

AN INTER-AMERICAN APPROACH TO THE LAW OF THE SEA?

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Nineteen seventy-four promises to be a momentous year in the development of the law of the sea. A comprehensive conference will meet in Caracas, Venezuela, this summer to elaborate a new and equitable international legal system for the sea, the seabed, and the ocean floor as well as the subsoil beyond the limits of national jurisdiction. A host of related issues will be considered, including precise definitions of the areas and the problems concerning the regime of the high seas, the Continental Shelf, the territorial sea and contiguous zone, as well as fishing and conservation of the living resources of the seas, the prevention of pollution, and issues concerning scientific research.

Preparation for the conference began in the United Nations in late 1970 and continued in other regional organizations during 1971. The importance attached to the work of the preparatory committee is reflected in the number of states in the General Assembly which sought appointments to the committee. Ultimately, 91 states of the General Assembly were appointed as members, and at least 19 other states have participated as observers. With so many members in the preparatory committee, agreement was not easily reached. In an

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effort to facilitate its work, the committee was divided into three subcommittees. The first is the Seabed Subcommittee whose focal point is the regime of law dealing with economic resources found on the seabed and subsoil of the Continental Shelf to the limits of national jurisdiction.

The second subcommittee deals with the classical themes of the law of the sea, such as the determination of maritime space and questions concerning the breadth of the territorial sea.

The third subcommittee is designed to deal with the preservation of the marine environment. Its areas of concern include the prevention of pollution, the problems associated with scientific research, and the preparation of draft treaty articles on those problems. It has been particularly concerned with determining state responsibility in preventing the contamination of the seabed.

A majority of states were in agreement that the subcommittee system should prevail for the focusing of points of law and breaking them down to more manageable proportions. This preparatory subcommittee work revealed that states differed significantly on the issues involved, and the approaches taken were largely a reflection of a leader's perceptions of states' present and anticipated national interests. The approaches generally fall into the following categories. First, some countries favor the status quo, are generally opposed to new regulations that would give coastal states either preferential treatment or extended jurisdictions, and feel that most of the ocean should be left open to the free use of all nations. Beyond the narrow limits of the territorial sea, emphasis is placed on the concept that the seas are a common heritage and resource of all mankind; no individual or group of states may claim a special right or interest to benefit from the seas and the resources therein unless the community of states sanctions the claim.

This group is led principally by the

Soviet Union, Japan, the United Kingdom, and a few other states with major distant-water fishing interests.¹ These developed states are joined in their opposition to the extensive claims of some coastal states by a large number of the world's landlocked and shelflocked states.² A large percentage of the landlocked countries are undeveloped and would have much to gain from either free access to the sea's resources or a broad international jurisdiction over the sea giving equal access to all states.

In opposition to the proposition of this first group are states which view the right of coastal states to extend their jurisdiction seaward either unilaterally or through international agreement. The claim of such coastal state prerogatives is a relatively recent phenomenon and represents a crude measure of the states' accessibility to the seas as well as their dependence on the resources in the seas and on the seabed. Representatives of this group are coastal states with considerable investment or dependence on ocean resources such as Brazil, Ecuador, and Peru.

The third position represents a compromise and had its origin with the "Specialized Conference of Caribbean Countries Concerning the Problems of the Sea," a group that formulated the Santo Domingo Declaration. Fifteen nations met and established principles³ based on a need for the development of regulations which would take into account scientific and technological progress as well as new political realities that did not exist when many of the classical rules were formulated. The declaration noted that the rights, obligations, and responsibilities of states relative to the various oceanic zones should be defined through norms of worldwide application without prejudice to regional or subregional agreements based on those norms. New rules on the oceanic zones should be designed to promote international cooperation for the protection and har-

vest of marine resources. In formulating these rules it is essential that both the needs and interests of individual states as well as those of the international community be met.

The Declaration of Santo Domingo is made up of two inseparable elements. The first element concerns the territorial sea in the classical sense. The sovereignty of the state is recognized as extending beyond its land territory over an area of the sea adjacent to its coast to a limit of 12 nautical miles, measured from the appropriate baseline. The sovereignty of the coastal state also extends to the superjacent airspace as well as to the seabed and subsoil beneath the territorial sea. Ships of all states maintain the right of innocent passage through the territorial sea.

The declaration recognized a consensus in support of a 12 nautical mile territorial sea and concluded that an international agreement should establish a legal norm. In the absence of a legal standard, several states in the world community have made claims beyond the 12 miles granted in the 1958 Convention on the Territorial Sea and the Contiguous Zone,⁴ even though they recognize that they can exercise only limited jurisdiction over such areas.

