THE PERU CURRENT AND THE SEARCH FOR A NEW LEGAL REGIME FOR FISHERIES

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INTRODUCTION

The Truman Proclamations of September 28, 1945 on the continental shelf and fisheries sent signals to other nations that unilateral assertions of jurisdiction over natural resources beyond the traditional three-mile territorial seas would be a trend in the future development of the law of the oceans.[1] The United States was not attempting to establish stewardship over coastal fisheries, but wished to set a legal precedent for the exploitation of hydrocarbons through the new technology of offshore drilling. Latin American nations were the first to react to the Truman Proclamations by issuing their own proclamations on extensions of jurisdiction over waters and the seabeds adjacent to their coasts. Mexico and Argentina declared claims focusing on the theme of a fisheries regime and made reference to what was termed the "epicontinental sea."[2]

The first controversies between governments and international legal jurists arose in 1952, when Chile, Ecuador and Peru (CEP) signed the Declaration of Santiago, setting up a 200-mile maritime zone.[3] The waters off the coasts of the CEP nations are among the richest fishing grounds of the oceans, on the average accounting for 20 percent or more of the world's fish catch.[4] The Declaration of Santiago alarmed the fisheries industries in many countries, especially California-based tuna operations which had long harvested their catch in the waters covered by the new Decla-

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1. 10 Fed. Reg. 12303-04 (1945).

2. *See generally* Garcia-Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AM. J. INT'L L. 33 (1974).

3. Declaration of Santiago, Laws and Regulations On The Regime Of The Territorial Sea United Nations Legislative Series, 723 U.N. Doc. ST/LEG/SER. B/6 (1956).

4. M. GROSS, OCEANOGRAPHY 88 (1980).

ration.[5] The tripartite agreement laid a foundation for what one Latin American scholar called the "inherent right of coastal states" to foster development of their maritime sovereignty and jurisdiction in accordance with reasonable criteria, taking into account the geographical, geological, biological characteristics, and the rational use of those resources.[6]

A review of the text of the Santiago Declaration reveals that the intent of the agreement was to design a means to protect an ecosystem essential to the economies of the three states. This article will attempt to trace the legal philosophy behind Latin American justification for the 200-mile fisheries regime. In addition, it will examine how the inter-American concept of a patrimonial or protective zone for fisheries was gradually accepted as an international norm by most nations engaged in the Third United Nations Conference on the Law of the Sea sessions.[7]

THE BIOME THEORY AND THE PATRIMONIAL SEA

In a 1947 study published in Peru, the scientist Erwin Schweigger defined the outer biological limit of the Peru or Humboldt Current as a distance of approximately 200 nautical miles from the coast of South America.[8] In 1952, using Schweigger's 200-mile figure as a reference point, the Peruvian Ambassador, Edwin Letts, presented a theory of the "biome" or ecosystem to the United Nations General Assembly's Sixth Committee.[9] He stated that the marine environment dominated by the Peru Current has long been a major concern in his country, because the cycle of the biome requires a delicate harmony among man, the coastal lands, and the ocean. The biome is set into motion by an upwelling of currents of colder bottom waters containing rich nutrients to the surface, where they produce an ecosystem unique to the world. In the words of an advocate of the biome theory:

> According to this concept, the human population of the coast forms part of the biological chain which originates in the adjoining sea, and which extends from the microscopic vegetables and animal life (phytoplankton and zooplankton) to the higher mammals among which we count man.[10]

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5. Loring, *The United States-Peruvian* "Fisheries" *Dispute*, 23 STAN. L. REV. 426 (1971).

6. Garcia-Amador, *supra* note 2, at 50.

7. For a detailed examination of the seventh session of UNCLOS III, see Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session*, 73 AM. J. INT'L L. (1979).

8. *El litoral peruano* 72 (1947).

9. 11 U.N. GAOR, C. 4 (46th mtg), 25-31, U.N. Doc. A/C. 6/SR. 486 (1956). The Spanish word for biome is "bioma".

10. *Santiago Negotiations on Fishery Problems*, 1955, Department of State, at 31-32.

