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JURISDICTION OVER OFFSHORE FISHERIES—HOW FAR INTO THE HIGH SEAS

*LUDWIK A. TECLAFF**

"Big Russ Fleet Sweeps Bottom Fish Grounds—Drives U.S. Fishermen Back to Port." Headline, The Daily Astorian (Oregon), April 11, 1966.

"I can't get perch this year. I go to our normal spots for fishing and Russian trawlers are there." Notarized deposition of an Oregon fishing-vessel owner, May 7, 1966, Hearings Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Commerce, 89th Cong., 2d Sess., ser. 65, at 162 (1966).

"Let not the fish Russia catches be us. Help!" Telegram from a Constituent to Senator Warren G. Magnuson, May 1966.

IT was not the first time, by any means, that Soviet and other foreign trawlers had fished close to American shores, but the appearance of a Soviet fishing fleet off the Oregon coast in the spring of 1966 precipitated a crisis in United States fishery circles. Pressure was intensified to pass legislation establishing an exclusive fishery zone beyond the territorial sea of the United States. Both House and Senate subcommittees held hearings toward the end of May, at which many witnesses testified to the depletion of off-shore stocks of bottom fish on the Atlantic and the Pacific coasts of the United States by large, well-equipped Soviet fleets, quartering the fishing grounds with precision and thoroughness, and reportedly using gear and methods forbidden to American fishermen for reasons of conservation.[1] The State Department, prodded by American commercial fishing interests, urgently requested talks with Soviet officials, and these were held in Moscow in July, resulting in Soviet promises to keep its vessels at least twelve miles offshore, a distance equivalent to the U.S.S.R.'s own fishery jurisdiction; to redistribute its fleet so that smaller American craft were not forced off their traditional fishing grounds; to refrain from salmon fishing; and to permit American inspection of Soviet vessels.[2] However, it was reported in the House of Representatives on

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1. Hearings on S. 2218 Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Commerce, 89th Cong., 2d Sess., ser. 65 (1966); Hearings on H.R. 9531 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 89th Cong., 2d Sess. (1966).
2. Department of State, Release No. 180, 55 State Dep't Bull. 273 (Aug. 3, 1966).

October 3 that these promises had not been kept, and that first-hand accounts had been received of Soviet vessels fishing within twelve miles of the shore.[3] Then on October 15 President Johnson signed into law a bill establishing an exclusive, contiguous fishery zone nine miles beyond the three-mile territorial sea of the United States.[4]

Not all American commercial fishermen favored the legislation. There was vigorous opposition from tuna-boat owners, who range far from United States shores and whose vessels have been seized by powers claiming much more extensive fishery jurisdiction. For example, three tuna clippers, the *Sun Europa, Ronnie S.*, and *Eastern Pacific*, were seized October 2-3, 1966, by the Peruvian navy some 20 to 30 miles off the coast of Peru.[5] The extension of a twelve-mile fishery zone reflects, for the time being at least, the predominance of local over distant fishing interests, and with its passage the United States abandoned a position almost as old as the nation itself—that in the waters seaward of the three-mile territorial sea, freedom of fishing was extended to all countries alike as part of the traditional freedom of the high seas.

The principle of freedom of the seas served the maritime nations of the world well enough, as long as the main use of the oceans was as a highway for commerce, but by the middle of the present century the conditions that had fostered its establishment had changed so much that a re-examination of the regime of the seas could no longer be avoided. The challenge came primarily from a greatly intensified exploitation of the living and mineral resources of the sea.

Despite more than a half century of advances in fishery science, controversy still rages on the question of whether the living resources of the ocean are exhaustible or not. McDougal and Burke, for example, contend that they are "difficult or impossible to deplete in a degree technologically irreversible."[6] Christy and Scott, on the other hand, state that because fishery resources vary so much in type, size, location, density of population, and ease of capture, "no single species is inexhaustible nor is it free from the possibility of depletion. The economic forces that dictate the intensity of fishing effort are concentrated on single species or groups of species, and it is here that competition induces conflict and international tension."[7]

The validity of the second part of this statement can be tested against any number of fishing disputes in history. The Oregon fisherman's 1966

3. 112 Cong. Rec. 24238 (daily ed. Oct. 3, 1966).
4. 80 Stat. 908 (1966).
5. 112 Cong. Rec. 24238 (daily ed. Oct. 5, 1966).
6. McDougal & Burke, The Public Order of the Oceans vii-viii (1962).
7. Christy & Scott, The Common Wealth in Ocean Fisheries 86 (1965).

complaint that he and his colleagues could not fish for perch because Russian trawlers had preempted their normal fishing spots is a 350-year-old echo of James I's 1609 proclamation concerning the Anglo-Dutch herring fishery, in which he referred to "the multitude of Strangers, which do preoccupy those places"[8] formerly enjoyed by local fishermen.

