but claim additional controls, even unilateral, over fishing in the contiguous sea already remote from their shores, invoking primarily biological arguments with particular emphasis on interdependence and migration of fish.[15] Such attempts could, if not met with common sense, degenerate into some kind of nationality of the fish population, probably according to their habitual domicile in some part of the expanded "national territory." This remark, of course, is not intended to minimize the importance of bona fide conservation measures which, if effectively handled and not only claimed, are in the interest not only of the coastal states but of all other maritime powers with fishing interests in these areas.

(II)

The first part of our discussion was intended to show how, under international law, fisheries may be subject to partial or complete control by the coastal states or how they may be free to all.[16] It is well known, however, that some important fisheries within the area of the high seas, as well as some within territorial waters, are controlled by "international agreements."[17] In regard to the former, conservation agreements can by their nature bind only the signatory countries and their nationals. The outsiders, non-signatories, are not controlled. This may be remedied by adoption of the methods suggested by the International Law Commission of the United Nations.[18]

It may be stated that within the Western Hemisphere fishery problems are playing an increasingly important role.[19] Countries that expanded their "national territory" far into the high seas, particularly Chile, Ecuador and Peru, joined forces in order to secure these attempts. At their first conference in Santiago (1952) the CEP countries made the 200 mile zone their common cause and reiterated their position that this area of the high seas, including the sea bed and its subsoil, is "subject to the exclusive sovereignty" of these countries, only "innocent and inoffensive passage"[20] excepted. Later, in Lima (1954), the same countries closed their ranks even tighter and decided on concerted action to put teeth into their claims. This country, constantly opposing such attempts, tried to reach a mutually acceptable solution. As a result a conference was held with the CEP countries in Santiago (1955) without success.[21]

Another way was still available to work for a solution, through the Organization of American States. Its Juridical Council was to prepare materials for a specialized conference of the Organization. The Council met in Mexico (1955) where, in a rather unusual way and far beyond its authority, it adopted, against the vote of the United States, a document called the Principles of Mexico, following the views of the expansionist countries as the "expression of the juridical conscience of the Continent."[22] It is not surprising to find that the Specialized Conference of the Organization (Ciudad Trujillo, 1956)[23] was unable, and probably unwilling, to consider these Principles as a workable basis for its deliberations. Instead, it adopted a Declaration containing a realistic inventory of agreements and disagreements and suggested that the Organization continue its efforts to reach an adequate solution.

This is where things stand now.

(III)

The question of control over the sea and its riches has attracted the attention of universal organizations as well. The League of Nations considered the problem (1930).[24] After 1945, these efforts were continued by the United Nations through its International Law Commission. In addition, the Food and Agricultural Organization, one of the specialized agencies of the U.N., took up the question of fishery conservation and at the Rome conference (1955) adopted a report accompanied by general conclusions.[25]

The International Law Commission, on the other hand, in charge of surveying the whole field of international law with a view to selecting topics for codification, chose as one of them the law of the sea. It is true, of course, that this Commission, like the United Nations, has no power to create law binding upon member states. Nevertheless, findings of the Commission, as to what the law is, have the inherent weight of an authoritative restatement. Moreover, the Commission may advance new solutions which, if adopted by member states, will greatly influence future developments in the law of the sea.

The Commission has, on the basis of the first draft (1955)[26] prepared a second and final draft (1956),[27] and submitted it to the General Assembly of the United Nations now (1957) in session in New York.

Without going into the legal details of the draft, we may well summarize here the most important findings of the Commission having direct bearing on fisheries. First, we see that the Commission, faced with divergent positions on the width of territorial waters, was unable to do anything but state that "international practice is not uniform as regards the delimitation of the territorial sea"; however, the Commission felt that it is in violation of international law to extend the regime of territorial waters beyond a maximum of twelve miles which, incidentally, clearly shows that claims up to 200 miles are untenable under international law.[28] In addition, the Commission stated that within the area from the minimum line of three miles and the maximum line of twelve miles countries take different positions. In the words of the draft, "many states have fixed a breadth greater than three miles and, on the other hand, states do not recognize such a breadth when that of their own territorial waters is less" (Art. 3). There can be no doubt, though, that according to the Commission the high seas begin at least at the twelve mile line off the coast and, consequently, freedom of fishing is guaranteed there under international law (Art. 27,2 and 49). Additional provisions deal with conservation of living resources of the high seas (Art. 50-60) which plan to give the coastal states a say regardless of the fact their nationals are not engaged in fishing within the contiguous sea while other countries will only have their interests represented provided their nationals fish there (Art. 52).

