New Trends in the Regime of the Seas

A Consideration of the Problems of Conservation and Distribution of Marine Resources (I)

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Introduction

The seas contain a boundless wealth of flora and fauna varying from minute bacteria in the vegetable world to the blue whale in the animal world. It is only possible to guess at the potential of the ocean as a source of food. According to Clark and Renner of Columbia University, the facts already known suggest that an acre of ocean should yield from 10 to 100 times more than one acre of land [1]). Ratcliff, a well-known scientific freelance writer, on the other hand, estimates that the oceans have a food-producing potential amounting to 300 times that of land [2]).

As with land resources, the need to maintain the resources of the sea has made itself felt. Increased demands for fish and advanced technology in fishing have dictated that proper conservation measures be taken in some areas lest the supply of marine resources be exhausted.

It was not until the early nineteenth century that the freedom of the high seas came to be universally recognized both in theory and practice [3]). It was only then that nation-states came to realize that they were part of a larger

1) Clark and Renner, We Should Annex 50,000,000 Square Miles of Ocean, Saturday Evening Post, May 4, 1947, p. 17.
2) Ratcliff, World's Greatest Treasure Hunt, Saturday Evening Post, August 28, 1948, p. 20.
3) See Oppenheim's International Law, vol. 1, 8th ed. 1955, p. 586.

community which demanded that, in the interest of the whole, they relinquish maritime sovereignty.

Today, the desire to maintain the supply of fish resources together with the hope of ultimately reaping untold wealth from the seas have led some nations into taking steps which suggest a return to the pre-nineteenth century position. The tragedy of recent history has taught us that national egoism has been the guiding force in world politics and it is no exaggeration to say that current trends in the maritime policy of some nations indicate that national interest is being carried into the regime of the seas. Sometimes unilaterally, sometimes by bilateral or multilateral agreements and often under the guise of conservation programs, steps are being taken towards the dividing-up and monopolization of the seas.

The reasons which prompted nations to give up maritime sovereignty are ever more pressing at the present time. The problems of conservation and distribution are the interests of all persons and for that reason, such problems should be solved by agreement between states, each having a fair and equal voice.

A. Extension of Jurisdiction over High Seas Fisheries by Coastal States

Following World War II, several Latin American countries claimed extension of jurisdiction over high seas fisheries beyond recognized territorial waters limits. Before discussing these and subsequent claims in detail, it is interesting to note the efforts in the United States before the War, which, if successful, would have created a precedent for these post-war claims.

I. Bills Introduced in the United States Congress Prior to World War II

With news of the authorization by the Japanese Government for a fleet to be sent to the Eastern Bering Sea for scientific investigation of the salmon [4]), the fishing industry on the Pacific coast of the United States was successful in its attempt to introduce bills into Congress to extend territorial seas with a view chiefly towards monopolizing fishery sites. A bill introduced by Senator Copeland and passed by the Senate on May 5, 1938, provided that U.S. jurisdiction was to extend to all the waters and submerged land adjacent to the coast of Alaska lying within the limits of the continental shelf having a depth of water of one hundred fathoms, more or less [5]). No action was taken on this bill by the House prior to adjournment. Further

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[4]) See, *e. g.*, Riesenfeld, Protection of Coastal Fisheries under International Law, 1942, pp. 248–249.

[5]) S. 3744, 75th Cong., 3rd Sess. (1938); 83 Cong. Rec. 4260, 6423.

bills were introduced in both Houses in order to extend the jurisdiction, not so much in terms of the continental shelf, but rather by reference to certain geographical features such as a depth of water of 100 or 200 fathoms [6]). Nothing came of these bills, either.

It is quite understandable that some scholars, who are concerned with the national interests of the United States to the exclusion of all else, have taken a position favouring unilateral extension of the territorial jurisdiction seaward, especially in Alaskan waters. Of these scholars, Allen in 1942 emphasized the contention that

> "the three mile policy may properly apply to the general question of sovereignty, but, nevertheless, under proper interpretation of international law, not prevent a nation from exercising an inherent right to protect its domestic economy by exerting such exclusive control of the fisheries adjacent to its coast as exigencies require" [7]).

Allen stated also on January 21, 1944, before the Committee on Commerce in the Senate, with regard to a bill for extension of the jurisdiction over Alaskan waters, that

> "it is urgent that it should be done now ... to ... make it effective, while we are at war with Japan, rather than wait until the war is over when it may be far more difficult to settle a problem of this character" [8]).

Halling, a secretary of the C.I.O. maritime committee, on behalf of the International Fishermen and Allied Workers of America, representing 20,000 fishermen and allied workers, submitted on the same occasion a statement that

> "The union has for a long time advocated the extension of U.S. jurisdiction over fisheries in Alaska ... We feel that the extension of jurisdiction for purposes of conservation is absolutely essential" [9]).

The attitude taken by the U.S. Administration has not been consistent.

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[6]) Dimond bill, H.R. 7552, 75th Cong. 1st Sess. (1937), 81 Cong. Rec. 5948; Dimond bill, H.R. 8344, 75th Cong. 2nd Sess. (1937), 82 Cong. Rec. 20; Bone bill, S. 2679, 75th Cong., 1st Sess. (1937), 81 Cong. Rec. 5953; Dimond bill, H.R. 883, 76th Cong., 1st Sess. (1939), 84 Cong. Rec. 32; Dimond bill, H.R. 3661, 76th Cong., 1st Sess. (1939), 84 Cong. Rec. 1095; Bone bill, S. 1120, 76th Cong., 1st Sess. (1939), 84 Cong. Rec. 998; McNary bill, S. 1712, 77th Cong., 1st Sess. (1941), 87 Cong. Rec. 5811; Wallgren bill, S. 1915, 77th Cong., 1st Sess. (1941), 87 Cong. Rec. 7435; Wallgren bill, S. 930, 78th Cong., 1st Sess. (1943), 89 Cong. Rec. 2731; Dimond bill, H.R. 3939, 78th Cong., 2nd Sess. (1944), 90 Cong. Rec. 78.

[7]) Allen, Developing Fishery Protection, American Journal of International Law (AJIL), vol. 36 (1942), p. 115 f.

[8]) Hearings before a Subcommittee of the Senate Committee on Commerce on S. 930, 78th Cong., 1st Sess. (1944), at p. 72.

[9]) *Id.* at p. 81, Statement by Halling on 21 January 1944.

The Department of State in its statement of November 22, 1937, to the Japanese Government espoused the following idea:

> "Large bodies of American citizens are of the opinion that the salmon runs of Bristol Bay and elsewhere in Alaskan waters are American resources ... It must be taken as a sound principle of justice that an industry ... which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries. The American Government believes that the right or obligation to protect the Alaskan salmon fisheries is not only overwhelmingly sustained by conditions of their development and perpetuation, but that it is a matter which must be regarded as important in the comity of the nations concerned" [10]).

The U.S. Government, which had favoured exclusive fishing, changed its attitude by the time the Wallgren bill was introduced in 1943 in the Senate with a view to extending the jurisdiction. Cordell Hull, then Secretary of State, made it clear in a letter that it was impossible for the Department of State to recognize the bill. The reason he gave was that

> "the application of the proposed legislation to alien nationals and vessels outside the national jurisdiction of the United States ... would be a matter of interest and possible concern to contiguous countries, especially to Canada" [11]).

The Secretary of the Interior indicated even more clearly the attitude of the United States:

> "the extension of Federal jurisdiction over fishing activities outside Territorial waters is provided for in a way which does not give due recognition to accepted principles of international fair play, which would almost certainly tend to promote serious jurisdictional conflict with neighboring countries, and which would jeopardize the important interests of this country in the fishing operation now being carried on by its fishermen in the offshore waters adjacent to foreign coasts" [12]).

The Department of State did not place its stamp of approval on any of these bills or claims, which so obviously contradicted established and undoubted principles of international law regarding free fishing in the high seas.

Jessup, adhering to the orthodox doctrine of international law, stood firmly against these unilateral claims. He stated in his article of 1939 that

> "The importance of the American interest involved – particularly in the case of the Alaskan salmon fishery – cannot be denied, but it must not be overlooked that in Japan, for example, fishing is also a vital industry",

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[10]) Department of State Press Release, vol. 18 (1938), p. 412, 414, 416–417.

[11]) See Hearings, *supra* note 8, at p. 9, letter by Secretary of State Hull to Bailey dated 15 September 1943.

[12]) See Hearings, *supra* note 8, at p. 98, letter by Fortas, Acting Secretary of the Interior to Bailey dated 21 January 1944.

and as well that

> "Should the United States attempt to enact either of these bills into law, it could not object to similar measures applied by other states to American fishermen" [13]).

It is interesting to note the statement by Jessup in 1940, who was accused by Bingham of being a doctrinaire. Jessup said:

> "I agree that international law must be dynamic if it is to endure, but there is a distinction which I think Professor Bingham sometimes leaves out of sight, and that is the distinction between dynamism and dynamite ... It [the concept of dynamism as applied to international affairs] tends to merge with the notion that because a state's interests require something, the law must be so interpreted as to permit the state to obtain it" [14]).

Eagleton supported the statement of Jessup and said Bingham's dynamism meant anarchy [15]).

Thus, late in the 1930's and early in the 1940's, a number of bills introduced in Congress in order to extend the jurisdiction of Alaska were killed through the efforts of the administration and of some outstanding international lawyers.

II. A Step by Latin American States Towards Monopolization of High Seas Fisheries

The Mexican Government indicated its policy in its Presidential Proclamation of October 29, 1945 that it "is taking steps to supervise, utilize and control the closed fishing zones necessary for the conservation" of fish within the limit of the continental shelf [16]). However, no implementing steps were taken at the time [17]). Argentina has attained, on the other hand, notoriety as a pioneer in challenging the traditional doctrine of the freedom of the high seas. By its Decree of October 11, 1946, it was claimed that "the Argentine epicontinental sea ... [is] subject to the sovereign power of the nation" [18]). Panama followed this example by its Decree of December 17, 1946, which extended "national jurisdiction over the territorial waters ... to all the space above the sea bed of the submarine continental shelf" [19]). On June 23, 1947,

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13) Jessup, The Pacific Coast Fisheries, AJIL vol. 33 (1939), p. 129, 134.
14) Proceedings of the American Society of International Law, 1940, p. 65.
15) *Id.* at p. 98.
16) United Nations Legislative Series, ST/LEG/SER. B/1, Laws and Regulations on the Regime of the High Seas vol. 1, 1951 (hereafter cited as UN's Laws and Regulations), p. 13.
17) The author was unable to confirm this point. However, see Young, Recent Developments with Respect to the Continental Shelf, AJIL vol. 42 (1948), p. 849, 851.
18) UN's Laws and Regulations, p. 4.
19) *Id.* at p. 15.

the Government of Chile claimed "national sovereignty over the seas adjacent to its coast whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas". The demarcation of the protection zones for whaling and deep sea fishery was temporarily drawn at a distance of 200 nautical miles from the coasts of Chilean territory [20]). This claim was followed on August 1, 1947, by one made by Peru. In accordance with a Peruvian Presidential Decree, national sovereignty and jurisdiction was extended "over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters". A protection zone extending 200 nautical miles was also adopted [21]).

A Costa Rican Decree-Law of November 2, 1949, put forth a similar claim. Costa Rica proclaimed its rights and interests "over the seas adjacent to the continental and insular coasts of the national territory, whatever their depth, and to the extent necessary to protect, conserve, and utilize the natural resources and wealth which exist or shall come to exist on, in, or under said seas". Although the limit of the protection zone was drawn at a distance of 200 nautical miles, such demarcation was subject to variation whenever the government deemed it necessary to the national interest [22]). The Political Constitution of November 7, 1949, set forth the proposition that the nation had complete and exclusive sovereignty over territorial waters [23]). This created an ambiguity as to whether or not 'territorial waters' was intended to include the zone claimed under the Decree-Law.