Depletion, real or fancied, results in pressures to regulate fishing. Until around the turn of the century, however, such regulation had consisted chiefly in measures to reduce the incidence of disputes between fishermen, as in the 1839 and unimplemented 1867 conventions concerning the Channel fisheries[9] and the 1882 Convention for Regulating the Police of the North Sea Fisheries.[10] By that time exploitation of certain species of marine creatures, such as the fur seal, had become so intensified that their extermination seemed imminent.[11] It was no longer a matter of police regulations to prevent the kind of international entanglements resulting from A's trawl gear carrying away B's drift nets. Positive conservation measures were needed.[12]

Thus the quest began for a formula of equitable apportionment of fishery resources, which of necessity involved progressive restriction and modification of free competition on the oceans. The first attempts were by agreement between the handful of principal seafaring nations, providing for quotas of their catch of particular marine species and for other measures of conservation. Among such agreements are the multilateral convention of 1911 for the preservation and protection of the fur seals of the North Pacific (Russia, Japan, Great Britain, and the United States);[13]

8. Quoted in Leonard, International Regulation of Fisheries 13 (1944).

9. Convention Between Great Britain and France, for Defining and Regulating the Limits of the Exclusive Right of the Oyster and Other Fishery on the Coasts of Great Britain and of France, 27 British and Foreign State Papers 983 (1839); Convention between Great Britain and France, Relative to Fisheries in the Seas between Great Britain and France, 57 British and Foreign State Papers 8 (1867).

10. Convention Between Great Britain, Belgium, Denmark, France, Germany, and the Netherlands, for Regulating the Police of the North Sea Fisheries, 73 British and Foreign State Papers 39 (1882).

11. See Letter From Secretary of State Bayard to American Ambassadors, Aug. 19, 1887, in Fur Seal Arbitration—Proceedings of the Tribunal of Arbitration, part II app., at 168-69 (1895); Note From Secretary of State Root to the British, Russian and Japanese Ambassadors, Jan. 21, 1909, in 1 Hackworth, Digest of International Law 792-93 (1940).

12. The study of fisheries was, by this time, becoming recognized as a science, and various bodies such as the International Council for the Exploration of the Sea (1902), the International Commission for the Scientific Exploration of the Mediterranean Sea (1914), and the North American Council on Fishery Investigations (1920) were created for research into the problem. See Sea Fisheries: Their Investigation in the United Kingdom 1 (Graham ed. 1956); Johnston, International Law of Fisheries 91-92 (1965).

13. 37 Stat. 1542 (1911). See 1 Hackworth, op. cit. supra note 11, at 795 (1940). On the history of the fur seal controversies and the Bering Sea Fur Seal Arbitration of 1893 see Leonard, op. cit. supra note 8, at 55-95.

the conventions of 1923, 1930, 1937, and 1953 for the preservation of the halibut fishery of the Northern Pacific Ocean and Bering Sea (United States and Canada);[14] the Baltic Convention of 1929 (Denmark, Germany, Poland, Danzig, and Sweden), which refers chiefly to plaice and flounder;[15] the convention of 1930 between Canada and the United States concerning Fraser River salmon;[16] and the abortive 1937 convention concerning cod, haddock, hake, and other species in the North Atlantic (Belgium, Denmark, Germany, Iceland, the Irish Free State, the Netherlands, Norway, Poland, Sweden, and the United Kingdom).[17]

After World War II, such measures in themselves were inadequate to cope with the changing situation. On the one hand, the world fish catch was increasing by leaps and bounds. Between 1950 and 1960 it almost doubled, from some 20 million metric tons to more than 39 million, and by 1964 it stood at nearly 52 million metric tons.[18] This remarkable growth was due in part to the entry of new participants, such as Peru, into the ranks of major fishing powers, and partly to technological developments permitting fleets to range the oceans for months at a time, operating with the most modern locating and catching equipment and with factory ships that would process, freeze, and store the fish at sea. On the other hand, after World War II many newly independent nations emerged, possessing considerable sea coasts and largely undeveloped offshore fisheries. As a rule, they did not possess the means for distant fishing and were concerned with the protection of whatever resources they could exploit near their own coasts, just at the time when the livelihood of local fishermen in parts of the world previously ignored as profitable fishing grounds began to be threatened by the aggressive, wide-ranging fleets of the distant fishing powers. There was a conflict between their interests and the interests of the distant fishing powers who were anxious to preserve the freedom of high seas fisheries.

The seriousness of the conflict is underscored by the fact that coastal waters, by and large, contain the best fisheries, or are the breeding grounds for rich fishery resources.[19] The relatively shallow waters of

14. 43 Stat. 1841 (1923); 47 Stat. 1872 (1930); 50 Stat. 1351 (1937); [1954] 1 U.S.T. & O.I.A. 5, T.I.A.S. No. 2900.

15. 115 L.N.T.S. 93 (1929).

16. 50 Stat. 1355 (1937). This was the successful culmination of efforts going back to 1908.

17. Johnston, op. cit. supra note 12, at 360 n.9, citing Tomasevich, International Agreements on the Conservation of Marine Resuorces 271-73 (1943).