It may be added that a modified definition of the continental shelf as one depending upon the feasibility of exploitation regardless of the depth did not, of course, affect the Commission's position on fishing in the epicontinental sea. The Commission unequivocally found that "the rights of the coastal states do not affect the legal status of the superjacent waters as high seas, or that of the airspace above these waters" (Art. 69). This means that not only must the freedom of navigation remain unimpaired but that the freedom of fishing there must also remain unimpaired.[29]

During the greater part of December 1956, this draft was discussed by the Sixth Committee of the General Assembly. In its final resolution[30] submitted

to the Assembly, the Committee calls for an international conference in Rome (1958) to "examine the law of the sea, taking into consideration not only the legal, but also the technical, biological, economic and political aspects of the problem and to embody the results of this work in one or more international conventions or such other instruments as it may deem appropriate," with the Commission's draft "as the basis for its consideration of the various problems involved in the development and codification of the law of the sea . . ."

1. Lines along deeply indented coasts with islands in immediate vicinity, running along the outer points but not departing from the general direction of the coast to include waters closely connected with the adjacent land. Leading case: Anglo-Norwegian Fisheries Case (1951). Evensen, The Anglo-Norwegian Fisheries Case and Its Consequences, 46 Am.J.Int'l L. 609 (1952); also 65 Harv.L.Rev. 1453 (1952) and 4 Stan. L.Rev. 546 (1952).
2. This rule is maintained by the United States. For documentation, 1 Wharton, A Digest of International Law 71, 100 (1887); Moore, A Digest of International Law 698, 702 (1906), and Hackworth, Digest of International Law 623 (1940). Hyde, 1 International Law . . . 451 (1947); Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927); Batty, The Three-Mile Limit, 22 Am.J.Int'l L. 503 (1928); Boggs, Delimitation of Seawards Areas under National Jurisdiction, 45 Am.J.Int'l L. 240 (1953); Dickinson, Jurisdiction at the Maritime Frontier, 40 Harv.L.Rev. 1 (1926); Frazer, The Extent and Delimitation of Territorial Waters, 11 Corn.L.Q. 455 (1926); Price, Sovereignty and Ownership of the Marginal Sea and Their Relation to Problems of the Continental Shelf, 3 Baylor L.Rev. 243 (1951).

   In regard to fisheries, Riesenfeld, Protection of Coastal Fisheries under International Law (1942); Allen, Legal Limits of Coastal Fishery Protection, 21 Wash.L.Rev. 1 (1946).

   Note also reports on territorial waters by Baxter and by Whiteman in the Proceedings of the American Society of International Law, 1956, 116 and 125 (1956).

   In regard to the Gulf of Mexico, adjacent states of the Union claim at least three marine leagues, i.e. nine miles, as their territorial waters, Ireland, Marginal Seas Around the States, 2 La.L.Rev. 252 (1940). So does Florida (Art. 1 of the Constitution, 1868); for background, The Abby Dodge, 223 U.S. 116 (1911), Pope v. Blanton, 10 F.Supp. 18 (1935) and Skiriotes v. State, 197 So. 736 (1940) aff'd on other grounds under 313 U.S. 69 (1941), all involving sponging. In regard to the Tortugas and adjacent shrimp grounds as Florida territory, see Atty. Gen. Rep. 1949/50 at 413.

   For the purposes of the Submerged Lands Act (1953, 67 Stat. 29, 43 USC 1301) the term "boundaries of a State" included in the Gulf of Mexico boundaries as they existed at the time such State became a member of the Union, or as theretofore approved by Congress, or as extended or confirmed pursuant to Sec. 1301 of Tit. 32 USC, but "in no event shall the term boundaries or the term lands beneath the navigable waters be interpreted as extending more than three geographic miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico."
3. For documentation, 1 United Nations, Laws and Regulations on the Regime of the High Seas (1951). For a list of claims as of 1930, 1 Hackworth, op. cit. 628. Phister, Regime of the High Seas, Proceedings of the American Society of International Law, 1956, 136 (1956).