The contiguous zone in which the coastal state may exercise authority regarding customs, fiscal, immigration, or sanitary regulations up to 12 miles from its coast is practically a dead issue, and nearly all states have now added the claim for exclusive fishing rights at least to the outer limits of the contiguous zone. This leaves only the right of high seas navigation, which is a bit broader than rights of innocent passage through a territorial sea, and scientific exploration in the contiguous zone beyond the territorial sea intact. Most states have decided to resolve the situation by claiming the maximum allowed under the 1958 convention.⁵

It is significant that the draft articles proposed by the United States on the

Breadth of the Territorial Sea, Straits, and Fisheries submitted to subcommittee II suggest the right of each state to establish the width of its territorial sea up to 12 nautical miles. This right would be limited only by the provisions of article II which state that,

In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas.⁶

The new position on the territorial sea is inseparable from the concept that there is a regime beyond the limits of the coastal states' sovereignty which is still not commonly shared by all states. This area in which the coastal state could exercise certain kinds of specialized jurisdiction over the economic resources was termed the "patrimonial sea." The Santo Domingo Declaration proposed that the whole of the area including the territorial sea and the patrimonial sea should not generally exceed a maximum of 200 nautical miles. Differences regarding the width of the zone and the powers of the coastal state are less important than the recognition of the principle itself. This is the zone which the forthcoming conference must determine and define. It represents one of the most important developments in recent years and provides the most promising basis of a compromise formula.

The concept that the coastal state bears the responsibility for the prudent use of coastal resources is a consequence of the philosophy of developing countries. The primary motive for coastal states aspiring to such a right has been justified by Mexico and an increasing number of states as being nothing less than the close interrelationship between

land and sea in the environment. Other states see the need for the establishment of a "buffer zone" to protect against pollution. It is also argued that there is an element of natural justice involved in the concept of the patrimonial sea. The living resources are fished by all, often to the detriment of those closest by. Developing countries are more desperately in need of creating a plentiful protein supply for their frequently undernourished and expanding populations. The utilization of the sea's resources also provides employment opportunities in these same countries.

At the same time, it is important to note that this is not an exercise in sovereignty. The Santo Domingo Declaration provides a basis for states to exercise rights over resources rather than over the area itself. Navigational rights are not affected as article 8 states that in the patrimonial sea, ships and aircraft from all states, whether coastal or not, should enjoy the right of "freedom of navigation and overflight with no restrictions."

The coastal state has no power to shut off the patrimonial sea from navigation, and while the patrimonial sea concept would allocate resource management functions over all living and nonliving resources on the seabeds, the subsoil, and the vertical water column to a distance of 200 miles seaward of the coastal state, the exact distance could be compromised. For example, Iceland recently claimed exclusive fishing rights within 50 nautical miles of its coast. That distance was used rather than 20 miles or 200 miles because 50 miles is roughly the edge of the Continental Shelf surrounding Iceland. Beyond that limit there is no great abundance of fish. There can, however, be no doubt that coastal states will be enabled to restrict fishing and other forms of economic exploitation in the waters adjacent to their coasts at distances greater than 12 miles. The same is true in terms of a coastal state's exclusive

right to exploit the resources in the adjacent seabed to a like distance.

A case in point is a recent U.S. agreement with Brazil concerning shrimp fishing by American vessels off the Brazilian coast.⁷ Brazil claimed a territorial sea of 200 nautical miles from its coast largely on the pragmatic political grounds that foreign fishing vessels with advanced technical equipment were fishing out certain fish and crustaceans, primarily shrimp, and were taking them back to their own countries. Not only was Brazil deriving no benefit from the exploitation of the fishing grounds, but her stocks were being depleted. The situation was seen by Brazil as being patently unfair. Brazil, anticipating that it would be criticized if it substituted foreign exploitation for coastal state exploitation, indicated instead its concern for conservation and agreed that foreign vessels could fish in those waters only after having obtained a license to fish up to a maximum limit of not more than 160 vessels flying the U.S. flag at any one time. There are other restrictions on the type of gear to be used and a prohibition against the use of electronic equipment for fishing purposes.

The United States has now established its own "conservation" areas in the Northeastern Pacific Ocean and has signed an agreement with the Soviet Union limiting the right of the Soviets to fish in an additional 9 mile area adjacent to but outside of the 12 nautical mile exclusive fishery claim by the United States.⁸ While the U.S. position is rather modest compared to claims of a 200-mile patrimonial sea, it is indicative of a positive attitude toward the idea of the patrimonial sea.