18. Food and Agriculture Organization, Yearbook of Fishery Statistics (1964).

19. See Christy & Scott, op. cit. supra note 7, figs. 10 & 11, at 62-63; Laevastu, Natural Bases of Fisheries in the Atlantic Ocean, figs. 2, 4 & 8, in Atlantic Ocean Fisheries 23, 27, 35 (Borgstrom & Heighway eds. 1961).

the continental shelves support a wealth of organisms on which fish feed and these organisms thrive on the nutrient salts and organic matter washed off the land by rivers and streams. Generally speaking, the coastal waters in most parts of the world are more fertile than those of the mid-oceans, though there are marked differences between sectors of coast.[20]

This has very important implications for the exploitation of the resource. Free-swimming marine fishes can be broadly divided into three types, according to habitat: anadromous, such as salmon, which are spawned in fresh water and return to their native rivers and streams for spawning; pelagic, living in the upper layers of the water, whether in the open ocean or close to shore; and demersal, spending most of their adult lives near the bottom and within the limits of the continental shelf.[21] The last type, also known as ground fish and bottom fish, are obviously of major concern to local fishermen. Though demersal fish do migrate for long distances, they are a more stable and accessible resource than the pelagic species. Demersal and pelagic fish can be, and are, taken with the same type of gear, but basically the former are scooped up in trawls drawn across the ocean bottom, whereas the latter are caught with lines or seines (nets that enclose a school of fish on the surfaçe). If trawls are used intensively and indiscriminately, a fishing ground could be seriously depleted of even immature fish.

In the open ocean fishermen compete on a more or less equal footing in terms of equipment and pursue the fish wherever they are to be found, whereas the coastal fisherman is often at a serious disadvantage vis-à-vis the well-organized fleets from other countries that appear on grounds he has traditionally fished. Because he is land-based, his vessel is usually smaller and his equipment less modern. Moreover, he may be restricted by local conservation measures that do not apply to the foreign fisherman. The effect of vigorous competition in coastal waters can be clearly seen in what happened to the hake off the Oregon and Washington coasts in 1966. The United States Bureau of Commercial Fisheries had encouraged the development of a local hake fishery, and confidently predicted that the annual catch would be in the neighborhood of 200 million pounds. That prediction was realized in 1966, but less than four million pounds had been taken by local fishermen when the season closed. All the rest was in Soviet nets.[22] As an expert reported to the Senate Subcommittee on Merchant Marine and Fisheries in May 1966:

20. Christy & Scott, op. cit. supra note 7, at 61. See Table I for a comparison of continental shelves around the Atlantic Ocean in terms of area and productivity of living organisms.

21. Christy & Scott, op. cit. supra note 7, at 75.

22. 64 Pacific Fisherman, Nov. 1966, p. 16.

TABLE I

CONTINENTAL SHELVES IN THE ATLANTIC OCEAN BY CONTINENT, AREA, AND PRODUCTIVITY*

	Area (in thousands of square kilometers)	Productivity
Africa		
Guinean	210	medium-low
St. Helena	140	high
Europe		
North Sea	570	high
Barents Sea	550	medium
Baltic	390	medium
Irish Sea	380	medium
Iceland-Faeroes	120	high
Norwegian	120	high
English Channel	90	high-medium
Bay of Biscay	80	medium
West Pyreneian	50	medium
North America		
Florida-Texas	450	low
Newfoundland	400	high
Nova Scotia	370	high
Labrador	160	medium
Bahamas	130	low
Carolina	120	medium
New England	100	high
South America		
Patagonian	1,000	high
Amazonian	540	low
South Brazilian	400	medium-low
Venezuelan	130	medium

* Based upon information compiled from Laevastu, Natural Bases of Fisheries in the Atlantic Ocean, fig. 2, in Atlantic Ocean Fisheries 23 (Borgstrom & Heighway eds. 1961).

These [large trawler] fleets might not be a low cost operation, but they are mobile and can easily fish one year in the Bering Sea and the next year outside South Africa. Thus if a ground has been over-fished the fleet can move to another area. The land-based fleet cannot move but is dependent on the fishing outside the coast. If restrictions for purpose of conservation are implemented, such as catch quotas, closed season, closed areas, etc., this will primarily hurt the local fishing fleet. The ocean-going trawlers and factory ships can fish elsewhere during the closed season, the land-based fleet cannot. Therefore, it should be recognized that the local fishermen have much more at stake in the fishing grounds outside their coast.[23]

This type of situation brought about another attempt to establish a principle for sharing the resources of the oceans and, while salvaging as much as possible of the traditional freedom of fishing on the high seas, of satisfying the coastal states.[24] A new formula was propounded by the United States, itself both a distant fishing power and a coastal state, in the Truman Proclamation of 1945,[25] which asserted the right of the United States to establish conservation zones unilaterally in areas of the high seas contiguous to its coasts in which its nationals alone fished and by agreement if nationals of other countries also fished in such areas. At the same time, the United States, by this proclamation, conceded a similar right to other coastal states. No conservation zones were in fact established by the United States under the terms of the Truman Proclamation,[26] but it did have an influence on the drawing up of the 1958 Convention on Fishing and Conservation of the Living Resources of the Sea.[27]