   In 1935 Mexico extended its territorial waters to nine miles off coasts; this country notified reservations, 1 Hackworth, op. cit. 693, but Mexico countered by invoking Art. V of the 1848 treaty, which argument was declined, 1 Hackworth, op. cit. 640. Difficulties date back to 1906, 1 Hackworth, op. cit. 657. For the British position, 1 McNair, International Law Opinions 351 (1956).
4. For example, Peru, Chile, Ecuador.
5. Note to Peru (1948, text in 1 United Nations, Laws and Regulations . . . 17), Chile (1948, ibid. 7) and El Salvador (1950, ibid. 300). Answer in Memoria del Ministerio de Relaciones Exteriores (Peru) 180 (1955).
6. Mouton, The Continental Shelf (1952). Benton, The Continental Shelf: International Aspects, 6 S.W. L.J. 488 (1952); Bingham, The Continental Shelf and the Marginal Belt, 40 Am.J.Int'l L. 173 (1946), and Juridical Status of the Continental Shelf, 26 So.Cal.L.Rev. 4 (1952); Borchard, Resources of the Continental Shelf, 40 Am.J.Int'l L. 53 (1936); Holland, The Juridical Status of the Continental Shelf, 30 Texas L.Rev. 587 (1952); Hounshell, The Continental Shelf, 5 J.Publ.L. 343 (1956); Lauterpacht,

Sovereignty over Submarine Areas, 27 Brit YB. Int'l L., 1950, 376 (1951); Young, The Legal Status of Submarine Areas beneath the High Seas, 45 Am.J.Int'l L. 225 (1951).

7. According to the Outer Continental Shelf Lands Act (1953, 67 Stat. 462, 43 USC 1331) "outer continental shelf means all the submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in Sec. 1301 of this title (see note 2 above), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." Such powers, however, must not be "construed in such a way that the character as high seas of the waters above the outer continental shelf and the right of navigation and fishing shall not be affected." The Presidential Proclamation establishing such area, 59 Stat. 884.

   Christopher, The Outer Continental Shelf Lands Act: Key to a New Frontier, 6 Stan.L.Rev. 23 (1953).
8. For example, Memoria del Ministerio de Relaciones Exteriores (Chile), 1947, at 203.
9. See below, note 13.
10. For a penetrating criticism, Kunz, Continental Shelf and International Law, 50 Am.J. Int'l L. 828 (1956). Boggs, National Claims in Adjacent Seas, 16 Geo.Rev. 185 (1951).

    This country claims controls to identify aircraft in the air beyond its territorial waters (ADIZ), 14 CFR 620.1 (b) (1955).
11. Bishop, Exercise of Jurisdiction for Special Purposes in High Seas Beyond Outer Limits of Territorial Waters, 99 (2) Congr. Rec., 83rd Congr. 1st Sess. 2493; see also at 2491.
12. 19 USC 1401 (m) (1955); beyond this area a customs enforcement area may be declared by Presidential Proclamation (ibid., Sec. 1701); however, no more than 50 miles beyond customs waters.
13. 1945, 59 Stat. 885. Selak, Recent Developments in High Seas Fisheries under the Presidential Proclamation of 1945, 44 Am.J.Int'l L. 670 (1950).
14. 16 USC 781 provides to be unlawful "for any citizen of the United States, or person owing duty of obedience to the laws of the United States, or any boat or vessel of the United States, or person belonging to or on such boat or vessel, to catch . . . in the Gulf of Mexico or in the Straits of Florida outside of State territorial limits, any commercial sponges measuring . . ."

