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Maritime Jurisdiction over Fishery Resources

Gilbert T. Davis

MARITIME JURISDICTION OVER FISHERY RESOURCES*

I. INTRODUCTION

Economic necessity and recent developments in marine technology have caused man to begin his move into the sea on a grand scale, occupying and exploiting it for recreation, minerals, food, waste disposal, and possible living space. These new technological advances and the increased need for the traditional fishery resources have precipitated the interests of nations in expanding their exclusive jurisdictions further into an ocean space where it had been traditionally free for all to use. Though this move for exclusive jurisdiction is motivated by the uniform desire of all nations to more efficiently utilize and conserve the resources and to protect them for national exploitation, the means to achieve these goals in the international community and the United States present a number of difficult legal problems.

The modern development of the law of the marginal or territorial waters commenced with Hugo Grotius in the early part of the seventeenth century when he proclaimed the concept of freedom of the seas in order to secure for the Dutch the right to fish for herring off the British coast.[1] Another Dutchman, Corneilius von Bynkershoek, stated the rule in 1702: "Wherefore on the whole it seems a better rule that the control of the land (over the sea) extends as far as a cannon will carry; for that is as far as we seem to have both command and possession."[2] During the eighteenth century this "cannon shot" rule of state jurisdiction developed an international acceptance and was equated to one league from shore or three nautical miles.[3] Initially the English opposed the Dutch theories, but later when England became dominant on the seas, she also became an aggressive proponent of the three mile limit. The rule was

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* See Headnotes

1. Allen, Legal Limits of Coastal Fishery Protection, 21 WASH. L. REV. 2 (1946).

2. W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 482 (2d ed. 1962).

3. Allen, supra note 1, at 3.

acquiesced to by the United States in a letter by Secretary of State Jefferson on November 8, 1793 to the British and French ministers. The United States acceptance was grounded on the economic advantages afforded New England fishermen wishing to frequent the waters adjacent to the Canada and Newfoundland shores.[4]

Prior to the four conventions of the Law of the Sea Conference held in Geneva in 1958, there was little that could be concluded regarding the accepted international rights and duties bearing on fishery jurisdiction. The Geneva Fisheries Convention was the first to develop an international code respecting fisheries.[5]

Following a modified rationale of the "cannon shot" rule, the 1958 Geneva Convention's code provides for the partitioning of the oceans into five jurisdictional zones. First is the zone of internal waters, including certain bays, estuaries, and other adjacent waters, over which the coastal state exercises complete sovereignty. Seaward of this is the territorial sea, over which the sovereignty of the coastal state is limited only by the right of innocent passage by foreign ships.[6] There is no agreement among states on a standard breadth of the territorial sea. In late 1967, of 92 states which claimed a definite breadth for their territorial waters, 28 (including the United States) claimed three miles, 33 claimed twelve miles, and 24 adopted breadths between three and twelve miles. The remaining seven had territorial claims in excess of twelve miles.[7]

Beyond territorial limits is the contiguous zone, in which coastal states may exercise the control necessary to prevent and punish infringements of their customs, fiscal, immigration or sanitary regulation. The contiguous zone may not extend more than twelve miles seaward of the base-line from which the breadth of the territorial sea is measured; thus, countries claiming a twelve mile territorial

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4. W. BISHOP, supra note 2, at 483.

5. Alexander, National Jurisdiction and the Use of the Sea, 8 NAT. RES. J. 374 (1968).

6. Id. at 375.

7. Id.

sea limit have no contiguous zone.[8] Equally important is the fact that many countries now consider their contiguous zone to be an exclusive fisheries area in which foreign fishing is prohibited except by special arrangement. Some 28 states with territorial breadths of less than twelve miles have extra territorial fisheries zones to the twelve mile limit.[9]

A fourth jurisdictional zone in which the coastal state has exclusive control over resources is the continental shelf, the shallow platform out from the land for varying distances beneath the sea. Three physical variables in determining the extent of the continental shelf are: (1) the depth at which the gentle incline of the shelf breaks to a steeper slope,(2) the distance from shore at which this edge of the shelf occurs, and (3) the existence of deep canyons in the shelf, seaward of which there are additional shallow areas.[10] The 1958 Geneva delegates defined the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the super adjacent waters admits of the exploitation of the natural resources of the said areas." This definition also includes water areas adjoining the coasts of islands.[11] Furthermore, living resources of the continental shelf were defined as "organisms which, at the harvestable stage are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil."[12]