A Congressional Decree made on March 7, 1950, by the Honduran legislature amended that country's Political Constitution to include in the national territory those waters covering the continental and insular shelves, irrespective of depth and distance from the shore. On the other hand, a distance of 12 kilometers was provided as the limit on the territorial waters [24]). However, neither common sense nor a knowledge of international law permitted a clear understanding of the meaning of this amendment. By its

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[20]) *Id.* at p. 6. See also International Law Quarterly (ILQ) vol. 2 (1948), p. 135. Cf. Comments of the Government of Chile, dated 8 April 1952, upon the Draft Articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951. The Chilean Government there proposed that "the sovereignty of a coastal State extends to its continental shelf and to the superjacent high seas". UN. Doc., A/2456, at p. 43, 45. Also cf. UN. Doc., A/C. 99/Add. 1, at p. 10 f.

[21]) UN's Laws and Regulations, p. 16. See also ILQ, vol. 2 (1948), p. 137.

[22]) UN's Laws and Regulations, p. 9.

[23]) *Id.* at p. 300.

[24]) *Id.* at p. 11.

Congressional Decree of January 17, 1951, the Honduran Government announced that the sovereingty of Honduras extended not only to the continental shelf, but also to the waters covering it. The protection and supervision of the State was declared to extend "over all waters lying within the perimeter ... drawn at 200 sea miles" from the coast in the Atlantic Ocean [25]).

The territory of the Republic of El Salvador was intended by her Political Constitution of September 7, 1950, to include "the adjacent seas to a distance of two hundred sea miles from low water line" [26]). The Congressional Decree of Ecuador, enacted on February 21, 1951, claimed "the control and protection of the fisheries appertaining" to the continental shelf contiguous to the coasts of Ecuador. On the other hand, the territorial sea was to "extend for a minimum distance of twelve sea miles of twenty to the degree" [27]).

The proclamations and decrees mentioned previously abound in obvious error and unfounded assertion. The Argentine Decree and the Chilian Declaration invoke as precedents the proclamations of Mexico and the United States. But, as will be explained later, the U.S. Proclamation asserts no claim of national sovereignty over the epicontinental sea [28]). The Peruvian Declaration and the Honduran Congressional Decree also cite the U.S. Proclamation and thereby reveal their dependence on an obvious misinterpretation.

The Argentine Decree provides that "The doctrine in question apart from the fact that it is implicitly accepted in modern international law, is now deriving support from the realm of science in the form of serious and valuable contributions, as is evidenced by numerous national and foreign publications and even by official educational programmes". Never before have we heard that such a claim is "implicitly accepted in modern international law", nor have we been informed of this by "numerous national and foreign publications and ... by official educational programmes". The need of Argentina for legal advice as to its rights to the exclusive disposition of fish resources found off her coast is greater than her need for the technical advice of scientists. It is not enough for Chile to say that "the justice of such claims is indisputable". She must prove why it is indisputable. Mexico has to prove in legal terms how

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25) *Id.* at p. 302.

26) *Id.* at p. 300. Cf. Letter dated 20 December 1954 from the Government of El Salvador commenting on the Provisional Articles concerning the regime of the territorial sea adopted by the International Law Commission at its 1954 session. UN. Doc., A/2934, at p. 27.

27) UN's Laws and Regulations, an attached sheet to p. 300. Also see UN. Doc., A/CN. 4/L. 63.

28) See at note 191, *infra.*

"it has been endowed by nature" with the fishing resources on the continental shelf. There is little agreement with Chile's statement that "international concensus of opinion recognizes the right of every country to consider as its national territory any adjacent extension of the epicontinental sea . . .". Very few may accept the view of Honduras that "legal doctrine has acknowledged and international law has declared that . . . the riparian States, . . . are entitled to proclaim their sovereignty over . . . the waters covering [the continental shelf]".

It is quite understandable that these claims, lacking proper justification and marked by error and unfounded assertion, have met with strong objection from other countries. The United States, the United Kingdom and France have been unable to tolerate these claims.

In the note to the Argentine Government, dated July 2, 1948, the United States "reserves the rights and interests of the United States so far as concerns any effects of the Declaration", since the Declaration claims "national sovereignty over the continental shelf and over the seas adjacent to the coasts of Argentina outside the generally accepted limits of territorial waters", and "fails, with respect to fishing, to accord recognition to the rights and interests of the United States in the high seas off the coasts of Argentina". In the U.S. view, "the principles underlying the Argentine Declaration . . . appear to be at variance with the generally accepted principles of international law" [29]). Essentially similar notes were sent to both the Chilean and Peruvian Governments on the same date [30]).

The protest which the United States lodged against El Salvador on December 12, 1950 clearly indicated the attitude of the United States on the question of high seas fisheries:

> "Under long-established principles of international law, it is universally agreed that the territorial sovereignty of a coastal State extends over a narrow belt of territorial waters beyond which lie the high seas. [The claim of El Salvador] would, if carried into execution, bring within the exclusive jurisdiction and control of El Salvador wide ocean areas which have hitherto been considered high seas by all nations . . . My Government desires to inform the Government of El Salvador, accordingly, that it will not consider its nationals or vessels or aircraft as being subject to the provisions [of the El Salvador Constitution relating to the continental shelf and exclusive fisheries] designed to carry it into execution" [31]).

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[29]) UN's Laws and Regulations, p. 5.
[30]) *Id.* at p. 7, 17.
[31]) *Id.* at p. 300. See also Department of State Bulletin, vol. 24 (1951), p. 24.

On June 7, 1951, the Government of the United States sent a similar note to the Government of Ecuador [32]).

With respect to the same problem, the United Kingdom sent notes of protest to some of the above-mentioned Latin American countries. On February 6, 1948, the United Kingdom Government delivered a protest to the Government of Peru:

> "The Peruvian Government's action ... in claiming that sovereignty may be extended over the large areas of the high seas above the continental shelf appears to be quite irreconcilable with any accepted principle of international law, governing the extent of territorial waters ... His Majesty's Government are obliged to place firmly on record with the Peruvian Government that they do not recognize territorial jurisdiction over waters outside the limit of 3 miles from the coast; nor will they regard British vessels engaged in their lawful pursuits on the high seas as being subject, without the consent of His Majesty's Government, to any measures which the Peruvian Government may see fit to promulgate in pursuance of the declaration" [33]).

On the same date, the U.K. Government sent an essentially similar note to the Government of Chile [34]). The U.K. Government sent a note of protest to Costa Rica on February 9, 1950, asserting that the U.K. Government could not approve the Costa Rica claim of 200 miles [35]). Also on December 12, 1950, a note was handed to the Government of El Salvador with similar content [36]). The U.K. Government sent two notes of protest to the Government of Honduras on April 23 and September 10, 1951 [37]). Ecuador was reminded in a British note of September 14, 1951, that under international law there was no right to control fishing outside the limit of territorial waters unless that right formed part of an historic claim to the regulation of sedentary fisheries, and even then, such regulation would not affect the general status of the area as 'high seas' [38]).

On April 7, 1951, the Government of France sent a note to the U.K. Government in reply to a request that the United Kingdom be advised as to the attitude of France towards the claims of certain Latin American countries concerning extension of their national sovereignty. The note stated that

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[32]) Ministry of Foreign Affairs (Japan), Laws, Regulations and Proclamations on the Continental Shelf, p. 286.

[33]) The text ist available in International Court of Justice, Fisheries Case *(U.K. v. Norway)*, vol. 2, p. 247 ff.: Annex 38.

[34]) *Id.* at p. 750 f.

[35]) *Id.* at vol. 4, p. 595.

[36]) *Id.* at p. 596.

[37]) *Id.* at p. 583, 585.

[38]) *Id.* at p. 589.

« Le Gouvernement français n'a jamais reçu, par la voie diplomatique, notification des résolutions ou propositions adoptées, de 1945 à 1950, par le Mexique, le Chili, le Pérou, Costa-Rica et le Salvador, ayant pour effet de changer la limite de leurs eaux territoriales ».

France placed no legal significance on the claims of the Latin American countries and emphasized that

« Aucun État ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auront pas formellement acceptée » [39]).

Chile, Ecuador and Peru, all possessing long coasts along the Pacific Ocean, sent delegates to Santiago, Chile, in August, 1952, for the conference on exploitation and conservation of the marine wealth of the South Pacific. The Santiago Declaration, adopted at the conference, proclaimed sovereignty and claimed the exclusive jurisdiction of these three nations over the sea adjacent to their respective coasts, up to a minimum distance of 200 nautical miles therefrom, with the single concession that innocent passage would be permitted [40]). The maritime policy of the countries on the Pacific coast was reaffirmed at their second conference at Lima, Peru, in December, 1954, where they promised not to sign any agreement which would impair the Santiago Declaration [41]).

The Santiago Declaration met strong objection from Denmark, Sweden, the Netherlands, the United Kingdom and the United States [42]). The United Kingdom made it clear in her notes of protest on August 11, 1954, to each of the countries concerned that she regarded all areas outside the three mile limit as part of the high seas, where vessels were subject solely to the jurisdiction and control of the state of their flag, and that she would be unable to admit the claim of these three countries to exercise jurisdiction and control in these areas over any vessels other than their own vessels [43]).

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39) *Id.* at p. 605.

40) The text is available at Garcia Sayan, Notas sobre la Soberanía Marítima del Perú, 1955, p. 48. See Pan American Union, Handbook, Third Meeting of the Inter-American Council of Jurists (Mexico City – January 17, 1956), 1955, p. 15; Garaioca, The Continental Shelf and the Extension of the Territorial Sea, Miami Law Quarterly, vol. 10 (1956), p. 490, 496. Costa Rica adhered to the Declaration on June 21, 1955.

41) N. Y. Times, December 4, 1954, p. 9, col. 3. See also Pan American Union, *op. cit. supra* note 40, at p. 15.

42) See Bayitch, International Fishery Problems in the Western Hemisphere, Miami Law Quarterly, vol. 10 (1956), p. 499.

43) Ministry of Foreign Affairs (Japan), Laws, Regulations and Proclamations on the Continental Shelf, p. 303.

The immediate impact of the claims of Chile, Ecuador and Peru fell especially upon the U.S. fishing industry, whose vessels were engaged in fishing off their coasts [44]). In 1952 some six tuna boats owned by U.S. nationals were captured by Ecuadorian patrol vessels off the coast of Ecuador [45]). The conflict between Ecuador and the United States over this incident was considered at a conference held upon the request of the United States at Quito, Ecuador, between March 25 and April 14, 1953. The conference brought out the difference in view of both governments with respect to the principles of international law applicable to the extent of territorial waters and measurement thereof, as well as those applicable to innocent passage of fishing vessels. It was agreed that these principles could be resolved only by the general agreement of maritime states. The conference could not recommend more than technical matters [46]). In September 1954 a U.S. fishing vessel was captured by an Ecuadorian boat 15 miles off shore and was fined $ 12,000 for illegal fishing in Ecuadorian waters [47]).

The most serious incident arose with the capture in November 1954 by Peruvian war vessels and aircraft of a whaling fleet owned by Onassis flying the Panamanian flag. Two catcher boats were captured about 120 –160 miles from the coast; and three others, including a factory vessel, were attacked with bombs and machine gun fire by naval and air units 300 miles or more off the coast. These vessels were taken into a Peruvian port. Fines of $ 3 million, to be paid within 5 days, were imposed by a Peruvian court upon the captains and owners of the vessels. The decision of the court backed the territorial claim to 200 miles and indicated that three vessels, captured beyond this limit, had been accused because they had been whaling within the territorial seas of 200 miles [48]). Strong protest was lodged with the Peru-

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44) See Whiteman, The Territorial Sea, Proceedings of the American Society of International Law, 1956, p. 125, 128; Kunz, Continental Shelf and International Law-Confusion and Abuse, AJIL, vol. 50 (1956), p. 828, 833.

45) N. Y. Times, August 25, 1952, p. 2, col. 4; October 22, p. 18, col. 3; October 25, p. 34, col. 6. The Ecuadorian Government blamed these boats for violating her territorial seas. It was not clear whether the boats were engaged in fishing within or without the three mile limit.