The United States has also proposed an alternative to the patrimonial sea economic zone in the form of the "species" approach. The species approach differentiates between three kinds of fish, each requiring different regulations—those that migrate widely

over great distances, those that spawn in fresh or estuarine waters and then return to the sea, and fish that remain off the coast of a particular state. The major question to be resolved by the conference is: Which approach to the resolution of the problem of the management and distribution of living marine resources will most effectively do the job and win the support of most states of the world? An economic zone recognized in the concept of the patrimonial sea certainly is less complicated, does not require agreements on each species, and enjoys the general support of many more states than does the species approach.

Although the problem is not addressed directly, the Santo Domingo Declaration and the patrimonial concept would still permit a solution to the fisheries problem in the economic zone by taking into account the migratory habits of fish and the manner in which they were fished. The declaration did not attempt to define procedures for the settlement of disputes and left open distinctions in the treatment of living resources based on their migratory habits. Therefore, the document provides a valuable starting point for serious negotiations and is in conformity with the idea.

In June 1972, within weeks of the meeting at Santo Domingo, a regional seminar of African States was held in Yaoundé (Cameroon) to discuss similar issues. At its conclusion the seminar adopted several recommendations that closely paralleled those of the Santo Domingo Declaration.⁹ It noted that the territorial sea should not extend beyond a limit of 12 nautical miles, but further recommended that the African States extend their sovereignty over all the resources of the high sea adjacent to their territorial sea "within an economic zone to be established and which will include at least the continental shelf."

The purpose of the economic zone over which the coastal state would have

exclusive jurisdiction is to provide for regulation and national exploitation of the living resources of the sea, their reservation for the primary benefit of coastal peoples and economies, and for the control of pollution in the area. The general report was adopted unanimously without reservation.

The waters of the seas situated beyond the limits of the patrimonial sea or economic zone constitute an international area of the high seas and seabed in which traditional freedoms remain. However, in the interest of protecting the marine environment and promoting scientific research and conservation, the area should be subject to international regulation of worldwide authority. The Yaoundé report adds that the governing body set up to manage the common heritage outside the limit of national jurisdiction should operate in such a way that the developing countries would be the primary controllers and beneficiaries.

By 1952, considerable juridical support had developed for claims of "sovereignty" over the sea adjacent to states up to a distance of 200 nautical miles. Chile, which had extended its territorial waters claim to 200 miles in 1946, invited Ecuador and Peru to meet in Santiago where they concluded the Declaration of Santiago on the Maritime Zone.¹⁰ The declaration recognized 200-mile claims of the three states, and 2 years later a subsequent agreement was signed by these states which bound them not to diminish the 200-mile limit without prior consultation and agreement with the other signatories.

The patrimonial sea concept appears to be the most viable method for compromise by which these states could still claim 200 miles, even if only for exclusive exploitation rights and not as a territorial sea beyond 12 miles. There is now general agreement that coastal states do have a legitimate claim for preferences on the high seas beyond the limit of the territorial sea.

The Inter-American Juridical Committee met in Rio de Janeiro in January and February of 1972 and appeared to sanction the Declaration of Santo Domingo in its report.¹¹ The Juridical Committee recommended that the American States take the report into consideration when presenting their recommendations to worldwide conferences discussing a new legal system for the seas. Unfortunately the Juridical Committee's statement was unclear in its definitions of "sovereignty" and "jurisdiction." Article one states that

The sovereignty or jurisdiction of a coastal state extends beyond its territory and its internal waters to an area of the sea adjacent to its coasts up to a maximum distance of 200 nautical miles, as well as to the air space above and the bed and subsoil of that sea.

Two zones of the sea within the 200-mile limit are distinguished. The first zone extends to a distance of 12 nautical miles and is dealt with in terms that leave no doubt that it is the territorial sea. The second zone is treated as the patrimonial sea but it is not clear that a coastal state's "jurisdiction" rather than "sovereignty" is exercised in this area. This failure is important since there remains the possibility that a state could subsequently enlarge its claims over an economic zone in the name of "sovereignty" over the area. If this becomes the case, an "innocent passage" agreement will be much more difficult to achieve.

Caracas, during the summer of 1974, will witness a comprehensive effort to thrash out an agreement on the law of the sea. The issues of the economic partition of the sea and the classical themes of the determination of maritime space and the more recently recognized problems of contamination and scientific exploration are so inextricably bound together that no one area of problems can be resolved without requiring accommodation in the other areas. Therefore, if serious ne-

gotiations are to go forward, a willingness to compromise is essential. Failure to reach a settlement would seriously jeopardize any hope of uniform rules concerning the law of the sea. Indeed, the consequences of failure to reach an agreement and the resulting anarchy are perhaps the greatest incentive to bargaining in good faith.