The fifth zone constitutes the high seas, which are open to all nations. Countries were guaranteed the rights to freedom of navigation, freedom of fishing, freedom to lay submarine cable and pipeline, and freedom to fly over the high seas.[13] Nowhere in the Geneva Conventions, however, is reference made to the legal status of the seabed and subsoil underlying the high seas beyond the limits of the

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8. Id.
9. Id.
10. Id. at 376.
11. Id.
12. Id.
13. Id.

continental shelf.[14]

Final ratification of the code formulated at the Geneva Conventions did not take place until March, 1966. Even then it did not represent international law but only provided precedent and standards for bilateral and multi-lateral agreements. Out of the Conventions the following principles represent a majority view of the nations present, and justify attention as representing the significant attitude of the international community in the immediate future: (1) a territorial sea of six miles is permissible but no pattern is dominant, (2) a state may extend exclusive fishing rights to a twelve mile limit, (3) a state may have an interest in fishing in adjacent areas further removed than twelve miles from its baseline, (4) traditional rights of fishing would be respected, (5) world opinion does not approve exclusive jurisdiction claims over large areas.[15]

The only difference between the opinion of the majority of nations at the Geneva Convention and the United States position on jurisdiction was the extent of territorial sea recognized. The United States representatives strongly contended that the traditional three mile limit should prevail, while the majority of nations agreed that the six mile territorial sea was permissible.[16]

II. UNITED STATES APPROACHES TO MARITIME JURISDICTION

United States policy on marine jurisdictional matters rests on three principal bases: (1) the regulations imposed by the Geneva Conventions, (2) bilateral and multilateral agreements which the U.S. has made with other states concerning specific uses of the sea, and (3) the division of responsibility and authority between federal and state governments in marine matters.[17]

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14. Id.

15. L. ALEXANDER, LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES 34 (1967).

16. Id. at 41.

17. Nomura, Fisheries Jurisdiction Beyond the Territorial Sea. . . . With Special Reference to the Policy of the United States, 44 WASH. L. REV. 308, 308-309 (1968).

United States control over fishing rights has been extended beyond three miles from shore by the passage of two Congressional acts. The first of these was Public Law 88-308, passed on May 20, 1964, making it unlawful for foreign fishermen to take continental shelf species. The second was Public Law 89-658, passed on October 14, 1966, establishing a nine-mile zone contiguous to the three-mile United States territorial sea, in which the United States "will exercise the same exclusive rights in respect to fisheries as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States."[18]

A. Bilateral Treaties

Several bilateral fishery treaties in which the United States participates are based on the rights created by tradition. The present agreement between the United States and Canada regarding U. S. fishing privileges in waters south and west of Newfoundland and south of Quebec can be traced to tradition prior to the American Revolution and to treaties following the Revolutionary War and the War of 1812. Though there have been numerous conflicts concerning these traditional fishing rights, the various issues were finally submitted to arbitration in 1910 before the Hague tribunal. It was ultimately decided that the grant of liberty to fish off the coasts applied within three miles from shore, that United States fishermen were subject to Canadian conservation regulations even beyond three miles, and that British authorities could require United States vessels operating in Canadian territorial waters to report to customs houses and pay taxes. The tribunal also proposed the establishment of a commission to deal with disputes over contested measures dealing with conservation. After the decision of the tribunal, the United States and Britain signed the treaty, presently in effect, embodying the findings of the tribunal.[19]

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18. Teclaff, Jurisdiction Over Offshore Fisheries. . . How Far into the High Seas, 35 FORDHAM L. REV. 410 (1967).

19. Windley, International Practices Regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction, 63 AM. J. INT'L LAW 491 (1969).

In 1964 and 1965, the United States negotiated agreements with Japan and the U.S.S.R. over fishing in the eastern Bearing Sea for king crab (claimed by both the United States and the U.S.S.R. as a continental shelf resource) and in 1967 signed initial agreements with Japan, the U.S.S.R., and Mexico over fishing by fishermen of those countries in the United States nine-mile contiguous fishing zone.