46) U.S. – Ecuador Fishery Relations, Department of State Bulletin, vol. 28 (1953), p. 759. See also Selak, Fishing Vessels and the Principle of Innocent Passage, AJIL, vol. 48 (1954), p. 627.

47) N. Y. Times, September 8, 1954, p. 3, col. 6; September 22, p. 10, col. 7; September 24, p. 8, col. 7.

48) See Territorial Waters and the Onassis Case, The World Today, vol. 11 (1955) p. 1; Phleger, Recent Developments Affecting the Regime of the High Seas, Dep. of State Bull., vol. 32 (1955), p. 934, 937; Scelle, Plateau Continental et Droit International, Revue Générale de Droit International Public, Année 59 (1955), p. 5, 45; Kunz, *op. cit. supra* note 44, at p. 837. See also case of Sauger et. al., Peru, Port Officer of Paita, 26 November 1954, AJIL, vol. 49 (1955), p. 575. Even before the Onassis case, there had

vian Government by the United Kingdom and the United States, where these vessels had been insured, in addition to Panama, under whose flag they sailed. Peru recognized that her claim was inconsistent with accepted rules of international law, but declared in the name of her Foreign Minister on December 3, 1954, that "the world must accept the fact that America is elaborating its own code of rights based on social needs which are at variance with the freedom of the seas" [49]). Early in 1955 two U.S. vessels were captured and fined $ 5,000 by the Peruvian authorities [50]). In the middle of February of that year, eight boats were captured and finally released, after having paid $ 2,045 in export duties on the fish they had caught [51]). On March 27, 1955, Ecuador seized two American fishing vessels some 25 miles from the coast, in the process of which an American seaman was seriously wounded by gunfire. Fines of more than $ 49,000 were imposed on the two vessels in the teeth of a strong protest from the U.S. Government [52]). In her note of May 13, 1955 the United States proposed that the dispute over the claims by Chile, Ecuador and Peru to sovereignty and jurisdiction over the ocean to a distance of 200 miles from their shores be submitted to the International Court of Justice, and that negotiations be entered into between representatives of the three countries and the United States for the conclusion of an agreement for the conservation of fishery resources in which the four countries had a common concern [53]). In their response to this note, the three South American countries on June 3, 1955 replied that they were not prepared at the time to consider whether or not the legal controversy should be submitted to the Hague Court but that they were prepared to initiate jointly the proposed negotiation of a conservation agreement [54]). Negotiations were subsequently opened on September 14, 1955. However, the conflict posed by the insistence of the three South American countries on jurisdiction over areas which the United States considered to be high seas in accordance with existing international law appeared to be insuperable. A decision was made to suspend the negotiations, and a communique was issued on October 5, 1955 to this effect [55]).

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been some incidents, in which the Peruvian authorities had captured or fired upon some U.S. vessels (N. Y. Times, February 9, 1952, p. 6, col. 1; August 25, p. 2, col. 4; August 30, p. 26, col. 8).

[49]) See Territorial Waters and the Onassis Case, The World Today, vol. 11 (1955), p. 1 f.

[50]) N. Y. Times, January 29, 1955, p. 3, col. 2; January 30, p. 16, col. 1.

[51]) N. Y. Times, February 21, 1955, p. 3, col. 1; February 22, p.6, col. 6.

[52]) N. Y. Times, March 29, 1955, p. 14, col. 6; April 14, p. 13, col. 1. See also Phleger, *op. cit. supra* note 48, at p. 937.

[53]) See note 55 *infra*, at p. 2.

[54]) *Ibid.*

[55]) Dep. of State Publication: Santiago Negotiations on Fishery Conservation Problems Among Chile, Ecuador, Peru, and the United States.

The delegations of Chile, Ecuador and Peru met again in December 1955 and fixed a limit of 2,100 sperm whales as the total catch permissible in the claimed 200 miles area between July 1, 1956 and June 30, 1957, while whaling might be carried on only with licenses issued by these three nations [56]). It was indicated that foreign vessels might engage in whaling provided they obtained the necessary permit and submitted to existing regulations [57]). On the other hand, according to a usually reliable news source, it was reported that Dulles obtained an assurance from the new President of Peru at their conference in Lima late in July 1956, that Peru might consider the possibility of dropping the 200 miles limit [58]). This was not confirmed, however, by the Peruvian communique later received [59]). The Ecuadorian Ambassador to the United States sent a letter to the New York Times and made it clear that there had been no such understanding between Dulles and his government [60]).

In addition, further incidents arose as the result of action by other South American nations notably Colombia, Mexico and Panama after 1952 [61]). On November 12, 1956, a U.S. shrimp boat was fired upon, which, at the time, according to the captain's statement, was about 13–14 miles off the Mexican coast. The captain was injured. The U.S. Government demanded from the Mexican Government an investigation of the incident. The Mexican Government, on the other hand, charged the boat with violating Mexican territorial waters [62]).

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56) N. Y. Times, December 17, 1955, p. 11, col. 2. This is a decision of the third Meeting of Permanent South Pacific Fisheries Commission consisting of the delegates of Chile, Ecuador and Peru.

57) N. Y. Times, December 14, 1955, p. 78, col. 3.

58) N. Y. Times, July 29, 1956, p. 22, col. 3.

59) N. Y. Times, July 31, 1956, p. 4, col. 1.

60) N. Y. Times, August 4, 1956, p. 14, col. 7.

61) *E. g.*, four U.S. boats were held in May 1952 because of their alleged illegal fishing in Columbian waters. After paying a fine of 350 pesos ($ 40) each, they were freed (N. Y. Times, May 2, 1952, p. 6, col. 3). Also a U.S. tuna boat was fired upon by a Columbian patrol 9 miles off her coast in February 1953 (N. Y. Times, February 17, 1953, p. 10, col. 4). A U.S. vessel was captured by a Panamanian police boat disguised as a fishing boat on May 20, 1953 outside the three mile limit. The vessel was released after $ 3,000 had been paid as a fine for alleged violation of Panama laws (N.Y. Times, June 15, 1953, p. 43, col. 4; July 5, V, p. 9, col. 4). There was also an incident, in which the Government of Mexico and U.S. shrimp fishing boats were involved (N. Y. Times, February 18, 1954, p. 4, col. 7; October 31, p. 7, col. 1). The trouble between Mexico and the United States stems from the Mexican claim to territorial waters of nine miles.

62) N. Y. Times, November 13, 1956, p. 24, col. 5; November 14, p. 31, col. 3; November 15, p. 72, col. 2; November 18, p. 13, col. 1, November 22, p. 29, col. 3.

III. Chaos in the Far Eastern Areas [63])

Apart from a few incidents, notably the Onassis case, the unilateral claims of most Latin American states to the exercise of jurisdiction upon the fisheries on the high seas contiguous to their coasts have given rise merely to rather theoretical controversy regarding special interests to be claimed by them. On the other hand, the area of the western Pacific, one of the richest fishing sites in the world, has witnessed a great number of incidents [64]). In many of these, Japan, possessing one of the biggest fishing industries in the world, has been involved [65]).

1. The Rhee Line [66])

By the end of 1951, some 92 Japanese fishing vessels had been seized by Korean patrol boats and taken into Korean ports where they were detained with their 1,909 fishermen for certain periods. It was reported that many of these incidents took place outside of the line (MacArthur line) which had been drawn by the occupation authorities with a view to keeping the fishing industry of Japan within relatively small areas surrounding the islands of Japan [67]). It was obvious, however, that the Korean Government, not a member of the occupation, was not competent to capture and punish those vessels and peoples of Japanese nationality.

On January 18, 1952, about three months before the Japanese Peace Treaty with the Allied Powers became effective, the President of the Republic of Korea proclaimed that

> "The Government of the Republic of Korea holds and exercises the national sovereignty over the seas adjacent to the coasts of the peninsula and islands of the national territory, no matter what their depths may be, throughout the extension, ... deemed necessary to reserve, protect, conserve and utilize the resources and natural wealth of all kinds that may be found on, in, or under

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[63]) Unless specifically mentioned, relevant materials are available only in Japanese. See author's book in Japanese, "Kaiyo no Kokusaiho Kozo" (International Law of the Sea), Tokyo, 1956, p. 266.

[64]) According to the Fishing Board of Japan, 496 vessels and 5,052 fishermen had been seized by USSR, South Korea and Nationalist and Communist China between the end of World War II and November 21, 1952. 188 vessels and 334 fishermen were still held at that time (N. Y. Times, November 22, 1952, p. 3, col. 5). According to official figures, USSR, Communist China and South Korea captured respectively 245,142 and 156 vessels, of which 52, 126 und 58 were returned (N. Y. Times, April 8, 1954, p. 11, col. 3). According to N. Y. Times, November 18, 1954, p. 18, col. 8, 696 vessels and 6,988 fishermen had been seized since the end of the World War II by foreign authorities, of which 278 vessels and 148 fishermen were still held.

[65]) Fish landings in 1953 were as follows: Japan = 4,576,500 (metric tons); U.S. = 2,385,200; Norway = 1,505,000; U.K. = 1,121,600. U.N. Statistical Yearbook 1954, p. 89.

[66]) Oda, *op. cit. supra* note 63, at p. 47–76.

[67]) See note 203 *infra*.

the said seas, placing under the Government supervision particularly the fishing and marine hunting industries in order to prevent this exhaustible type of resources and natural wealth from being exploited to the disadvantage of the inhabitants of Korea, or decreased or destroyed to the detriment of the country".

The Korean Government arbitrarily drew a line of demarcation on the map, which extended about 200 miles at certain points. This line was to be subject to modification, in accordance with new discoveries, studies, or interests that might come to light in future [68]). Although it was quite understandable to read that this claim was "urged by impelling need of safeguarding, once and for all, interests of national welfare and defense", Korea's insistence that such a claim was "supported by well-established international precedents" could not be taken seriously because of its misinterpretation of precedents as in some Latin American claims [69]).

Japan sent a note on the 28th of January to the Korean Government charging that the Korean view was completely untenable under any of the accepted ideas of international society and could not therefore be acquiesced in by the Japanese Government. The Korean Government attempted to refute this charge in its note of February 12 stating that those who still adhered to the nineteenth century concept of the freedom of the high seas, claiming absolute freedom of fishing on adjacent seas, must be considered as being unaware of the evolution of international law. A Japanese-Korean conference, which began in Tokyo on February 15, 1952, was unsuccessful.

The situation and controversy became further complicated by the establishment on September 27, 1952 by the Headquarters of the U.N. Army in Korea of a 'Sea Defense Zone' around Korea for defense against any attack, the maintenance of supplies and the prevention of infiltration by enemy spies [70]). The Zone almost covered the area previously claimed by Korea, and it was known that the U.N. action had been taken at the request of Korea. However, it seemed obvious that the U.N. Army was without competence to prohibit Japanese fishing in the Defense Zone, and that Japan was under no such restriction so far as high seas fisheries were concerned [71]).

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68) Ministry of Foreign Affairs (Japan), Laws, Regulations and Proclamations on the Continental Shelf, p. 113.

69) Also see a note by the Korean Government dated February 12, 1952; a statement by the Chief Justice on September 30, 1953; a note verbale dated April 14, 1954; a letter of May 6, 1954, by the Korean Minister to the Japanese Minister of Foreign Affairs.

70) See The South Korea-Japan Fishery Conflict, The World Today, vol. 10 (1954), p. 50; Brittin, International Law for Seagoing Officers, 1956, p. 78. Commander Brittin's description appears erroneous. The Sea Defense Zone was chiefly established to eliminate infiltration of enemy agents and not to exclude fishing vessels of Japanese nationals. Despite his description, this zone did not replace the old MacArthur line.

71) The ambiguous attitude of the Headquarters of U.N. Army gave rise to a protest

The already tense relations between the countries were further strained by an attack by a Korean gunboat on a Japanese fishing vessel on February 4, 1953, in which one Japanese fisherman was killed. The Japanese Government immediatly demanded that the Republic of Korea apologize for the incident, punish those responsible, and pay damages. In response to this demand, the Korean minister in Tokyo issued a statement accusing the Japanese Government of violating the claimed Korean waters. In addition, on February 25, the President of Korea issued a statement to the effect that fishing by Japanese in the claimed waters would be regarded as hostile action. Both Governments opened talks in Tokyo on April 15, 1953, but in July an indefinite recess was called. Other discussions commenced early in October of the same year were broken off on October 21 by the Korean delegations.