Article I of the Convention reiterates the rights of all nations to engage in fishing on the seas, subject to the interest and rights of coastal states as provided in the Convention and to the provisions contained in the articles concerning conservation of the living resources of the high seas. The rights of the coastal state are spelled out in articles 6 and 7. They include the right of the coastal state to a voice in any conservation measures in areas of the high seas adjacent to the coastal state's territorial waters and the right to impose conservation measures in these areas unilaterally if agreement with other states fishing there cannot be reached within six months. These measures are binding unless dis-

23. Hearings on S. 2218, op. cit. supra note 1, at 176.

24. The term "coastal state" has come through widespread use to mean a state with a primary interest in fisheries close to its own shores, as opposed to so-called "distant fishing states" whose vessels operate primarily away from their own shores.

25. Proclamation of Sept. 28, 1945, 59 Stat. 885-86.

26. See Letter From Assistant Secretary of State MacArthur to Senator Wayne Morse, May 9, 1966, in 112 Cong. Rec. 10169-70 (daily ed. May 16, 1966).

27. United Nations Conference on the Law of the Sea, Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. No. A/Conf. 13/38, at 139 (U.N. Pub. Sales No. 1958 V.4, II) (1958).

allowed by the special commission provided for in article 9 of the Convention concerning settlement of disputes.

As often happens with efforts at compromise, the Convention appears not to have succeeded in satisfying the opposing interests. Some of the distant fishing nations believe that the freedom of the sea has been too much curtailed in favor of the coastal states. This was shown, for example, in an official statement in 1963 as to why Belgium had not signed the Convention, in which the Belgian Foreign Minister declared that it would be futile and even dangerous for his country to permit itself to be bound by such provisions, since no agreement had been reached at the 1958 Geneva Conference on the precise limit of the territorial sea and since any extension of fishing jurisdiction beyond the traditional three miles would be a serious blow to his country's fishing industry.[28]

On the other hand, the coastal states cannot, under the Convention, exclude foreign fishermen altogether, and may impose conservation measures only after having proved that these are urgent and after having conducted scientific surveys.[29] This may be an expensive and difficult proposition. Even such an advanced fishing nation as the United States has not yet begun a thorough scientific evaluation of its fisheries in accordance with the terms of the Convention.

Despite the apparent timeliness of the proposition that a coastal state has a special interest in the maintenance of the productivity of the living resources of the high seas off its shores, the Convention has taken almost eight years to come into force and was the last of the four Geneva Conventions on the Law of the Sea to do so.[30] Of the thirty-seven original signatories among the eighty-six states represented at the 1958 Conference, only eleven had ratified the Convention by the spring of 1966.[31] Out of the eleven other states bound by the Convention at the time when it came into force, eight were not represented at the 1958 Conference.[32]

Meanwhile, parallel with these attempts at compromise, and because

28. Réponse du Ministre des Affaires Etrangères à MM Dehousse, Lilar, et Rolin sur Question No. 29 du 6 mars 1963, in 1 Rev. Belge de Droit International 217-18 (1965). It must be noted, however, that in the following year Belgium was a signatory to the European Fisheries Convention which extended fisheries jurisdiction to twelve miles. 58 Am. J. Int'l L. 1068, 1070-75 (1964).

29. Convention on Fishing and Conservation of the Living Resources of the High Seas, op. cit. supra note 27, at art. 7.

30. The Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, T.I.A.S. No. 5969 (effective March 20, 1966).

31. Australia, Colombia, Haiti, Portugal, United Kingdom, United States, and Venezuela ratified it, United Nations, Status of Multilateral Conventions (ST/Leg/3, Rev. 1), as did the Dominican Republic, 51 State Dep't Bull. 530 (1964), Finland, 52 id. 477 (1965), the Netherlands, 54 id. 592 (1966), and Yugoslavia, 54 id. 549 (1966).

32. The eight states not represented at the 1958 Conference were Jamaica, Madagascar, Malawi, Nigeria, Senegal, Sierra Leone, Uganda, and Upper Volta. For a complete list of

of their shortcomings, a third, much more radical and one-sided formula had begun to emerge: namely, the incorporation of coastal fisheries as much as possible under the exclusive jurisdiction of the coastal state, either through extension of the territorial sea or through the creation of special fishery zones. Its acceptance was made easier because the three-mile width of the territorial sea was never universally acknowledged, and because the establishment of contiguous zones extending into the high seas was a familiar practice of states. Both the United States and Great Britain had established protective zones of varying width for customs purposes since the end of the eighteenth century, and the validity of such practice was upheld long ago by Mr. Chief Justice Marshall in *Church v. Hubbart*,[33] a case concerned with an insurance claim, the enforcement of which hinged on the validity of the Portuguese seizure of an American vessel outside the territorial waters of Brazil, then a Portuguese possession. Holding the seizure to be valid, the Chief Justice said:

> a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.[34]

Besides customs control, states have also imposed sanitary, fiscal, and health regulations and security measures.[35] Nearly 40 years ago the concept of zones for such purposes was advanced, preparatory to the Hague Conference, by the American Institute of International Law,[36] by the Institut de Droit International,[37] and by the Harvard Research Draft on the Law of Territorial Waters, which, in the comment on article 20, refers to "the long-established practice of many states."[38] The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone permitted the coastal state to impose customs, fiscal, immigration, or sanitary regu-

delegations at the Conference see United Nations Conference on the Law of the Sea, supra note 27, vol. II, at xiii-xxvii.