1. United States-U.S.S.R. Treaty on the King Crab Fishery.

In January, 1965, representatives of both countries met in Washington. The United States disagreed with the Soviet contention that the king crab fishery qualified as a traditional fishery, but recognized that an abrupt cessation of the Soviet king crab fishery would work an economic hardship upon the U.S.S.R., and that the king crabs were not being fully utilized by the United States fishermen. By an agreement signed on February 5, 1965, the United States allowed the U.S.S.R. to continue its king crab fishery for two years subject to (1) a reduced catch, (2) reciprocal rights of boarding king crab fishing vessels to observe enforcement of the agreement, (3) exchange of scientific data on the exploited stocks, (4) delimitation of an area where king crab could be fished by crab pots only (used only by United States fishermen), and (5) no Soviet king crab fishing south of the Aleutian Islands.[20] The agreement was renegotiated in 1967, with the U.S.S.R. accepting a further reduction in catch and again in January, 1969, with still further reductions in catch and an increased area where only crab pots could be used for king crab, and a quota on the catch of tanner crab.[21]

2. United States-Japanese Treaty on the King Crab Fishery.

In November, 1964, representatives met in Washington to discuss the continuation of the king crab fishery. Japan, not a party to the Convention on the Continental Shelf, maintained that the king crab was a high seas fisheries resource and not subject to the exclusive control of the United States. In an exchange of notes on November 25, 1964,

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20. Id. at 493.
21. Id.

Japan agreed to reduce its catch and to provide scientific data on its fisheries. Also an area was delimited for the use of crab pots exclusively.[22] The agreement was renegotiated in January, 1967, with Japan agreeing to a further reduction in catch, and again in December, 1968, with Japan agreeing to a further reduction in catch and an increased area for the crab pot use, and to the adoption of measures relating to the tanner crab fishing.[23]

3. United States-U.S.S.R. Treaty on the West Coast Contiguous Fisheries Zone.

Representatives met in Washington in early 1967, to discuss Soviet fishing in the three to twelve mile contiguous fisheries zone, and to discuss simultaneously Soviet fishing beyond twelve miles on stocks important to United States fishermen. An agreement was signed on February 13, 1967, allowing Soviet fishing within twelve miles in various areas off the coast of Alaska, and providing for Soviet vessels to anchor and transfer catch and other goods within various areas. The U.S.S.R. agreed to reduce fishing efforts in certain areas beyond 12 miles, including an area off the mouth of the Columbia River important to United States sports fishermen.[24] In December, 1968, the treaty was renegotiated with some changes. Both agreed to restrict fishing for certain species during the winter months in six locations lying between the 200 and 450 meter isobaths and to take other measures to protect these species. The Soviets agreed not to trawl on important halibut and king crab grounds during specified periods. The United States agreed to allow Soviet loading operations in three additional locations within the United States contiguous fisheries zone and to allow Soviet fishing within the contiguous zone in certain areas along the Aleutian Islands.[25]

4. United States-U.S.S.R. Treaty on the East Coast Contiguous Fisheries Zone.

Representatives signed a one year agreement in Moscow in November, 1967, regarding the populations of red hake

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22. Id.
23. Id. at 494.
24. Id.
25. Id.

and other fish. The agreement provided for a discontinuance of Soviet and United States fishing between January 1 and April 1, 1968, in a 4600-square-mile area beyond twelve miles off Long Island; for the total catch in the "mid-Atlantic bight" area south of 39 degrees north latitude not to exceed the 1968 catch; and for fishermen of both countries not to conduct specialized fisheries for certain species in the mid-Atlantic area. In return, the United States granted the U.S.S.R. the privilege of fishing within the three to twelve mile contiguous fisheries zone between January 1 and April 1, 1968, in a ten mile area along central Long Island, and of conducting loading operatings among fishing vessels within the contiguous fisheries zone in areas off New Jersey and Long Island during specified periods.[26] The agreement was renegotiated in December, 1968, and generally had the same provision, the only difference being a southward extension of the abstention zone and minor changes with respect to species.[27]

5. United States-Japan on the United States Contiguous Fisheries Zone.

On May 9, 1967, the Japanese Government agreed to curtail certain operations of Japanese fishermen within various areas of the three to twelve mile United States contiguous fisheries zone. The note did not recognize the exclusive control over the 3-to 12-mile fishing zone claimed by the United States.[28] This agreement was renegotiated in December, 1968. The present treaty continues the policy of the earlier treaty and continues the curtailment of Japanese fishing activities in the United States contiguous fisheries zone, and in a few zones adjacent to that zone.[29]

6. United States-Mexico on the Contiguous Fisheries Zone.

By treaty, signed on October 27, 1967, both the United States and Mexico continue to reserve their positions on the breadth of the territorial sea, Mexico claiming nine

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26. Id. at 495.
27. Id.
28. Id.
29. Id. at 496.