On December 12, 1953, the Korean Government enacted a Law for Conservation of Fishery Resources, providing for licensed fishing in the claimed waters. In addition it was provided that any person violating that Law should be punished and any fishing vessel, equipment, catch, and cultured and manufactured product owned and possessed by such person should be confiscated [72]).

Between 1952 and 1955, some 121 fishing boats of Japanese nationals were captured and 1670 fishermen arrested and detained and up to January 10, 1956, 107 vessels and 691 persons had not as yet been returned. Great numbers of Japanese vessels were pursued and ordered to get out of the area by Korean patrol boats. There were a couple of incidents, in which public vessels belonging to the Japanese Government were attacked by the Korean Navy. On September 27, 1953, a patrol boat under the supervision of the Japanese Fishing Board was captured and detained for a time in Korea, and on February 20, 1954 a vessel of the Japanese Coast Guard was taken to a Korean port. A warning that those vessels which came into the claimed waters would be fired upon and sunk, was delivered by the Defense Minister on September 11, 1953, and by the Chiefs of Staff on November 17, 1955. The Japanese fishermen taken to Korean ports were brought before the court after more than one month's detention and sentenced to imprisonment for periods varying from six months to one year, while all ships, appliances and

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by the Japanese Government (N. Y. Times, October 16, 1952, p. 4, col. 2; November 2, p. 7, col. 1). According to an unauthorized news report, final understanding was reached that this zone did not concern fishing carried on by Japanese. With termination of hostilities in Korea, the zone was suspended on August 27, 1953.

72) Ministry of Foreign Affairs (Japan), Laws, Regulations and Proclamations on the Continental Shelf, p. 114.

catches were confiscated by the Korean authorities. According to various reports, the fishermen were subjected to harsh treatment in Korean prisons.

The busy exchange of notes of protest between the two countries revealed that the attitudes of the two governments towards the concept of the high seas were diametrically opposed.

2. Capture of Japanese Vessels by the Chinese Navy[73])

The Yellow and Eastern China Seas, also very rich fishing sites, have given rise to conflict between China and Japan. Between 1948 and 1949, while the mainland of China was still under the control of Nationalist China, her Navy captured 29 and sank two Japanese fishing vessels. A decree had been in effect since August 1948, authorizing the capture of any Japanese fishing vessel that came beyond the MacArthur line. However, the Chinese Navy was obviously incompetent to enforce such decree upon Japan. On January 20, 1948, because of its alleged breach of Chinese fishing rights, a Japanese fishing vessel was captured about 30 miles off the Chinese coast. The total catch was confiscated and the hull was transferred to a Chinese public fishing industry corporation for its own use.

On December 7, 1950, about one year after Communist China had established itself firmly in Peking, a Japanese fishing boat was seized about halfway between Shanghai and Kyushu[74]). Since then, as many as 158 fishing vessels of Japanese nationals have been captured, the total tonnage amounting to 13,315 tons. The Chinese Government has arrested and detained 1,900 Japanese people, all of whom, however, had been returned on various occasions on board some of the captured vessels. By November 3, 1954 all the people had come home, but the hulls of 104 vessels were still detained.

The reason why the Japanese fishing vessels engaged in fishing on the high seas were captured by the Chinese authorities, has never been disclosed. A delegate of the Japanese fishing industry, sent to Peking in September 1953 was advised by a competent official that it was impossible to find a solution to the conflict in the light of the attitude adopted by the Japanese Government towards the Communist regime. This explanation, however, was not convincing to the Japanese fishing industry. The Chinese delegation, at the conference held in Peking early in 1955 (which will be explained later) tried to convince the Japanese delegation of the strong desire of the Chinese Government to maintain peaceful relations with the Japanese peoples by pointing to its release of the Japanese fishermen. However, these

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[73]) Oda, *op. cit. supra* note 63, at p. 115–132.

[74]) Kyushu is one of the four main islands of Japan, and closest to China.

fishermen had been arrested or detained for unspecified offences and in the author's view this magnanimous attitude on the part of the Chinese delegation did not compensate for the refusal to inform the Japanese of the reasons for the initial arrests.

Since December 6, 1950, the Commission of Military Administration for Eastern China has had rules to prevent fishing resources from extermination. In addition to limiting meshes of fishing nets and closing areas at specific times, the rules established certain areas, the width of which extended as far as sixty miles along the coasts, wherein trawling by steamers was forbidden. It is important, however, to note that almost all incidents involving attack and capture of Japanese fishing vessels took place on the high seas far away from the closed area, even supposing the unilateral claim to close such an area was acceptable. In December, 1950, some of the released fishermen testified before the Japanese Diet to the fact that they had been accused by the Chinese officials of violating Chinese territorial seas covering the whole Eastern China Sea. This Chinese concept of the territorial sea extending over the vast ocean of the Eastern China and Yellow Seas were also to be found in some documents published in China.

The incidents which arose between Communist China and the fishing industry of Japan in the Yellow and Eastern China Seas were suspended through an unusual process. The Japanese Government, which neither recognized the Government of Communist China *de facto* nor *de jure*, never demanded damages for the injuries suffered by its fishing industry. As a result of this inaction, some private associations of fisheries in Japan negotiated directly with the Chinese Government. Late in 1953 they sent a delegate to Peking with a view to sounding the Chinese Government on the possibility of negotiations with respect to conservation measures. Premier C h o u made it clear, when he met some members of the Japanese Diet in October 1954, that his Government was prepared to settle the conflict relating to the fisheries at the earliest possible chance. In response to this authoritative statement of the Peking Government, a new association was established by those fisheries affected. Negotiation between this association and the Association of Fisheries of China was commenced in January, and reached agreement in April 1955 [75]).

This Convention signed on April 15, 1955, at Peking is distinctive because of the fact that it was concluded between two private associations of different nations, having no diplomatic status whatever. The convention waters covered the high seas of the Yellow and China Eastern Seas. No over-all

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75) N. Y. Times, April 15, 1955, p. 4, col. 5; April 16, 1955, p. 37, col. 4.

provision was made for conservation such as restriction of fishing, but scientific studies of resources, salvage, safety of navigation, etc. were to be undertaken. In six specified areas, the number of vessels to be allowed to each state was respectively fixed, the total of which amounted yearly to 376 for Japan and 496 for China. Any violation of the agreement committed by a vessel was to be reported to the association of the state under whose flag the vessel sailed, and the competent association was to be responsible for disciplining such vessel. The Convention came into effect for the term of one year on June 13, 1955, but is still valid by extension.

Although the Convention did not contain sufficient regulations for conserving resources in the convention waters, the letters exchanged between the delegates of both associations seemed to be of greater significance in this respect. The letter from the Chinese Association, in accordance with instructions from its own government, called to the attention of the Japanese Association the area established along the coast of China, wherein trawling by steamers had been forbidden since 1950, and which accordingly were excluded from the convention waters. In addition, three areas were designated for the purpose of national security and military necessity. Japanese fishing vessels were required to keep clear of the whole area of the Hangchow Bay including the Chusan Islands. The Gulf of Pohai was designated as a military warning zone, where no Japanese fishing vessel would be allowed to come without specific permission from the Chinese Government. It was stated that the Chinese Government would not be liable for any incident, which might take place in the area south of 29° N., where some military operations were to be carried out. In its letter to the Chinese delegates, the delegation of the Association of Japan approved the areas for military purposes with the proviso that fishing vessels of all nationalities should be asked to observe them.

In the course of the conference, the Chinese delegation maintained as a matter of course that China would exercise her jurisdiction on the area designated in 1950 and modified in 1954 with a view to the prohibition of trawling by steamers. Despite objections from the Japanese delegation, the Chinese delegation adhered to their view that the exercise of jurisdiction of the areas unilaterally established fell categorically within the domestic concerns of China. While this area was mentioned in the letter signed by the Chinese delegation, the Association of Japan promised in its letter that it would voluntarily abstain from fishing there, with the reservation that any Chinese municipal legislation was not to be applicable to Japanese fishing vessels on the high seas.

Although this Convention, concluded by private associations, did not

ensure that Japanese fishing vessels would be immune from attack and seizure by the Chinese Navy, a peaceful situation has continued in the fishing stations on the Yellow and Eastern China Seas up to the present time [76]).

3. The Russo-Japanese Conflict [77])

The northwestern Pacific Ocean remains in a state of legal chaos as far as fisheries are concerned. Fishing in the Seas of Japan and Okhotsk has been carried on by both Japanese and Russian fishermen. Under the Treaty of Portsmouth at the close of the Russo-Japanese War (1904–5), "Russia engages to arrange with Japan for granting to Japanese subjects rights of fishery along the coasts of the Russian possessions in the Japan, Okhotsk and Bering Seas" [78]). In 1907 Japan and Russia concluded a Fisheries Convention to last twelve years which gave Japanese subjects the right to fish for all kinds of fish and aquatic products except fur-seals and sea-otters along the Russian coasts of these waters [79]). By the Convention of 1925, signed in Peking, the U.S.S.R. agreed not only that the Portsmouth Treaty would remain in full force, but that the Convention of 1907 would be revised to some extent [80]). A new Fisheries Convention, signed in Moscow in 1928, retained substantially the rights Japanese subjects had previously enjoyed i. e., the right to catch, to take and to prepare all kinds of fish and aquatic products, with some exceptions, along the coasts of the possessions of the U.S.S.R. in the Japan, Okhotsk and Bering Seas [81]). This Convention was supposed to remain in force for eight years and to be revised and renewed at the end of this period. For political reasons the two countries did not succeed in cooperating in matters of fisheries, and the Convention of 1928 expired in 1936. After 1936, the fishery rights given to Japan under the 1905 Portsmouth Treaty and confirmed by the 1928 Convention, were renewed every year merely by temporary agreements [82]).

The U.S.S.R.'s Declaration of War against Japan in 1945 severed peaceful relations between the two countries and created problems of regulation of fisheries in these areas [83]). Between 1947 and 1953, 232 boats were captur-

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[76]) See N. Y. Times, October 17, 1955, p. 12, col. 5. It is mentioned that the catch by Japanese vessels was increased by 20 % as a result of this Convention.

[77]) Oda, *op. cit. supra* note 63, at p. 133–149.

[78]) Art. XI. Martens, Nouveau Recueil Général de Traités, 2e Série, Tome 33 (1906), at p. 3, 11.

[79]) Art. I. *Id.* at 3e Série, Tome 1 (1909), at p. 861.

[80]) Art. I, III. League of Nations, Treaty Series, vol. 34 (1925), at p. 32, 34 (No. 866).

[81]) Art. I *Id.* at vol. 80 (1928), at p. 342 (No. 1839).

[82]) See Martens, *op. cit. supra* note 78, at 3e Série, Tome 37, at p. 436.

[83]) In February 1952, General Ridgeway, Supreme Commander of the Allied Powers, protested to the Soviet Representative because of repeated captures of Japanese

ed, 30 boats and 20 persons were still held in March 1954 [84]). Even accepting the Russian claim of twelve miles as territorial seas [85]), most of these captures took place on the high seas far away from this territorial limit. By the end of February, 1955, most of the captured fishermen had been freed by the Government of the U.S.S.R. Thirty four fishermen, however, were detained as they were considered guilty of espionage.

According to a broadcast transmitted from Moscow on February 10, 1956, the Soviet Cabinet stated that the stock of salmon in the Okhotsk Sea had been rapidly depleting in the past few years because of excessive exploitation by the Japanese. In view of this, it was ordered that the Ministry of Fisheries and other agencies should take measures to stop Japanese fishing in this area. On March 21 an ordinance relating to salmon fishing in the area was decreed by the Russian Government [86]). This ordinance limited the fishing by the Russians and foreigners for a period of three months from May 15. The right to fish was to be dependent upon the issue of a license by the Ministry of Fisheries of the U.S.S.R. and the catch in 1956 was not to exceed 25,000,000 in number.