33. 6 U.S. (2 Cranch) 187 (1804).

34. Id. at 235.

35. Dickinson, Jurisdiction at the Maritime Frontier, 40 Harv. L. Rev. 1 (1926).

36. American Institute of International Law, Project No. 12, art. 12, 20 Am. J. Int'l L. (Supp. 1926, at 323-24).

37. Art. 12 of the Project, La Mer Territoriale en Temps de Paix, drafted at the 1928 Stockholm meeting, added fishing to the list of interests that a state was entitled to take measures to protect. 34 Annuaire de l'Institut de Droit International 736 (1928).

38. Harvard Research Draft on the Law of Territorial Waters, 23 Am. J. Int'l L. (Supp. 1929, at 243, 334).

lations, but did not include security measures.[39] The practice of states indicates that the list of interests that can be protected by a zone is not constant, but depends on generally acknowledged importance and reasonableness, and it does not seem to matter whether the locus of the interests to be protected is on the land and territorial sea, or on the high seas.[40]

In the case of the territorial sea, it could be argued with some authority that no numerically expressed width has become a principle of customary international law, and that any width that is reasonable and warranted by the circumstances of the case would not be contrary to this law. Such was the view of Judge Alvarez in his concurring opinion in the *Anglo-Norwegian Fisheries Case* in 1951.[41] The International Court of Justice itself, on that occasion, did not deal with the width of the territorial sea, but with its measurement from baselines, permitting the use of specific rules in cases warranted by special circumstances. Its judgment directly influenced Iceland's decision to institute the straight baseline system around its coasts,[42] and, somewhat later, the similar but much more extensive claims of Indonesia and the Philippines.[43] The straight baseline system, by pushing seaward the baseline from which the territorial sea is measured, places a much larger extent of sea under the state's exclusive jurisdiction.

By the time the United Nations Conference on the Law of the Sea was called in 1958, therefore, a trend toward extension of the territorial sea beyond three miles was firmly established, particularly among countries such as Iceland and some of the Latin American states (Peru, Chile, Ecuador) which had valuable fisheries off their shores and sought a wider territorial sea to secure exclusive rights in at least part of those fisheries. Most of the maritime and distant fishing powers represented at the Conference, on the other hand, strove, both for strategic and economic reasons, to preserve as narrow a belt of territorial sea as possible.

In order to reach a compromise which would preserve a narrow ter-

39. U.N. Doc. No. A./Conf. 13/L. 52, art. 24.

40. See McDougal & Burke, The Public Order of the Oceans 606-07 (1962). See also Hydeman & Berman, International Control of Nuclear Maritime Activities 226-40 (1960); see generally McDougal & Burke, op. cit. supra at 565-729.

41. Anglo-Norwegian Fisheries Case, [1951] I.C.J. Rep. 116, 145. See also Teclaff, Shrinking the High Seas by Technical Methods—From the 1930 Hague Conference to the 1958 Geneva Conference, 39 U. Det. L.J. 660 (1962). Alvarez stated that having regard to the great variety of geographical and economic conditions of states, it was not possible to lay down uniform rules governing the extent of the territorial sea applicable to all states. The state could do this itself, provided it were done in a reasonable manner and with justification therefor. Alvarez' view was to a large extent based on, and subsequently gave great support to, the practice of the Latin American countries.

42. Kobayashi, The Anglo-Norwegian Fisheries Case of 1951 and the Changing Law of the Territorial Sea 40-43 (U. Fla. Monograph No. 26, 1965).

43. Id. at 45-46.

ritorial sea and at the same time satisfy the coastal states, the United States proposed a three-mile territorial sea with a twelve-mile fishery zone, measured from the baseline, in which zone other states would retain their fishing rights if they had fished there for at least ten years.[44] In view of the fact, however, that most states had already gone beyond three miles in their approach to the problem of the territorial sea, the United States tendered another proposal, for a six-mile territorial sea with no change in the fishery zone.[45] Canada went further and proposed a six-mile territorial sea, plus a six-mile exclusive fishing zone without any rights for other states.[46] The upshot was that no proposal secured the necessary two-thirds majority, and the whole problem was left in abeyance.