miles and the United States claiming the traditional three miles. The treaty applies only to fishing in the waters between nine and twelve miles off each other's coasts. The agreement lists the species which each country claims its fishermen traditionally fished in the nine to twelve mile zones off each country's coasts, and contained the following provisions: Annual meetings to review operations of the agreement were to be conducted, and annual reports on volume of catch and areas fished would be exchanged. Intergovernmental co-operation in studies of stocks of fish and shrimp of common concern off the coasts of Mexico would be conducted. Recreational fishing by United States citizens in Mexican fishery zones during the next five years would be allowed. Finally, the total catch of each listed species by fishermen of each country in the zone of the other during the five years commencing January 1, 1968, would not exceed the total catch during the five years preceeding that date.[30]

III. DOMESTIC POLICY REGARDING MARITIME JURISDICTION

Domestically, the Submerged Lands Act and the Outer Continental Shelf Act have had the effect of dividing between federal and state governments the resources adjacent to the coast of the United States, thus raising the problem of where the jurisdiction of the state ends and that of the federal government begins. Abrogating the California decision giving federal authority to submerged lands underlying the marginal sea, Section 3(a)(1) of the Submerged Lands Act grants to the states "title to and ownership of" all lands underlying "navigable" waters within their boundaries. "Boundaries" include the boundaries possessed by a state at the time it entered the union, or as subsequently approved by Congress, but in no event are such boundaries allowed to go beyond three miles from the coastline in the Atlantic or Pacific Oceans or beyond three leagues in the Gulf.[31] The "coastline" is defined as the low water mark on the coast or the "seaward limit of inland waters." The Submerged Lands Act further provides that states which had no defined maritime boundary when admitted to the Union may extend their boundaries to a point not to exceed the three miles mentioned earlier.[32]

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30. Id.

31. 43 U.S.C. §§ 1301-14 (1964); 43 U.S.C. §§ 1331-43 (1964); United States v. California, 332 U.S. 19 (1967).

32. 43 U.S.C. § 1312 (1964).

The majority of states entered the Union with no defined maritime boundary in their acts of admission and thus derived their authority over a three-mile marginal sea from the Congressional grant under the Submerged Lands Act. In contrast, however, difficulties in determining the width of the marginal sea did develop with respect to those few states which entered the Union with Congressional approved boundaries in excess of the three mile limit. By judicial decision the Supreme Court made the claims in Louisiana, Alabama, and Mississippi conforming.[33] In Texas and Florida the acts of admission provided for a boundary of three leagues seaward. In these states the boundary is now located three leagues seaward of the coast in the Gulf Stream and three miles seaward at other locations.[34] Thus, with the passing of the extended fisheries legislation in 1966, these states were able to exercise their authority in state jurisdictional areas that was not possible under earlier United States policy.[35]

IV. CONCLUSION

Given a hierarchy of boundary delineation rules that are now either established or reasonably predictable, questions on policy using these rules must be examined. From the historical context, freedom in the fishery resources creates waste. Furthermore, any effort to restrict this freedom will cause conflicts as to others wanting a share of the wealth. The real question is not whether the nations of the world can avoid the inevitable conflicts for unclaimed wealth, but whether they can continue to pay the high price to keep the fisheries' resources free. Obviously, they cannot. Thus, policy should be formulated to minimize the conflicts with the guiding principal being that of applying science to protect the resource as it is used. The 1958 Convention provided for national expansion beyond the 200-meter isobath. At that time it was not believed to be feasible and was therefore not claimed by the nations represented. Now the indications seem to be that depth of water is not nearly so important an obstacle to exploitation, and thus the expansion policy is raised.

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33. United States v. Louisiana, 363 U.S. 1 (1960).
34. United States v. Florida, 363 U.S. 121 (1960).
35. Gross, Maritime Boundaries of the States, 64 MICH. L. REV. 643 (1966).

There seem to be two schools of thought regarding the policy position the United States and other nations should take on future expansion and negotiation on ocean space jurisdiction. The first urges a "wait and see" doctrine until the problems and the interests are further clarified. This position places considerable emphasis upon the opportunity for new departures in international co-operation and organization in an effort to preserve the seas from exploitive influences of the nation-state system. This position is rather idealistic and contrary to previous conduct of states. It could succeed only if all nations are properly schooled in preserving what is becoming limited world fishery resources. Increased education and time are the critical elements to this solution's advocates.

The second position urges positive action due to the vested interests that are being created under existing laws that are not necessarily based on good conservation policy nor the position the United States should ideally favor. Under this position, the United States must proceed, by unilateral actions and declarations if necessary, to acquire that which is available in the coastal area, and to assert freedom to what it can in the seas beyond, postponing new law until the day when conflicts produce a need for agreement.