According to the Soviet view, unregulated salmon fishing conducted on an ever increasing scale in the northwestern Pacific, without any consideration for the size of stocks, threatened these valuable resources with extermination [87]). According to scientific data available to the Japanese Government, on the other hand, it was not necessary to take any immediate measures for conservation in these areas [88]). Although maintaining that the Russian decree contradicted the principles of international law [89]), the Government of Japan sent a delegation to Moscow in order to enter into negotiations with the Soviet Government for the prevention of the enforce-

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fishing vessels by Soviet Authorities. According to his protest, 178 vessels had been captured, of which 114 were released, and 29 confiscated. 35 were reported to have disappeared without trace (N. Y. Times, February 13, 1952, p. 3, col. 3). A report of the Japanese Maritime Safety Board stated that early in July 1952 11 vessels and 111 persons were detained by Soviet (N. Y. Times, July 9, 1952, p. 3, col. 3).

84) N. Y. Times, March 31, 1954, p. 3, col. 4. According to other sources, 286 Japanese fishing vessels were captured between 1946 and August 1954.

85) See *e. g.*, Schapiro, The Limits of Russian Territorial Waters in the Baltic, The British Year Book of International Law, vol. 27 (1950), p. 439; Reinkemeyer, Die sowjetische Zwölfmeilenzone in der Ostsee und die Freiheit des Meeres, 1955 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Heft 30).

86) N. Y. Times, March 22, 1956, p. 71, col. 2. The Soviet Union later laid down some strict rules prescribing fine, seizure, and expulsion from the fishing area. N. Y. Times, April 23, 1956, p. 3, col. 6.

87) N. Y. Times, March 22, 1956, p. 71, col. 2.

88) The total catch of salmon in 1955 by the Japanese fishing industry was 70,889,000. This was still less than half the pre-war catch. N. Y. Times, May 20, III, p. 1, col. 4.

89) See note 87, *supra*.

ment of the decree upon Japanese fishing boats. A Convention of ten years duration was signed on May 15, 1956, by the delegations of these two countries after prolonged negotiations [90]), and came into force on December 12, 1956, after the Joint Declaration was ratified [91]).

According to the preamble, both governments recognized that it would best serve the common interest of mankind, as well as the interests of the contracting parties, to ensure the maximum sustained productivity of the fishery resources of the Northwest Pacific Ocean, and that each of the parties should assume an obligation, on a free and equal footing, to encourage the conservation of such resources. The area to which this Convention applied was to include all waters, other than territorial waters, of the North Pacific Ocean, including the Seas of Japan, Okhotsk and Bering. However, nothing in the Convention should be deemed to affect the claim of any contracting party as to the limits of territorial waters or to the jurisdiction of a coastal state over fisheries. The contracting parties should carry out the conservation measures provided in the Annex attached thereto, which formed an integral part of the Convention. The Northwest Pacific Fisheries Commission (composed of both national section) was to pass resolutions, and make recommendations and other decisions only by agreement at meetings to be held at least once each year. The Commission could recommend the amendment of the Annex on the basis of scientific investigation. It could decide annual total catch of stocks, if so required, and recommend any matter relating to the preservation and development of the marine resources in the convention waters. Each contracting party agreed, for the purpose of rendering effective the provisions of this Convention, to issue licenses and proper documents to vessels sailing under their respective flags and to enact and enforce necessary laws and regulations, with regard to its nationals and fishing vessels, with appropriate penalties against violations thereof. One of the most significant points in this Convention was the provision that only the authorities of the state to which persons or fishing vessels accused of violation of the Convention belonged might try the offence and impose penalties therefor.

The conservation measures to be taken were prescribed in detail in the Annex attached to the Convention. A line was drawn approximately along 185° E. and 45° N., within which the fishing of salmon was allowed only before August 10 in each year. Certain restrictions were imposed upon fish-

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90) The text ist available at Japanese Annual of International Law, vol. 1 (1957), p. 119. See also N. Y. Times, May 15, 1956, p. 1, col. 8. As to comments on the Convention, see N. Y. Times, May 20, III, p. 1, col. 4.

91) N. Y. Times, December 12, 1956, p. 2, col. 4; December 13, p. 3, col. 1.

ing appliances and the catch allowed to a fishing vessel and an investigation boat was fixed respectively at 300 and 150 tons. The total catch of salmon depended, upon the decision of the Commission. In 1956 salmon fishing on the seas was prohibited within the areas extending 40 miles from the coast of each contracting party, except that this restriction was not to be applicable to small fishing vessels of Japanese nationals engaged in fishing in the areas contiguous to the Japanese coast. With the acquisition of scientific data, it was hoped that the Commission could re-examine the size of this area as soon as possible. In addition to the control imposed on salmon fishing, the catching of immature herring and female and immature crabs was prohibited. The Commission was to impose some restrictions on the disposition of crab-nets taking into account the preservation of crab and the efficient operation of fishing.

As there was a gap between the signing of the Convention and its coming into operation, a provisional agreement was exchanged, which provided for some measures to be applicable to fishing in 1956. This temporary agreement, made verbally only, confirmed the area which had been unilaterally established by the Russian ordinance of March 11, wherein salmon fishing was to be controlled. The total catch was increased in this agreement to 65,000 tons from the previously announced 50,000 tons. The Japanese fishing vessels had to carry licenses issued by the Japanese Government and endorsed by the Russian overseas agency in Tokyo. This agreement appeared to favour Russian extension of jurisdiction, to which Japan did not object. It might well be that Japan had to acquiesce in this temporarily, lest incidents should occur.

IV. Australian Claim to Pearl-Shelling [92])

Since the middle of the nineteenth century, pearl-shelling off the northern coast of Australia has been carried on by several corporations established in Australia. Malayan and Indonesian, and also many Japanese divers were employed by them. It was around 1930, when the Japanese started their

92) As to the history of pearl-shelling in this area and negotiations between Australia and Japan, see O'Connel, Sedentary Fisheries and the Australian Continental Shelf, AJIL, vol. 49 (1955), p. 185; Mouton, The Continental Shelf, Recueil des Cours, T. 85 (1954 I), p. 343, 445; Scelle, *op. cit. supra* note 48, at p. 41. As to the Australian claim, see, in addition to those mentioned above, Australia and the Continental Shelf, Australian Law Journal, vol. 27 (1953), p. 458; Goldie, Australia's Continental Shelf, International and Comparative Law Quarterly (ICLQ), vol. 3 (1954), p. 535, 559; Helmore, The Continental Shelf, Australian Law Journal, vol. 27 (1954), p. 732; W. Heidelmeyer, Der australisch-japanische Perlfischerei-Streit, Archiv des Völkerrechts, Bd. 5 (1954/55), p. 128–136.

own enterprise for pearl-shelling in this area. The restoration of peace after the war caused anxiety to Australia, who was afraid of competing again with the Japanese in the pearl-shelling off her coast.

The exchange of notes and letters between Australia and Japan in the month prior to the signing of the Japanese Peace Treaty clearly disclosed the different views of these two governments toward pearl-shelling on the high seas contiguous to the Australian coast. The Australian Government, for its protection, insisted on its right to exclude Japanese fishermen from the area of the continental shelf. On the other hand, the Japanese Government supported its claim on the established principle of the freedom of the seas. The only provision upon which Australia could rely was that article in the Peace Treaty which obliged Japan to enter into negotiations with the Allied Powers so desiring for the conclusion of agreements providing for the conservation of marine resources [93]).

The Peace Treaty was signed in September 1951, and it was unlikely that negotiations would be entered into between the two countries for some time. The fishing industry in Japan set about forming a new corporation for the exploitation of this profitable pearl-shelling off the Australian coast. Since the fishing was to be conducted solely on the high seas, the Japanese Government could find no reason for banning this project, and disclosed late in 1952 that planned fishing would be allowed on condition that certain strict conservation measures were observed. The Japanese Government agreed to the Australian proposal, handed to it early in 1953, to participate in a conference to be held in April at Canberra at which negotiations between the two countries regarding the common fishing interest could be conducted. Under strong pressure from the United Kingdom and Australia, the Japanese Government ordered that the fleet originally due to sail in April should postpone its departure. Since no agreement was reached by the two countries in the month following the commencement of the negotiations on April 13, the Japanese fishing fleet was dispatched in May, and from its arrival in June, engaged in pearl-shelling, in the area contiguous to the Australian coast without, however, intruding into the territorial seas. This was in accordance with a previous understanding exchanged between the governments. After more than four months' prolonged negotiations the conference was suspended on August 28. The Australian Government was dissatisfied with the selection by the Japanese fleet of pearl-shelling sites, and, according to some reliable reports, this was the reason for the suspension.

The Pearl Fisheries Act of 1952, which was enacted to regulate the pearl-

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[93]) Article 9. See at note 207, *infra*.

shelling in the Australian waters beyond the territorial seas (never brought into effect) [94]), was amended by the Pearl Fisheries Act of 1953 so as to cover the superjacent waters of the continental shelf in terms of the Australian waters, and to make this Act applicable not only to Australian nationals and vessels but also to fishermen and vessels of foreign nationality [95]). The continental shelf here was defined as the sea bed and subsoil, the depth of which did not exceed 100 fathoms. On September 25, 1953, the Governor-General issued a proclamation to the effect that this Act should come into force on October 12 of that year [96]). A couple of weeks previously, on September 11, the Governor-General had issued a proclamation:

> "Australia has sovereign rights over the sea-bed and subsoil of the continental shelf to any part of its coasts ... for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil" [97]).

It is submitted that pearl-shelling is no different from regular fishing, although the object to be caught lies always at the bottom of the sea [98]). It follows that even accepting the proclamation of September 11 at its face value, it provides no basis for the claim by Australia to regulate and control pearl-shelling.

Strong protests were lodged by Japan with the Australian Government on September 15 and October 8. The Japanese Government, adhering to its traditional endorsement of the principle of freedom of the seas, reminded the Australian Government that extraterritorial domestic jurisdiction was applicable only to the nationals and the vessels of the state which enacted such legislation and any proposed action by the Australian Government upon foreign nationals under its unilateral claims was in contradition to the established principles of international law and usage. The Australian Government in its note of October 30 responded to this protest by saying

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[94]) No. 8 of 1952. Commonwealth Acts, 1952, vol. 1, p. 32.

[95]) No. 38 of 1953. Commonwealth Acts, 1953, p. 148. Cf. No. 4 of 1953. *Id.* at p. 13.

[96]) Proclamation fixing Limits of Continental Shelf for Purposes of Pearl Fisheries Act 1952–1953, Commonwealth Statutory Rules, 1953, p. 619.

[97]) Proclamation declaring Australia's Sovereign Rights over Continental Shelf contiguous to its Coasts, Commonwealth Statutory Rules, 1953, p. 570; Proclamation declaring Australia's Sovereign Rights over the Continental Shelf contiguous to the Coasts of the Territory of New Guinea, *Id.* at p. 571. Also AJIL, vol. 48 (1954), p. 102.

[98]) See O d a, *op. cit. supra* note 63, at p. 153–175. It is there explained that it is far more important to look at fishing activities carried on by the human being, than the place, where the object is located. So far as fishing activities are carried on on the seas, fisheries or sedentary fish are not on the sea bed but on the seas themselves. There is no logical reason for separating sedentary fishing from regular fishing. The doctrine differentiating sedentary fisheries appears to stem from certain historical claims to the exercise of jurisdiction by the coastal authorities. Such historical claims are the only basis on which sedentary fishing may be separated from other fishing.

that it could not accept the view taken by the Japanese Government to the Australian Pearl Fisheries Act. Australia agreed in rather general terms, however, to seek a decision of the Hague Court upon the conflict resulting from the different views taken by the two governments.