In the 1950s this holistic view of an interdependent ecosystem as large as most of the Pacific Coast of South America was rarely a source of political and legal discussion. Environmental ethics in the United States, for example, did not become a widespread policy issue until the 1970s.[11]

Within the biome, not only is Peru's economy dependent upon the harvesting of the anchovy, tuna, and other species, but there is also a need to protect the fish stocks that provide food for guano-producing sea birds.[12] In the 19th Century the exportation of the rich guano fertilizer to Europe and elsewhere was the major source of income for Peru. Today, the nitrate deposits remain an extremely important aspect of the ecosystem, despite the advent of synthetic fertilizers.

It is necessary for coastal states to preserve the ecosystem of the biome by instituting a protection zone or patrimonial sea. Professor Edmundo Vargas Carreño was the first to describe the 200-mile zone in terms he called the "patrimonial sea." The patrimonial argument recognizes the legality of unilateral extensions of oceanic zones by nations to protect their natural resources, as long as such extensions are not arbitrary.[13] Vargas Carreño argues: "The jurisdiction of the coastal state to regulate the exploration, conservation, and exploitation of the marine resources contained within the patrimonial sea is extended over the adjacent waters, the seabed and subsoil thereof."[14] The key word in the above statement is "regulate." The right to regulate or to protect the marine resources is consistent with the Roman law concept of patrimony, explained by another prominent Latin American jurist as "a plurality of economic rights vested in a single person, whether natural or juridical."[15]

These economic rights rest on a rather fragile and unpredictable ecological system. Scientists have observed that about every seven years the Peru Current temporarily disappears, causing disastrous effects upon the productivity of the food chain through the disappearance of nutrients, phytoplankton, fish, and sea birds.[16] The time period during which the Peru Current is displaced is known as *El Niño*. Marine biologists have only recently verified

11. *See* J. PETULLA, AMERICAN ENVIRONMENTALISM: VALUES, TACTICS, PRIORITIES 51 (1980).

12. Posner, *The Peru Current*, 190 SCIENTIFIC AM. 66 (March 1954).

13. Cited in Garcia-Amador, *supra* note 2, at 43.

14. *Id.* at 43.

15. A. AGUILAR, THE LAW OF THE SEA, NEEDS AND INTERESTS OF DEVELOPING COUNTRIES: PROCEEDINGS OF THE SEVENTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE, 1972 at 162 (L. ALEXANDER, ed. 1973).

16. Posner, *supra* note 12.

that it actually does occur in seven year cycles.[17] The catastrophic reprecussions of *El Niño* have contributed greatly to the Peruvians' awareness of the existence of a complex interlocking ecosystem and the dire necessity to apply the patrimonial approach to their offshore waters. In a word, they must ensure that they have the economic and legal rights to sustain the environment that is the foundation of Peru's economy.

To further understand the magnitude of the impact of the Peru Current upon the economy, one should consider the conclusions of a 1963 report about shifting ocean currents:

> A temporary absence of anchovy in coastal waters during recent months and particularly during September resulted in the suspension of operations in much of the fishmeal industry, Peru's largest. Due, it was believed, to a change in ocean currents, the disappearance of the industry's basic resource caused the temporary unemployment of 40,000 workers in fishing and canning enterprises and the idling of many boats and factories.[18]

The report goes on to say that another 100,000 people were on the brink of losing their jobs in related industries, such as shipbuilding.[19] Later we will see that indiscriminate overfishing in Peruvian waters by foreign vessels equipped with the latest technology posed a similar threat to the fishing grounds by depleting many species of fish.