The proposal put forward at Santo Domingo in June of 1972 provides a sound basis for a compromise solution. Nothing in the concept of the patrimonial sea would prevent the maintenance of "free passage" as opposed to "innocent passage" in the straits that would otherwise become part of the territorial sea if a uniform 12-mile limit was established. This would satisfy the major maritime states' concern for freedom of movement upon the seas. The patrimonial sea, between 12 and 200 miles, in which the coastal state would exercise rights over the resources rather than sovereignty over the area, would ensure that the navigational rights of other states would not be affected. Such an agreement would prevent a creeping extension of restrictive claims and offer states having made claims of a 200-mile territorial sea an acceptable compromise. Several states claiming a 200-mile territorial sea have already indicated that they intend to enforce only their economic claims in the area.

In this system it would be possible for the coastal state either to adopt the measures necessary to prevent or reduce pollution within this zone unilaterally, the zone being a part of its national resources, or the state could refer to a broader set of international standards. Scientific research could also be carried out in this area with the coastal state having a right to receive all results of such research activities. The coastal state would be required to give its permission to allow the scientific research activities without unjustified discrimination or restriction.

These proposals leave open the

question as to whether the seas and the ocean floor located beyond the patrimonial sea, as well as the resources beyond that limit, are the common heritage of mankind or whether that area should be governed by a new international organization. An international organization could grant licenses for economic exploitation with the licensing revenues being turned over to

an international development fund as well as enforce pollution controls in that area. A major point in favor of the "international organization" approach as opposed to the "common heritage" approach is the realization that "freedom of the seas" has come to mean freedom to pollute and overfish. The old anarchy must be replaced by progressive laws regulating the use of the seas.

NOTES

1. Other states with major distant-water fishing interests include the United States, East and West Germany, Poland, South Africa, South Korea, and the People's Republic of China. The United States and the People's Republic of China are major exceptions in not supporting the position of this group.

2. "Shelf-locked" is defined here to indicate a nation whose continental shelf abuts that of a neighbor so that no portion of the shelf descends below the 200-meter isobath, which is the legally defined limit.

3. Barbados, El Salvador, Guyana, Jamaica, and Panama did not sign the Santo Domingo Declaration. It was signed by Colombia, Costa Rica, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Dominican Republic, Trinidad and Tobago, and Venezuela.

4. United Nations Conference on the Law of the Sea, Geneva, 1958, *Convention on the Territorial Sea and the Contiguous Zone*, A/CONF.13/L.52 (Geneva: 1958).

5. Fifty-four states now claim 12 miles and 23 claim more than 12. Of 41 states who claim less than 12 miles for a territorial sea, 25 claim at least 12 miles for exclusive fishing rights.

6. United Nations, General Assembly, "Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted to Sub-Committee II by the United States of America" (A/AC.138/SC.II/L.4), *Official Records; Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction*, 26th Session, Supplement No. 21 (A/8421) (New York: 1971), p. 241. The United States recognizes in its submission the inevitability of the 12-mile territorial sea, but, as a major maritime nation, is concerned that these expanded claims could impede navigation and commerce, and decrease the mobility of military vessels. Article I of the draft articles proposed by the Union of Soviet Socialist Republics concerning straits used for international navigation has almost identical language. See United Nations, General Assembly, "Draft Articles on Straits Used for International Navigation Submitted by the Union of Soviet Socialist Republics" (A/AC.138/SC.II/L.7), *Official Records; Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction*, 27th Session, Supplement No. 21 (A/8721) (New York: 1972), p. 162-163. Both states would recognize the right of coastal states to designate corridors for transit by both ships and aircraft in these areas.

7. "Agreement Between Government of Federative Republic of Brazil and Government of USA Concerning Shrimp," *Lawyer of the Americas*, v. 5, no. 1, Feb. 1973, p. 188-197.

8. U.S. Treaties, etc., "Fishing Operations, Northeastern Pacific Ocean"; "Fisheries, Northeastern Part of the Pacific Ocean off the United States Coast," *Treaties and Other International Acts*, Series 7572 and 7573 (Washington: U.S. Govt. Print. Off., 1973).

9. United Nations, General Assembly, Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, *Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, Held in Yaoundé, from 20-30 Jun 1972*, A/AC.138/79 (New York: 1972).

10. Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Dept. of State, 1965), v. IV, p. 1089-1090.

11. Organization of American States, General Secretariat, *Work Accomplished by the Inter-American Juridical Committee during Its Regular Meeting Held from January 15 to February 16, 1973*, OEA/Ser.Q/IV.6 CJI-13 (Washington: 1973).