V. Some Other Areas

Iceland's law of April 5, 1948 empowered the Ministry of Fisheries to issue regulations establishing "conservation zones within the limits of the Continental Shelf of Iceland, wherein all fisheries shall be subject to Icelandic rules and control". It provided, on the other hand, that the regulations were to be enforceable, "only to the extent compatible with agreements with other countries to which Iceland is or may become a party" [99]). Excluding consideration of its claim to territorial seas extending four miles, which has caused some conflict [100]), the Icelandic claim as regards the conservation zone was designed to avoid conflicts with the interests of other countries. However, in its comment on the 1951 Draft Articles of the International Law Commission, Iceland stated that it "considers itself entitled and indeed bound to take all necessary steps on a unilateral basis to preserve these [fish] resources" found on the continental shelf [101]). This view was repeated in the comment of the Icelandic Government on the 1954 Draft Articles of the International Law Commission [102]). Again, it pointed out in its comment on the Commission's 1955 Articles that the interests of the coastal state should be protected within the limits of exclusive coastal jurisdiction over fisheries. The distance over which such exclusive jurisdiction would be exercised would vary according to economic, geographic, biological and other relevant considerations [103]).

India proposed a twelve mile limit for the territorial seas. On the other hand, the Indian Government, in its comment on the Commission's 1955 Articles, stated that the coastal state should have the exclusive right of taking measures for the protection of the living resources of the sea within a reasonable distance of its coast and beyond the territorial waters. This view

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99) UN's Laws and Regulations, p. 12.

100) See D. H. N. Johnson, Icelandic Fishery Limits, ICLQ, vol. 1 (1952), p. 350; V. Böhmert, Meeresfreiheit und Schelfproklamationen, Jahrbuch für internationales Recht, Bd. 5 (1955), p. 1, 30; N. Y. Times, May 17, 1952, p. 4, col. 1; May 20, p. 6, col. 5; June 20, p. 12, col. 4; January 6, 1953, p. 64, col. 5; January 21, p. 55, col. 1; October 29, p. 13, col. 2; November 4, p. 14, col. 3.

101) UN. Doc., A/2456, at p. 52, 53. See note 241, *infra*.

102) UN. Doc., A/2934, at p. 28, 30. See note 214, *infra*.

103) UN. Doc., A/CN. 4/99/Add. 2, at p. 9. See note 214, *infra*.

was adopted by India in favour of underdeveloped countries which for political reasons had hitherto been unable to assert their rights to develop their fishing fleets [104]).

VI. Concept in Favour of Widely Extended Jurisdiction Reflected in the Pan American Union

The concept which warrants such an exercise of jurisdiction on the high seas contiguous to the coast is backed by many Latin American lawyers. It is of interest to observe how the Pan American Union has responded to the unilateral claims supported by some of its member states.

In the first conference held in 1950 at Rio de Janeiro, the Inter-American Council of Jurists, an official meeting of lawyers of all the Union's member states, selected the "System of Territorial Seas and Related Matters" as one of its topics for development and codification [105]). In pursuance of the request by the Council, the Juridical Committee of the Union prepared a Draft Convention on this subject accompanied by a report [106]). The Draft Convention took the position that present international law grants to a coastal state exclusive sovereignty over the continental shelf and the waters covering it and the right to establish an area of protection, control and economic exploitation to a distance of 200 nautical miles from the coast was recognized. The representatives of Brazil, Colombia and the United States would not assent to this draft and held the opinion that there was no uniform rule on the extent to which a coastal state was entitled to exercise its jurisdiction. Brazil's comment was that, according to established principles of international law, the sovereignty of a coastal state extended only to the territorial waters varying between three and twelve miles [107]).

The Council's second meeting held between April 20 and May 9, 1953, in Buenos Aires recognized that

> "it is an obvious fact that development of technical methods for exploring and exploiting the riches of these zones has had a consequence the recognition by international law of the right of such States to protect, conserve and promote these riches, as well as to ensure for themselves the use and benefit thereof" [108]).

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104) *Id.* at p. 24.

105) Pan American Union, Final Act of the First Meeting of the Inter-American Council of Jurists (1950), 1950, p. 17: Resolution VII.

106) See Pan American Union, Second Meeting of the Inter-American Council of Jurists, Report of the Executive Secretary of the Inter-American Council of Jurists (1953), 1953, p. 24.

107) *Ibid.*

108) Pan American Union, Final Act of the Second Meeting of the Inter-American Council of Jurists (1953), 1953, p. 52.

The U.S. delegation made an explicit reservation to this statement in view of the fact that this matter had not been given scientific or juridical consideration by the meeting and that it affirmed as an existing right something which was not clearly defined or settled in international law [109]).

The Tenth Inter-American Conference, held between March 1 and 28, 1954 at Caracas, passed among others, a resolution concerning the "Conservation of Natural Resources: The Continental Shelf and Marine Waters" [110]). This resolution reaffirmed

> "The interest of the American States . . . that proclaim sovereignty, jurisdiction, control, or rights to exploitation or surveillance to a certain distance from the coast, of the submarine shelf and oceanic waters and the natural resources which may exist therein", and "That the riparian states have a vital interest in the adoption of legal, administrative, and technical measures for the conservation and prudent utilization of the natural resources existing in, or that may be discovered in, the areas mentioned, for their own benefit and that of the Continent and the community of nations".

The Inter-American Council of Jurists was especially concerned with the territorial seas and related matters in its 1956 meeting held between January 17 and February 4 at Mexico City [111]). A project submitted by the delegates of nine member states was put to a vote at the close of the general debate [112]). Fifteen states were in favour, the United States alone opposed, and five abstained [113]). Each state was, in this project, recognized to be

> "competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defense", because "The distance of three miles as the limit of territorial waters is insufficient, and does not constitute a general rule of international law".

The coastal state was also given

> "the right to adopt, in accordance with scientific and technical principles, measures of conservation and supervision necessary for the protection of the living resources of the sea contiguous to their coasts, beyond territorial waters"

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109) *Id.* at p. 66.

110) Pan American Union, Tenth Inter-American Conference (Caracas, March 1–28, 1954), Final Act, 1954, p. 84, Resolution LXXXIV: Conservation of Natural Resources: the Continental Shelf and Maritime Waters.

111) Pan American Union, Third Meeting of the Inter-American Council of Jurists, Report of the Executive Secretary of the Inter-American Council of Jurists (1956), 1956, p. 9. See, also, Territorial Waters and Related Matters – Action taken by the Third Meeting of the Inter-American Council of Jurists, Mexico City, January 17–February 4, 1956, Dep. of State Bull., vol. 34 (1956), p. 296.

112) The project was sponsored at first by eight countries, Argentina, Chile, Ecuador, El Salvador, Guatemala, Mexico, Peru and Uruguay, and later joined by Costa Rica.

113) Bolivia, Colombia, Cuba, the Dominican Republic and Nicaragua abstained.

without prejudice to rights derived from international agreements as well as to fishing by foreigners, and

> "the rights of exclusive exploitation of species closely related to the coast, the life of the country, or the needs of the coastal population, as in the case of species that develop in territorial waters and subsequently migrate to the high seas, or when the existence of certain species has an important relation to an industry or activity essential to the coastal country, or when the latter is carrying out important works that will result in the conservation or increase of the species".

This project was named "Principles of Mexico on Juridical Regime of the Sea" [114]).

The Dominican Republic, Nicaragua and Colombia, all of whom had abstained from voting, and the United States, expressed the view in their respective statements that the project exceeded the competence of the Council as a technical-juridical body and was contrary to international law [115]). The United States was of the opinion that the resolution was based on unfounded economic and scientific assumptions and was completely oblivious of the interests and rights of states other than the adjacent coastal states. The Columbian delegation believed that the matter of the extension of territorial jurisdiction should be settled by means of special or general agreements between states. The Government of Cuba warned that the unilateral extension of the territorial waters proposed by the principles of Mexico ignored

> "the fact that, when considering the appropriation in full sovereignty of a maritime zone that heretofore has been a part of the high seas, it is not alone the needs and interests of the coastal State that are involved".

It was also pointed out by Cuba that the principles of Mexico included, in the idea of 'conservation' of the living resources of the high seas, the 'right of extensive exploitation' of certain maritime species, and that exclusive exploitation presupposed a juridical regime totally different from that of conservation [116]).

Among those states in favour of the principles of Mexico, Panama and Brazil were rather sceptical of the unilaterally extended jurisdiction of the coastal states upon the wide areas of the high seas [117]). The Panama dele-

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114) Pan American Union, Final Act of the Third Meeting of the Inter-American Council of Jurists (1956), 1956, p. 36, Resolution XIII: Principles of Mexico on the Juridical Regime of the Sea.

115) *Id.* respectively at p. 50, 59, 53, 58.

116) *Id.* at p. 50. The Cuban delegate also pointed out that the proposed principles differed greatly from the proposal presented by Cuba and Mexico and approved by a majority of the Latin American countries at the Rome Conference, which established certain limitations to the taking of unilateral action by the coastal state.

117) *Id.* respectively at p. 50, 55.

gation hoped that a formula would be found more favourable to the maintenance of a balance between the interests of the coastal sate and of the international community. The Brazilian delegation thought it proper to warn that too much emphasis was placed upon the individual state, without consultation of the interests of the international community, in establishing the limits of the territorial waters of each state. The unilateral character of the principles was such as to make it impossible to work out a binding international rule, nor would it contribute to better relations among states.

As a whole, the claim to the extension of coastal control, which had been raised following World War II by some Latin American countries, and expounded especially by Chile, Ecuador and Peru, was widely supported by the Inter-American Council of Jurists, although some member states were reluctant to recognize it *in toto*.

The principles of Mexico, approved by the meeting of the American lawyers having no diplomatic status, but nevertheless reflecting the views of those countries represented, could not *per se* have set up any binding rules of international law. On the other hand, the Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters" was convoked at Ciudad Trujillo by the Council of the Organization of American States, as an international conference in the strict sense, with a view toward the study of the different aspects of the juridical and economic system governing the submarine shelf, oceanic waters, and their natural resources in the light of present-day scientific knowledge [118]).

The Conference lasted for two weeks from March 15, 1956. At the outset the United States proposed that no final decision was to be made except by unanimous vote. This proposal was accepted by the Conference. In addition to recognizing jurisdiction and control exercised by the coastal state upon the continental shelf, it was unanimously agreed, as follows:

> "Cooperation among states is of the utmost desirability to achieve the optimum sustainable yield of the living resources of the high seas, bearing in mind the continued productivity of all species; Cooperation in the conservation of the living resources of the high seas may be achieved most effectively through agreements among the states directly interested in such resources; In any event, the coastal state has a special interest in the continued productivity of the living resources of the high seas adjacent to its territorial sea".

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118) Pan American Union, Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters", Ciudad Trujillo, March 15–28, 1956, Final Act. See, also, Problems relating to the Economic and Legal Regime of the High Seas – Inter-American Specialized Conference on Conservation of Natural Resources: Continental Shelf and Maritime Waters, Dep. of State Bull., vol. 34 (1956), p. 894.

On the other hand, agreement was not reached

> "with respect to the juridical regime of the waters [covering the continental shelf], nor with respect to the problem of whether certain living resources belong to the sea-bed or to the superjacent waters", "either with respect to the nature and scope of the 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", and "with respect to the breadth of the territorial sea".

The "Resolution of Ciudad Trujillo", together with the statements of various delegations, clearly demonstrated the scope of conservation measures to be taken on the high seas although no agreement was reached upon the most controversial matters relating to the regime of the seas.

In addition to the views expressed on various occasions in the Pan American Union, it is of interest to note the opinions of a few academic associations composed mostly of Latin American lawyers.

"El Congreso Hispano-Luso-Americano de Derecho Internacional" composed of Spanish, Portuguese and Latin American lawyers, at its second meeting held in 1953 at Sao Paulo in Brazil, passed a resolution relating to territorial waters and the continental shelf [119]).