    For Florida statutes regulating taking sponges in her own territorial waters in the Gulf of Mexico, Fla. Stat. 370.17 (2) (1955). For cases, note 2 above.
15. Garaicoa, The Continental Shelf and the Extension of Territorial Waters, 10 Miami L.Q. 490 (1956); Aramburu, Character and Scope of the Rights Declared and Practiced over the Continental Sea and Shelf, 47 Am.J.Int'l L. 120 (1953).
16. Statements on the United States position: Chapman, United States Policy in High Seas Fisheries, 20 Dep't State Bull. 67 (1949); Phleger, Recent Developments Affecting the Regime of the High Seas, 32 Dep't State Bull. 934 (1955); Greenbaum, Proposed United Nations Conference on the Law of the Sea, 36 Dep't State Bull. 60 (1957).
17. Bilateral conventions are in force in relation to Canada (sockeye salmon, 1930, 50 Stat. 1355 with additional protocol 1956, 36 Dep't State Bull. 76, 1957; ascent of salmon, 1944, 59 Stat, 1614; halibut, 1950, 1 UST 536, 1953, 5 UST 75) and Mexico (tuna, 1949, 1 UST 513). Multilateral conventions on seals (1952, 3 UST 3896), whaling (1931, 49 Stat. 3079; 1946, 62 Stat. 1716), fishing in the North West Pacific (1949, 1 UST 471), North Pacific (1952, 4 UST 380) and one on the Indo-Pacific Fisheries Council (1948, 62 Stat. 3711). Leonard, International Regulation of Fisheries (1944); Daggett, The Regulation of Maritime Fisheries by Treaty, 28 Am.J.Int'l L. 104 (1934).
18. Solution to be reached by a combined method of compulsory negotiation and arbitration. Where nationals of more countries are engaged in fishing, such states must engage in negotiations; if negotiations should fail, the dispute will be settled by arbitration (Art. 52). Latecomers have to accept the status quo, though their states may demand a renegotiation of the preexisting agreement; in case of failure, issues must be arbitrated (Art. 53). Coastal states are granted "special interests" in all cases (Art. 54); they even may adopt unilateral conservation measures if negotiations with countries with fishing interests there should have failed, provided such measures are warranted by enumerated conditions and, in addition, there is no discrimination against other (the draft has the inappropriate term "foreign") fishermen (Art. 55).
19. Bayitch, International Fishery Problems in the Western Hemisphere, 10 Miami L.Q. 499 (1956); Young, Pan American Discussions on Offshore Claims, 50 Am.J.Int'l L. 909 (1956).
20. Selak, Fishing Vessels and the Principle of Innocent Passage, 48 Am.J.Int'l L. 627 (1954).
21. U.S. Department of State, Santiago Negotiations on Fishery Conservation Problems

(1955); also 33 Dep't State Bull. 1025 (1955).
22. 34 Dep't State Bull. 296 (1956).
23. 34 Dep't State Bull. 894 (1956).
24. Reeves, The Codification of the Law of Territorial Waters, 24 Am.J.Int'l L. 486 (1930); for documentation, ibid. Supp. 25 seq.
25. United Nations, Report of the International Technical Conference on the Conservation of Living Resources of the Sea (1955); and Papers Presented at the . . . (1956).
26. Bishop, International Law Commission Draft Articles on Fisheries, 50 Am.J.Int'l L. 627 (1956); for the United States position, ibid. at 1037.
27. United Nations, Yearbook of the International Law Commission 1956 (1956); and Report of the International Law Commission Covering the Work of its Eighth Session (1956); for the United States position, see Greenbaum, 36 Dep't State Bull. 60 (1957).
28. Brittin, Art. 3 Regime of the Territorial Sea, 50 Am.J.Int'l L. 934 (1956).
29. Kwang Lim Koh, The Continental Shelf and the International Law Commission, 35 B.U.L.Rev. 522 (1955).
30. Text in 36 Dep't State Bull. 61 (1957).

DISCUSSION

Shrimp Session

Discussion Leader: LAWRENCE W. STRASBURGER
Discussion Panel: MARY SCHULMAN, A. J. HARRIS, DONALD H. MCKEE, BERLIN FELTON

Aims and Progress of Gulf Fishery Investigations' Shrimp Research

THOMAS J. COSTELLO

Q. Strasburger: In your statement you made a remark with regard to the way the white shrimp enter the estuaries. Can you elaborate on this?

A. Costello: Probably the biggest factor is that the white shrimp larvae and post larvae are completely at the mercy of currents. Where the currents are favorable a large group enters through the passes. At Galveston we have about four years of data of abundance of small shrimp at East Pay Lagoon, and we find that the entry of the white shrimp depends largely upon the direction of the currents. White shrimp larvae and post larvae enter in large numbers perhaps for a day and a half and then for a week or two they will almost disappear.

Q. McKee: Would the method of staining or tagging shrimp work equally well on brown and pink shrimp?

A. Costello: The stains are usable on all species of shrimp, as far as we know, and I suspect that they are probably usable on other marine decapods as well. There are three colors of stains, red, green and blue. All are almost equally distinct, although I think that the blue is the best.

Q. McKee: How long will these stains last?

A. Costello: At least three months, and perhaps longer.