It was taken up two years later at the 1960 Conference, and the significant feature at this time was the shift in the position of the maritime powers, especially those of Europe. The United States-Canadian proposal for a six-mile territorial sea and a six-mile fishing zone,[47] amended by Brazil, Cuba and Uruguay to be more favorable to the coastal states,[48] almost carried the day. It failed by only one vote.[49] The Brazil-Cuba-Uruguay amendment would have enabled the coastal state to claim preferential fishing rights in the high seas beyond its fishing zone when it was "scientifically established that a special situation or condition makes the exploitation of the living resources of the high seas in that area of fundamental importance to the economic development of the coastal State or the feeding of its population."[50] It is significant that this proposal, when put separately to a vote, was adopted 58:19:10, in a rare display of agreement in which all the western European nations, Canada, the United States, almost all the Latin American countries, and several Asian and African ones concurred.[51]

The 1960 Conference showed that the principle of exclusive fishing rights within a zone up to twelve miles had been accepted by the majority of states, including the most important maritime powers, though with stress on historic rights in the case of the latter. It also accelerated the

44. U.N. Doc. No. A/Conf. 13/C.1/L. 140 (1958).

45. U.N. Doc. No. A/Conf. 13/C.1/L. 159/Rev. 2 (1958).

46. U.N. Doc. No. A/Conf. 13/C.1/L. 77/Rev. 3 (1958).

47. U.N. Doc. No. A/Conf 19/C.11/L. 10 (1960).

48. U.N. Doc. No. A/Conf. 19/L. 12 (1960).

49. France, for example, voted in favor of the proposal, although, as her delegate André Gros made clear, its acceptance involved "immense sacrifices." United Nations Second Conference on the Law of the Sea, U.N. Doc. No. A/Conf. 19/8, at 24-25 (U.N. Pub. Sales No. 1960 V.4, II) (1960). Other European and primarily distant fishing powers voting for it included Belgium, Germany, Netherlands, Portugal, Spain, and the United Kingdom.

50. U.N. Doc. No. A/Conf. 19/L. 12, para. 6 (1960).

51. United Nations Second Conference on the Law of the Sea, U.N. Doc. No. A/Conf. 19/8, at 30 (U.N. Pub. Sales No. 1960 V.4, II) (1960).

establishment, by unilateral action of individual states and by multilateral regional convention, of fishing zones extending out to twelve miles. Its effect was immediately noticeable, for instance, in the fisheries agreement between Great Britain and Norway of November 17, 1960, whereby Great Britain recognized Norway's jurisdiction over a twelve-mile fishery zone, but was permitted to fish in the outer six miles until October 1970.[52] The preamble to that treaty specifically refers to the United States-Canadian six-plus-six proposal at the Conference.[53]

By mid-summer 1966, 49 nations with sea coasts had established a twelve-mile limit, among them eleven African states which had become independent since World War II.[54] Regional extension of fishery jurisdiction to the twelve-mile limit was achieved by the convention adopted at the 1964 European Fisheries Conference in London. Through the signatories to this convention, including such long-established maritime powers as the United Kingdom, a girdle of exclusive or restricted rights was thrown around most of western and northwestern Europe.[55]

The United States continued to hold to the three-mile limit. A State Department letter of July 13, 1962, declared unequivocally that "it must be concluded that in the present state of international law, there is no valid basis for the assertion by a coastal State of a twelve-mile exclusive fisheries zone."[56] Within four years, however, the situation had changed so radically that on May 18, 1966, Douglas MacArthur II, Assistant Secretary of State for Congressional Relations, wrote to Senator Warren G. Magnuson: "In view of the recent developments in international practice, action by the United States at this time to establish an exclusive fisheries zone extending 9 miles beyond the territorial sea would not be contrary to international law."[57] Even as the United States was formally extending its fishery jurisdiction out to twelve miles in the following

52. Cmd. No. 1352 (T.S. No. 25 of 1961), reproduced in 57 Am. J. Int'l L. 490 (1963).

53. "Taking into account the proposal on the breadth of the territorial sea and fishery limits which was put forward jointly by the Governments of the United States of America and Canada at the Second United Nations Conference on the Law of the Sea in 1960 and which obtained 54 votes . . . ." Ibid.

54. 112 Cong. Rec. 12974 (daily ed. June 20, 1966). These figures are based on U.S. Department of State information.

55. The text of the Convention can be found in 58 Am. J. Int'l L. 1068, 1070-74 (1964). For a list of signatories and parties to the Convention (according to information available to the Department of State as of May 15, 1966) see 1966 U.S. Code Cong. & Admin. News 4033-34 & nn.1-2.

56. Letter on file in the Office of the Legal Advisor, Department of State, July 13, 1962, reproduced in 57 Am. J. Int'l L. 404 (1963).

57. Letter From Assistant Secretary of State MacArthur to Senator Magnuson, Chairman of the Senate Commerce Committee, May 18, 1966, in S. Rep. No. 1280, 89th Cong., 2d Sess. 12 (1966).