> «Art. 10. La autoridad y jurisdicción del Estado ribereño comprende también las facultades de reglamentar y fiscalizar la pesca y la caza que se realicen en toda la extensión de las aguas que cubren la plataforma submarina con objeto de proteger sus recursos naturales contra su exterminación, aunque sus habitantes no practiquen tales actividades en dicha zona.
>
> Art. 11. Los Estados que carecen de plataforma submarina tienen, con el mismo objeto especificado en el artículo annterior, el derecho de reglamentar y fiscalizar la pesca y la caza que se realicen en las zonas del alta mar adyacentes al mar territorial hasta el límite de 200 millas marinas contadas desde la línea exterior de aquél.
>
> . . . . . .
>
> Art. 14. El ejercicio, por un Estado ribereño de las facultades de reglamentar y fiscalizar la pesca y la caza que se realicen en la zona del mar adyacente a su mar territorial, dentro de los límites fijados por el artículo 11, no afecta el régimen general del alta mar, ni excluye los buques de otros países que, en igualdad de condiciones, se dediquen lícitamente a aquellas actividades».

While endorsing the right of a coastal state to exercise jurisdiction over an area of 200 miles, it was implied that foreign fishermen would be permitted to fish in such area subject to the regulation and control of the coastal

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[119]) Universidad de Buenos Aires, Revista de la Facultad de Derecho y Ciencias Sociales, Año 9 (1954), p. 252.

state. On the other hand, «La extensión del mar territorial debe ser de 12 millas marinas» (Art. 4).

A report submitted by the Committee on the Continental Shelf to the Inter-American Bar Association held in April 1956 at Dallas is also of some interest [120]). The Committee, over which Bingham presided, strongly supported in general terms the Latin American claims. This report emphasized the fact that the doctrine of the continental shelf

> "arose in connection with claims of jurisdiction of states over their coastal fisheries ... [and] has a practical juridical, but not yet sufficiently recognized, value in many international coastal fishery controversies". "It is the opinion of [the] committee that, especially in this scientific age, these problems of jurisdiction over sea areas should not be prejudiced by political slogans and propaganda or solved in terms of traditional abstract global mechanical formulas. Rather they should be subject to unprejudiced, careful regional examination of all pertinent factors, biological, economic, social, political, and historical with a view to fair and just appraisal and separate solution of each concrete local case".

The committe was of the opinion that

> "claims should not be barred and cogent social considerations ignored by blind adherence to traditional slogans and restrictive mechanical rules politically imposed for group or national aggrandizement by naval powers in ages of aggressive force with minimum restraining scruples".

After pointing out that "The law of the sea ... has grown out of unilateral assertions of right", the committee's report stated:

> "freedom of the seas is not a definitive principle of international law or politics. It still is, as it always has been, only a popular political slogan referring to the recognized general common interest of the international community in outlawing unjustified restrictions and monopolies of sea uses. It leaves entirely indeterminate the extent of this general common interest and the justification of particular uses and restrictions – including those important ones of coastal state maritime jurisdiction".

It is respectfully submitted that the argument employed by the committee to substantiate their views is somewhat confused. The report was signed by all Latin American members of the committee in addition to Bingham of the United States, while, on the other hand, many of the U.S. members including Bishop and Young dissented.

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120) Report to the Inter-American Bar Association on the Doctrine of the Continental Shelf, Dallas, April 1956.

B. Exercise of Jurisdiction over High Seas Fisheries: Dividing-Up of the Seas

As we have seen, a great number of states have asserted their right to exercise jurisdiction upon the fisheries off their own coasts. The form of these claims has varied greatly. Sometimes, the extent of the territorial seas has been simply extended by unilateral proclamation or municipal legislation. On the other hand, some states have claimed rights exclusively for the purpose of fishing without touching the extent of their territorial seas. We find also some countries, while confining their territorial seas to a narrow belt, claim sovereignty over the high seas to a far greater distance. It is submitted that the absence of uniform limit of the territorial seas has made it more difficult to give precise legal evaluation to these various claims [121]). It is not within the scope of this article to discuss in detail the practices of different nations regarding the width of the territorial seas. However, many of the unilateral claims, while differing perhaps in point of distance and terminology, are fundamentally similar in so far as they are asserted with a view to conferring upon each claiming state the right to exercise its jurisdiction upon foreign nationals engaged in fishing in the area beyond the traditionally drawn territorial limit. In other words, all of these countries insist upon their right to subordinate foreign fishermen found in the claimed areas to their own jurisdiction.

There is no doubt that off-shore fisheries are connected to the coast. It may be true, as contended by Argentina, that

> "The waters covering the submarine platform constitute the epicontinental seas, characterized by extraordinary biological activity, owing to the influence

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121) As to various practices concerning the territorial seas, see, Crocker, The Extent of the Marginal Sea: A Collection of Official Documents and Views of Representative Publicists, 1919; Meyer, The Extent of Jurisdiction in Coastal Waters illustrated by State Practice and the Opinions of Publicists, 1937; League of Nations, C. 74, M. 39. 1929. V., p. 105 ff. See, also, UN. Doc., A/CN. 4/53; A/CN. 4/61; A/2934, at p. 25. The International Law Commission of the United Nations provided in its Articles concerning the law of the sea drafted in 1956: "Article 3. 1. The Commission recognizes that international practice is not uniformas regards the delimitation of the territorial sea. 2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles. 3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less. 4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference". UN Doc., A/3159, p. 4. See, also Oda, The Territorial Sea and Natural Resources, ICLQ, vol. 4 (1955), p. 415.

of the sunlight, which stimulates plant life and the life of innumerable species of animals, both susceptible of industrial utilization" [122]).

We have no doubt that the continental shelf forms with the land mass a single morphological and geological unit [123]). Some scholars favour such a geographical concept. Aramburú is of the view that

"The right to occupy the bed of the sea (beyond three miles) recognized as it is, one must face the problems raised in its entirety and recognize that the water and the air are accessary elements subject to the fact of the principal" [124]).

Garaioca maintains that

"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" [125]).

However, these scholars fail to cite authority for the statement that this concept has been accepted in the field of law. Such a scientific concept can not become *per se* a legal concept.

The distinction between the high seas and the territorial seas as a part of national territories is fundamental in international law. It has been commonly understood that the established principle of the freedom of the high seas prohibited all nations from reserving to themselves the competence of exercising jurisdiction [126]). Fitzmaurice properly indicated recently that international law recognized the full sovereignty of the coastal state within its territorial sea, but gave it no rights at all outside that area [127]). It seems obvious that these claims by coastal states to high seas fisheries are contrary to the concept of the freedom of the high seas. In order to make a deviation from established principle acceptable, proper justification must be proved.

It is sometimes contended that these claims are required for the purpose of properly conserving marine resources. It is certainly not denied that certain disadvantages would follow, if strict adherence to the legalism of the freedom of the high seas should be maintained. The doctrine, which

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122) See note 18 *supra.*

123) The Peruvian and Honduran claims mention this feature. See notes 21, 25 *supra.*

124) Aramburú, Character and Scope of the Rights Declared and Practised over the Continental Sea and Shelf, AJIL, vol. 47 (1953), p. 120 f.

125) Garaioca, The Continental Shelf and the Extension of the Territorial Sea, Miami Law Quarterly, vol. 10 (1956), p. 490, 495.

126) See, *e. g.*, Sibert, Droit International Public, I, 1951, p. 653; Oppenheim's International Law, vol. 1, 8th ed. 1955, p. 589; Verdross, Völkerrecht, 3. Aufl. 1955, p. 232.

127) UN. Doc., A/C. 6/SR. 487 (Provisional), at p. 8. Fitzmaurice was the British Representative at the Sixth Committee of the Eleventh General Assembly of 1956–57.

prevents all states from exercising jurisdiction on the high seas, leaves room for unregulated fishing, which is likely to exhaust marine resources. However, although certain controls of fishing are required for the purpose of conservation, there is no reason, why control and regulation should be vested in any one state. Fitzmaurice recently expressed the opinion that the term "conservation" could not mean that a state could reserve certain rights for itself [128]). It is submitted that Böhmert is right, when he says

»Es ist aber nicht richtig, daß Fischereifreiheit stets zur Verringerung des Fischbestandes und daß uferstaatliches Fischereimonopol bzw. uferstaatliche fischereipolizeiliche Maßnahmen stets zur Erhaltung desselben führen müssen« [129]).

There is no causal relation between the need of conservation of marine resources and control of some fisheries by a coastal state.

Certain states emphasize that they have no intention of excluding foreign nationals, and that their intention is only to regulate and control the fisheries for the purpose of conserving resources. It is said that issuance by the coastal state of licenses should not be objected to by anybody having respect for conservation. It is submitted, however, that the U.S. delegate was absolutely right at the Santiago Conference of 1955, when he pointed out that the authority to license fishing operations would involve the authority, not only to determine the fees and other conditions of the licenses, but also to withhold them completely [130]). Scelle stated that

« la possession de la couche marine surjacente du P. C. [plateau continental] pourrait être de nature à remédier effectivement au dépeuplement, *si* l'on pouvait se fier à l'action gouvernementale s'exerçant dans l'intérêt public et tenant en bride l'avidité des concessionnaires » [131]).

Even if a state exercising jurisdiction sought to exercise it in a non-discriminatory manner in the first instance, there could be no guarantee that such would continue to be the case in the future.

Furthermore, once a coastal state is allowed to exercise jurisdiction upon foreign vessels on the high seas, the acts of such vessels would naturally be evaluated in terms of the interests of the coastal state and be subject to the judgement of the coastal state. It is no exaggeration to say that claims to exercise jurisdiction have been asserted mainly with a view to securing a

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128) UN. Doc., A/C. 6/SR. 492 (Provisional), at p. 10.

129) Böhmert, Meeresfreiheit und Schelfproplamationen, Jahrbuch für Internationales Recht, Bd. 5 (1955), p. 1, 34.

130) Department of State Publication: Santiago Negotiations on Fishery Conservation Problems Among Chile, Ecuador, Peru, and the United States, p. 6.

131) Scelle, Plateau Continental et Droit International, Revue Générale de Droit International Public, Année 59 (1955), p. 5, 28.

favourable share of marine resources, and it is questionable whether such is sufficient justification.

It is true that a coastal state is certainly entitled, under exceptional cases, to exercise jurisdiction on vessels of foreign nationals even beyond the territorial waters in defiance of the established principles of the freedom of the high seas. The doctrine of 'hot pursuit' has been recognized, wherein a coastal state may pursue and catch any foreign vessel which has violated the laws and regulations of that state while in its territorial seas, provided such pursuit is commenced when the foreign ship is within those waters [132]). The doctrine of 'contiguous zone', by which a coastal state is entitled to exercise the control beyond its territorial seas which is necessary to prevent infringement of customs, fiscal or sanitary regulations within its territory, is now about to be accepted in international law [133]). The author does not deny that the freedom of the high seas has been modified in these respects. However, the reasons behind these exceptions should be examined.

The regime of the high seas has been developed in favour of 'freedom of intercourse' and 'exploitation of resources', and, accordingly, it has been found necessary to adopt various measures for the protection of such legitimate interests. Piracy is nowadays considered as an international crime because of its hindering of free navigation [134]). The rule es now practically

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132) 1956 Articles concerning the law of the sea of the International Law Commission: "Art. 47. 1. The hot pursuit of foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship is within the internal waters or the territorial sea of the pursuing State, and may only be continued outside the territorial sea if the pursuit has not been interrupted ...". UN. Doc., A/3159, p. 9, 30.

133) See Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 1927; Masterson, Jurisdiction in Marginal Seas, with special reference to Smuggling, 1929; League of Nations, C. 74. M. 39. 1929. V., p. 105 ff.; UN. Doc., A/2456, Annex II; A/CN. 4/53, 61. "In 1930 Great Britain and Japan were the two major countries defying the adoption of the contiguous zone rule even as *lex ferenda*. However, some countries, especially France, were of the opinion that the adoption of the principle of the contiguous zone was the only way to establish any uniformity of the problems of the territorial sea. Although the Codification Conference failed to accept even the legal institution of the contiguous zone, already in 1930 there existed the hope and expectation that the concept of the contiguous zone would be institutionalized before long". Oda, The Territorial Sea and Natural Resources, ICLQ, vol. 4 (1955), p. 415, 419. The articles concerning the law of the sea of the International Law Commission: "Article 66. 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea; b) Punish infringement of the above regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured". UN. Doc., A/3159, p. 11, 39.