CHALLENGES TO THE 200-MILE REGIME

Although the Truman Proclamations fomented the trend toward unilateral claims over expanded ocean spaces, the United States Government was the most active opponent of the 1952 Declaration of Santiago and the 200-mile maritime zone. The Navy Department feared that a proliferation of national claims to the ocean would impede the movement of United States vessels throughout the world.[20] This position was supported by the maritime industry, which feared possible restrictions on the movement of merchant ships. Similar fears were expressed by tuna fishermen who operated in the South Pacific Basin.[21] Soon, the United States Department of State began protesting any claims which did not differentiate between the continental shelf and the waters above it. The State Department particularly objected to the formation of the "200-Mile Club" by Argentina (1948), Chile

17. *See* W. Cromie, *When Comes El Niño*, SCIENCE 80, March/April 1980, at 36-43.
18. *Hispanic American Report*, November 1963, at 897.
19. *Id.* at 897.
20. Hollick, *United States Ocean Politics*, 10 SAN DIEGO L. REV. 467 (1973).
21. Loring, *supra* note 5, at 402.

(1948), Peru (1948), Ecuador (1951), and El Salvador (1950).[22]

Reynoldo Galindo Pohl, Representative of El Salvador to the United Nations, pointed out that the Latin American 200-mile declarations "produced a very strange path, first a noisy and surprising one and afterwards consistently advancing."[23] The first "noise" came with the so-called "fishing wars" in the early 1950s. In 1955 Peru seized eleven United States tuna boats, but negotiations between the American Tunaboat Association and the Peruvian Government settled the conflict over the fines imposed on the U.S. vessels.[24] Between 1962 and 1971, Peru seized twenty-one U.S. boats and in 1971 Ecuador captured and fined fifty-one U.S. vessels. These seizures drew vigorous protests from the Pentagon, Congress, and of course, the tuna industry.

Two early spokesmen for the fisherman's cause were Senator Warren Magnuson and Representative Thomas M. Pelly, both from the state of Washington. Congressman Pelly introduced a bill to withhold funds for arms and development assistance from nations that imposed fines on boat owners whose vessels were seized to enforce the 200-mile rule. Congress passed a number of retaliatory laws, but the legislation which seemed to work best as a United States protest against the 200-mile zone was the Fishermen's Protective Act of 1954.[25] This act provided that owners of fishing boats which were seized while operating in water the United States considered international would be reimbursed for any fines, license fees, registration fees or any other direct charges paid by the owner. The Secretary of State was directed to collect the amounts of the fines, fees, and other costs from the government capturing the vessels. If the offending government did not pay within 120 days, an amount equal to any unpaid claim would be withheld from any funds programmed for assistance for the current fiscal year.

Why did the United States refrain from using military force in the form suggested by Senator Jacob Javits: sending destroyers to protect the tuna boats? Alberto Szekely, a leading Latin American legal scholar, gives the following answer:

> The reason why military action was not used by the United States can be found in the nature of the changing relationships between that country and the Latin American States. The American-sponsored overthrow of the Government of President Arbenz of Guatemala in 1954, the invasion of the Domini-

22. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 793-802 (1965).

23. R. GALINDO POHL, PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE, June 21-24, 1971 at 206 (L. ALEXANDER, ed. 1972).

24. A. SZEKELY, LATIN AMERICA AND THE DEVELOPMENT OF THE LAW OF THE SEA, REGIONAL DOCUMENTS AND NATIONAL LEGISLATION 182 (1976).

25. Fishermen's Protective Act of 1954, 22 U.S.C. §§ 1971-76 (1964).

> can Republic in 1965, the assassination of Che Guevara in the mountains of Bolivia by the Green Berets in 1967, combined with the disastrous military intervention in Vietnam, were enough to make U.S. intervention in Latin America (at least an overt military one) a less than popular issue in the United States.[26]

Thus, United States opposition to the disputed waters off of the Pacific Coast of South America was not strong enough to warrant force, and by the 1970s the United States was beginning to have fishing conflicts with Soviet trawlers off of the coast of New England and Alaska.

At the Santiago negotiations of 1955, the United States rejected the biome theory "in a manner the Peruvians considered to be a sarcastic misrepresentation."[27] Chile, Peru, and Ecuador offered a compromise of restricting "their exclusive fishing jurisdiction to 12 miles plus areas 'traditionally fished' "[28] and sharing conservation jurisdiction over the rest of the 200-mile zone with the United States. The American delegation refused this alternative offer with the argument that areas "traditionally fished" were the waters that constituted the richest tuna fishing grounds. In addition, the United States objected that this shared conservation role would give *de facto* power to the CEP nations. The conference ended in a stalemate, precluding any further chances for reasonable agreement on some issues and intensifying the bitterness between the two sides over the 200-mile limit controversy.