October, Japan, the diehard opponent of coastal states' rights, was reported to be considering a similar exclusive fishing zone around its territory.[58] The pressures for such action came, as in the United States, from local fishing interests threatened by the activities of foreign, chiefly Soviet and Korean, fishing boats. A Japanese fisheries spokesman stated in justification that "extension of administrative authority over wider waters is an internationally accepted custom today, a demand of the times."[59]

The twelve-mile fishery zone appears to have the support of the majority of states, and, if all the countries which now claim it had voted for the Canadian proposal for such a zone at the 1958 Geneva Conference, it would have passed then.[60] Claims to wider jurisdiction have been resisted and therefore can hardly be considered as an accepted general principle or an acquired right. Once established on a broad regional or continental basis, however, they may be difficult to disregard or even modify. As of mid-summer 1966, some fifteen nations claimed jurisdictions of 100 miles or more.[61] Such extensive claims lend substance to the view that the twelve-mile fishing zone, even if coupled with preferential rights for coastal states beyond that limit, may not be the final answer to the problem of conservation and exploitation of the resources of the seas. It may be nothing more than a temporary compromise, and, from the point of view of the interests of the coastal state, the ultimate acceptable jurisdiction may be nothing less than the control of all offshore fisheries.

The twelve-mile zone is, after all, a very arbitrary limit; it may give adequate protection to fishery resources in some instances and be wholly inadequate in others. With reference to the United States, for example, an expert presenting his opinion to the Senate Subcommittee on Merchant Marine and Fisheries in May 1966 stated:

58. 64 Pacific Fisherman, Oct. 1966, p. 6.

59. Ibid.

60. The fishing zone was proposed by Canada as an alternative to the twelve-mile territorial sea, and was envisaged as a contiguous zone, with the modification that within it the coastal state should have the exclusive right of regulation and control of fishing. See Gotlieb, The Canadian Contribution to the Concept of a Fishing Zone in International Law, 2 Canadian Yearbook of International Law 55, 64-65 (1964). The text of Canada's proposal is contained in U.N. Doc. No. A/Conf. 13/C.1/L. 77/Rev. 3 (1958), and it provides: "A State has a fishing zone contiguous to its territorial sea extending to a limit twelve nautical miles from the baseline from which the breadth of its territorial sea is measured in which it has the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea."

61. See the table in 112 Cong. Rec. 12974 (daily ed. June 20, 1966), which was compiled from information supplied by the Department of State, as of June 1, 1966.

I question the use of mileage as a basis for a fisheries limit in areas where ground fish predominate. . . . The depth of the ocean . . . seems . . . to be a more logical basis for a fisheries limit than the distance from the shoreline. A 200 meter isobath could be a logical fisheries limit. On the East Coast of the United States the distance from land would then range from about 10 miles outside Miami to about 170 miles on the George's Bank and in the Gulf. On the Pacific Coast this isobath runs between 3 and 40 miles off shore, but the whole Bering Sea would be included. Here the median between the U.S. and Russian territory could be used. On the map one can visualize what this fisheries limit would mean in New England.[62]

While it is true, generally speaking, that coastal waters are more productive than those of the mid-ocean, their productivity varies enormously even for individual species within a relatively small area, depending on depth and temperature of the water, nature of bottom sediments, and the amount and type of organisms on which the fish feed, as well as other factors.[63] Marine ecology has not yet arrived at the stage where the distribution of the living resources of the sea can be described, analyzed, and predicted with accuracy, although considerable progress is being made toward this end through surveys sponsored by international bodies such as UNESCO, the Food and Agriculture Organization, the General Fisheries Council for the Mediterranean, the Western Africa Fisheries Commission, the International Commission for North Atlantic Fisheries, and works such as the American Geographical Society's *Serial Atlas of the Marine Environment.*[64]

A more flexible criterion than the twelve-mile limit for the extent of the coastal state's control has been claimed in so-called geographical reality. This was the underlying principle of the judgment in the *Anglo-Norwegian Fisheries Case,* in which the International Court of Justice emphasized that "it is the land which confers upon the coastal State a right to the waters off its coasts."[65] It was given an even more liberal interpretation in the concurring opinion of Judge Alvarez,[66] which influenced a number of Latin American states to establish territorial seas or fishery zones as wide as 200 miles. The Declaration of Santiago,

62. Hearings Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Commerce, 89th Cong., 2d Sess., ser. 65, at 175 (1966) (opinion of Professor Andreas A. Holmsen of the University of Rhode Island).

63. The silver hake, for example, a common and widely distributed ground fish in Atlantic waters off the New England coast, is found in varying concentrations at depths ranging between 70 and 210 meters and in water temperatures ranging from 6° to 12° Centigrade. American Geographical Society, Serial Atlas of the Marine Environment, Folio 10: Autumn Distribution of Groundfish Species in the Gulf of Maine and Adjacent Waters, 1955-61 (1965).