134) The 1956 Articles of the International Law Commission: "Art. 38. All States shall

established that, in the interest of protecting marine resources, a state may not pollute and contaminate sea waters [135]). At present, almost all countries incline to accept the rule that penal jurisdiction on persons in matters of collision should be limited to the flag state of their vessels or the state of which they are nationals [136]). This is also a means to strengthen free navigation. In these ways, the legitimate interests of navigation and fishing have been protected. Any act which might impair these values would appear to be in contradiction with international law [137]).

On the other hand, the exercise of jurisdiction by a coastal state in terms of hot pursuit or contiguous zone, as previously defined, has not seriously interfered with the legitimate interests of other states. The advantage, which the coastal state may obtain by the extension of its jurisdiction over a wide area for the purpose of preventing smuggling or unsanitary action is incomparably greater than any expected disadvantage that other states may suffer therefrom. We should note that it is not accidental that the 'contiguous zone' has never been considered as covering the competence of a coastal state to control the exploitation of marine resources [138]).

It is quite a different story when a coastal state seeks the extension of its jurisdiction so that it may regulate and control the exploitation of resources. This would clearly involve a benefit to the coastal state completely at the expense of the legitimate interests of other states. Simple extension of territorial seas meets the same problem. In another place, the author has said:

> "the impossibility of compromise with respect to the breadth of the territorial sea is chiefly due to the conflicting interests in these fisheries, which are located outside of the territorial sea and theoretically free of access to all peoples" [139]).

co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". UN. Doc., A/3159, p. 8, 27.

135) "Art. 48. 1. Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject. 2. Every State shall draw up regulations to prevent pollution of the seas from the dumping of radioactive waste ...". *Id.* at p. 9, 31. See, also, UN. Doc., ST/ECA/41: Pollution of the Sea by Oil.

136) "Art. 35. 1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which the accused person is a national ...". UN. Doc., A/3159, p. 8, 27.

137) In this respect, H-bomb tests conducted on an island in the Pacific were considered to be contrary to international law, insofar as the legitimate interests of the Japanese fishing industry were thereby seriously injured. O d a, The Hydrogen Bomb Tests and International Law, Die Friedens-Warte, Bd. 53 (1955/56), p. 126.

138) O d a, The Territorial Sea and Natural Resources, ICLQ, vol. 4 (1955), p. 415, 423.

139) *Id.* at p. 425.

It is unfortunate that some politicians and scholars cannot distinguish fishing, in which the legitimate interests of all states are involved, from smuggling or some other offensive act. In fact, the doctrine favouring the exercise of jurisdiction of a coastal state on the high seas seeks precedent especially in the institution of 'contiguous zone'. Some scholars seek to argue that the regime of the seas has been constructed through unilateral claims of various states, and to rationalize, by analogy to the concept of 'contiguous zone', the claims asserted for the purpose of exploitation of resources. This argument has been adopted by Baxter of Harvard, who has stated that

> "The conclusion to which one is impelled is that a piecemeal assertion of jurisdiction puts a state on the side of the angels, while an attempt to do it all at once by an extension of the territorial sea is profoundly evil" [140]).

Koh also follows this line of thought:

> "No one can deny that the so-called contiguous zones impose limitations on the principle of the freedom of the high seas important enough to challenge the validity of at least one of its elements – the freedom of fishing on the high seas" [141]).

They fail to recognize the fundamental regime, both historical and logical, of the seas, and are blind to arguments, expounded during the past few decades, on the extent of the territorial seas and the regime of the contiguous zone [142]).

It is of interest in this respect to call attention to the 1956 reports of the International Law Commission [142a]). It is submitted that many scholars have erred in their interpretation of the words 'special interest of a coastal State' used by the Commission [143]). The Commission does not imply that these

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[140]) Baxter, The Territorial Sea, Proceedings of the American Society of International Law (1956), p. 116, 122.

[141]) Koh, The Continental Shelf and the International Law Commission, Boston University Law Review, vol. 35 (1955), p. 522, 528.

[142]) "The coastal State ist entitled to extend its jurisdiction beyond the territorial sea under the institutions of hot pursuit and contiguous zone. Why then, does it happen that certain limited jurisdictions are widely extended, while the territorial sea is not extended?" (Oda, *op. cit. supra* note 138, at p. 420). It is submitted that this question is still of some pertinence.

[142a]) UN. Doc., A/3159. See note 204, *infra*.

[143]) Even Kunz, who holds most conservative and orthodox views of the regime of the seas, seems to be somewhat confused in his comment on the 1955 Articles of the International Law Commission, which Articles are essentially similar to those of 1956. "[1955 Articles] are devised to give such international fishing regulations which fully uphold the freedom of fishing on the high seas and yet give full satisfaction to the legitimate claims of the coastal States ... It could ... be hoped that the coastal States concerned, having obtained the satisfaction of their legitimate claims, will desist from their unlawful

interests of the coastal state would take precedence *per se* over the interests of the other states concerned [144]). The Commission does not admit the right of a state to exercise jurisdiction over high seas fisheries off its coast [145]).

The only exception is article 55 of the 1956 Articles. It provides:

"1. ... any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

a) That scientific evidence shows that there is an urgent need for measures of conservation;

b) That the measures adopted are based on appropriate scientific findings;

c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the [arbitration] procedure ..." [146]).

Once those measures in the first place unilaterally proposed by the coastal state have been accepted by other states, they cease to be 'unilateral' measures. If they are not acceptable to other states, the conflict between the coastal state and other states is to be decided by the compulsory arbitration procedure [147]), and, thus, the unilateral measures may remain obligatory and

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claims to an enormous extension of their territorial seas" (Kunz, Continental Shelf and International Law: Confusion and Abuse, AJIL, vol. 50 (1956), p. 828, 851 f.).

144) See UN. Doc., A/3159, p. 9 f.

145) In the 1953 session of the International Law Commission the concept in favour of the control of fishing sites off the coast by the coastal state was vigorously advanced. It is worth noticing that François and Lauterpacht, who had gained fame because of their orthodox concept of the seas, jointly proposed a draft that "States are under a duty to accept, as binding upon their nationals, measures adopted by the coastal State in areas situated within fifty miles of its territorial sea, provided that such measures are not discriminatory against foreign nationals and that they are essential for protecting fisheries against waste or extermination". This joint proposal met strong objection from some members including Scelle, who could not tolerate the extension of the territorial seas implied in this proposal, and was finally withdrawn by its two sponsors (UN. Doc., A/CN. 4/SR. 208). The comment on the 1953 Articles shows the view of the Commission towards certain unilateral actions: "in so far as it [the existing law] renders the coastal State or the States directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it is productive of friction and constitutes an inducement to States to take unilateral action, which at present is probably illegal, of self-protection ... Once such measures of self-protection, in disregard of the law as it stands at present, have been resorted to, there is a tendency to aggravate the position by measures aiming at or resulting in the total exclusion of foreign nationals" (UN. Doc., A/2456, at p. 17).

146) UN. Doc., A/3159, p. 10, 35.

147) See after note 217, *infra.*

'unilateral' only pending the arbitral decision. Even in this case, the coastal state probably cannot subject foreign nationals to its own jurisdiction. It can only require other states to take appropriate measures in accordance with these initial conservation measures. Needless to say, the Commission does not recognize "the right to establish a zone contiguous to the coasts where fishing could be exclusively reserved to the nationals of the coastal States" [148]). Thus, the Commission adheres to the orthodox idea of the regime of the high seas in so far as it does not acquiesce in the exercise of jurisdiction over coastal fisheries by any coastal state.

The Commission admits in article 54 of the 1956 Articles that a coastal state has a special interest [149]). The possibility that other states have a special interest even though their nationals do not engage in fishing, is also recognized in article 56 [150]). It should be noted, however, that the special interest of these nations recognized by the International Law Commission is solely concerned with the maintenance of the productivity of the living resources in the area of the high seas. In other words, such states may be represented at a commission established with a view to scientific investigation or conservatory measures in specific areas, and they are competent to propose specific conservatory measures. However, they are not given any specific consideration for sharing or exploiting marine resources. The Commission is concerned with the special interest of states in conserving resources, and not in the sharing of resources.

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[148]) UN. Doc., A/3159, p. 32.

[149]) *Id.* at p. 9, 35. "1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. 2. A coastal State is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there". In 1951 this idea was adopted (UN. Doc., A/1858, at 19). The idea was objected to by some governments. The United Kingdom, in particular, could not see any reason why a coastal state was particularly mentioned as being entitled to any regulation in view of her opinion that "any State which claims an interest in the fishing is a particular area of the high seas is entitled to take part on an equal footing in any system of regulating the fishing in that area, whether it is more or less than 100 miles away from that area and whether its nationals are or are not at present engaged in fishing in that particular area" (UN. Doc., A/2456, at p. 69). In spite of such comment, similar idea was retained by the Commission in its 1953 Articles (UN. Doc., A/2456, at p. 17). This idea was included in the Articles, because the Commission felt that "Where a fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even though its nationals do not fish in the area", (1951) or "that [the] protection of [the] interests [of the coastal state] is equitable and necessary even if, for the time being, its nationals do not engage in fishing in the area" (1953).

[150]) UN. Doc., A/3159, p. 10, 36: "This case may arise, for example, if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area where the nationals of the State concerned do not engage in fishing".

Also of interest in this respect is the report of the International Technical Conference on the Conservation of the Living Resources of the Sea, convened at Rome on April 18, 1955 by the U.N. General Assembly pursuant to its resolution of December 14, 1954. This Conference was convened to consider the problems of fishery conservation and the making of recommendations thereon [151]). There was no objection to the idea that "The principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products". However, the sentence that "When formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast", was included in the report by a vote of 18 against 17, with 8 abstentions [152]). Although the Rome Conference adopted the phrase 'special interest of a coastal State', this does not necessarily mean that the conference favoured the claim to coastal fisheries asserted by coastal states.

The International Law Commission and the Rome Conference have been chiefly concerned with the question of conservation of marine resources, to which there can be no categorical objection. It is most important to note that the special interest of specific states is recognized only for maintaining the productivity of the marine resources. The U.S. comment on the Commission's 1955 Articles stated that the special interests of a coastal state

> "can be safeguarded by giving the coastal State, upon satisfactory showing of a special interest, a right to participate fully in the conservation programme" [153]).

It is also interesting to read a statement of the United Kingdom, that

> "Her Majesty's Government also recognize that the conservation of natural resources in the high seas outside territorial waters may be a legitimate interest of the coastal State: but this is only on condition that Conservation is effected by agreement with those States to whose nationals the conservation measures are to be applied" [154]).

The unilateral claim, as previously explained, would appropriate the common interests of the world to the use of the individual state. Böhmert aptly warned that if such trend were acceptable,

»Die Kluft zwischen den 'haves' und den 'have-nots' in der Welt wird noch

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151) UN. Doc., A/CONF. 10/6: Report of the International Technical Conference on the Conservation of the Living Resources of the Sea.

152) *Id.* at § 61.

153) UN. Doc., A/CN. 4/99/Add. 1, at p. 75.

154) See note of protest by the U.K. Government, note 43 *supra.*

tiefer aufgerissen und ein Sicherheitsventil, das eine kriegerische Explosion verhindern kann, wird entfernt« [155]).

The author shares the feelings expressed by Scelle:

« Reste à savoir seulement si la notion nouvelle ne présente pas d'inconvénients plus graves que le principe juridique traditionnel qu'elle est destinée à restreindre et s'il n'est pas d'autres remèdes aux abus de la liberté des mers que celui qui consiste à élargir démesurément et sans considération suffisante de l'avenir la compétition anarchique des souverainetés affrontées » [156]).

The claims to regulate and control high seas fisheries or to extend the limit of territorial seas are not acceptable, unless it is proved that the interests of the world can be overriden by individual coastal interests.

(To be continued)

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155) Böhmert, Meeresfreiheit und Schelfproklamationen, Jahrbuch für Internationales Recht, Bd. 5 (1955), p. 1, 33.

156) Scelle, Plateau Continental et Droit International, Revue Générale de Droit International Public, Année 59 (1955), p. 5, 7.