64. American Geographical Society, supra note 63, Folio 4: Regional Fisheries Oceanographic Synopses (1963).

65. Anglo-Norwegian Fisheries Case, [1951] I.C.J. Rep. 116, 133.

66. Id. at 150-51.

adopted by Chile, Ecuador, and Peru in 1952, states that "the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora of the waters adjacent to the coasts of the declarant countries . . ." had rendered the former extent of territorial sea and contiguous zone, "insufficient to permit of the conservation, development and use of those resources, to which the coastal countries are entitled."[67] The basis of these countries' claims to such an extensive fishery jurisdiction is the varying distance from the shore to the Humboldt Current, which ranges between 100 and 200 miles out to sea.[68]

The court's affirmation of the close relationship between land and adjacent sea in the *Anglo-Norwegian Fisheries Case* has given support also to proponents of the continental shelf as a zone of fishery jurisdiction. The idea of the shelf as a fishery zone was put forward at least half a century ago—for example, by Odon de Buren, later Spanish Director-General of Fisheries, at a national fishery congress in Madrid in 1916; by the Argentinian José Léon Suarez in a series of lectures published in 1918; and by the Portuguese Admiral Almeida D'Eça in a memorandum meant for the 7th International Fishery Congress which was to have been held in Santander in 1921.[69]

The Truman Proclamation of 1945 concerning the continental shelf[70] influenced other states to issue similar proclamations, and once it was accepted that mineral resources could come under a state's exclusive jurisdiction, provided that this did not unduly interfere with navigation, it was easy to make the next step and include living resources of the sea. The 1958 Geneva Convention on the Continental Shelf did make this step, but was confined to "sedentary" species, specifically withholding from the coastal state jurisdiction over the waters above the shelf outside the territorial sea.[71] The definition of "sedentary" species as those which "at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil,"[72] has not been clarified and has given rise

67. Declaration of the Maritime Zone, U.N. Legislative Series, Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. No. ST/Leg./Ser. B/6, treaty No. 20, at 724 (1957). The agreements between Chile, Ecuador and Peru were signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific on August 18, 1952, in San Diego.

68. See Dean, The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas, 54 Am. J. Int'l L. 751, 755 n.14, citing Peruvian Decree No. 781 of Aug. 1, 1947, and other sources.

69. See Riesenfeld, Protection of Coastal Fisheries Under International Law 75-76, 116 (1942).

70. Proclamation No. 2667, 10 Fed. Reg. 12303 (1945).

71. U.N. Doc. No. A/Conf. 13/L. 55 (1957).

72. Id. at art. 2(4).

to considerable dispute, for example in the matter of the king crab of the United States continental shelf under the Bering Sea[73] and the lobsters on the continental shelf off Brazil.[74]

There would appear to be a strong argument for regarding all fisheries, both floating and sedentary, as one type of resource, since the distinction between the more mobile sedentary and the less mobile floating species is by no means sharp. Evidently a number of states do regard them as one, for some of the more extensive fishing limits claimed are in effect claims to the continental shelf as a zone of fishery jurisdiction.[75] Recently there has been considerable demand from fisheries interests in the United States for an exclusive fisheries zone superadjacent to the continental shelf, and legislation to that end was introduced in the 89th Congress.[76]

The shift that has occurred within the past quarter of a century in the regime of the sea—the widespread separation of territorial waters from fishery jurisdiction, the steady erosion of the concept that fish are "free for all"—is a revolt against the situation outlined by the 1953 report of the International Commission to the United Nations General Assembly:

> The seas are in reality dominated, used, and—it may almost be said—possessed by States maintaining powerful navies, fishing and merchant fleets, bases, supply ports, docks and shipyards. The nationals of those States are the only persons who fully enjoy all the privileges of the "freedom of the seas."[77]

Not merely have the claims of states with a primary and, for the most part, exclusive interest in local offshore fisheries begun to take precedence, but most of the distant fishing powers have been forced, for the protection of their own offshore resources and their own fishermen, to join the ranks of the coastal states. If this trend continues, it is not improbable that ever-more extensive jurisdictions will be sought, and exploitation of some of the richest sea fisheries would then be divided up by a process dependent on geographical accident—hardly an equitable solution, though better, perhaps, than none at all.

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73. See Christy & Scott, The Commonwealth in Ocean Fisheries 171 (1965); see also 64 Pacific Fisherman, Nov. 1966, p. 1.

74. See Azzam, Dispute Between France and Brazil Over Lobster Fishing in the Atlantic, 13 Int'l & Comp. L.Q. 1453 (1964).

75. For example, the hundred-mile jurisdictions claimed by India and Pakistan, see table in 112 Cong. Rec. 12974 (daily ed. June 20, 1966), correspond approximately to the continental shelf at its widest around the Indian sub-continent, see 4 Fishing News Int'l, Jan.-March 1965, pp. 20, 21, 24.

76. H.R. 14961, 89th Cong., 2d Sess. (1966). This bill was introduced by Congressman Pelly on May 10, 1966.

77. 2 U.N. Yearbook of the Int'l Law Comm'n 244, U.N. Doc. No. A/Cn. 4/Ser. A/1953/add. 1 (1953).