A REGIONAL VIEW OF THE NEW FISHERIES REGIME

The division between international legal thought in Latin America and the legal systems in other areas of the world stems in large measure from the persistent emphasis which many Latin American statesmen and scholars place upon regional particularism in the field of international law. In asserting particularism, the Latin Americans often find expression in the synthesis of the Iberian and New World cultures.[29] Moreover, their articulation of Inter-American or regional positions in international law flows from interaction with the United States and concern over natural resources being exploited by powerful industrial states. In addressing the problem of the resources of the patrimonial sea, Andres Aguilar explains: "For the developing countries, this means not only having the additional resources they so badly need to promote and expedite their development, but also participating

26. SZEKELEY, *supra* note 24, at 190.
27. Loring, *supra* note 5, at 405.
28. *Id.* at 405.
29. *See* A. Leonhard, *Regional Particularism: The Views of the Latin American Judges on the International Court of Justice*, 22 MIAMI L. REV. 674 (1968).

actively in all phases of the utilization of these resources."[30]

Two Latin American judges on the International Court of Justice, in dissenting opinions in cases involving fishery disputes, expressed the Inter-American perspective on the issue of the 200-mile zone. In the 1951 *Anglo-Norwegian Fisheries Case*, Judge Alejandro Alvarez of Chile contended that States have various rights over their coastal seas by reason of economic or geographic factors and that these rights are particularly strong in regard to fisheries.[31] Furthermore, he argued that the rights are "of great weight if established by a group of States, and especially by all the States of a continent."[32] Judge Alvarez interpreted the individual and collective claims to coastal water spaces by Latin American nations as valid under international law.

In the *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*, 1972), Judge Padilla Nervo's dissenting opinion made reference to a 200-mile exclusive fisheries claim:

> The progressive development of international law entails the recognition of the patrimonial sea, which extends from the territorial waters to a distance fixed by the coastal state concerned, in exercise of its sovereign rights, for the purpose of protecting the resources on which its economic development and the livelihood of its people depends.[33]

In citing the Santiago Declaration of 1952 and the increasing trend toward the 200-mile fishery zone, Padillo Nervo points out that many of these nations "have enacted and enforced regulations to that effect 20 years ago."[34] Thus, by 1972 a Latin American jurist could point to a legal concept of jurisdiction existing for over two decades. It had survived through the determination of a few nations to enforce their jurisdiction, while other countries aquiesced to or adopted the new regime for fisheries.

The leadership in the Western Hemisphere in the development of a new law of the sea is acclaimed by many Latin American scholars and statesmen as a regional contribution to the Third United Nation Law of the Sea Conference. Michael A. Morris, who conducted an exhaustive survey of Latin American writings on recent changes in the law of the oceans, observes: "Recurring themes include the inequitable nature of the traditional law of the sea, particularly depredation of Latin American marine resources through the freedom of the seas doctrine, concomitant regional commitment to a new ocean order, and UNCLOS III as one positive result of the sustained Latin American drive to revise the

30. AGUILAR, *supra* note 15, at 162.
31. [1951] I.C.J. 150.
32. *Id.* at 150.
33. [1972] I.C.J. 27.
34. *Id.* at 27.

traditional law."[35] In the academic literature, declarations, judicial opinions and political statements emanating from Latin America, there is a high degree of dedication to the 200-mile fishery regime.

ACCEPTANCE OF THE FISHERY ZONE FROM OUTSIDE OF THE REGION

The formal acceptance of the 1972 Declaration of Santo Domingo by most Latin American nations[36] was one of the last concerted efforts for an Inter-American policy aimed at persuading other members of the international community to accept a 200-mile zone. When the Third United Nations Conference on the Law of the Sea Sessions were held in Caracas in 1974 and in New York in 1977, with the exception of some questions about the meanings of the terms the "patrimonial sea" and the "exclusive economic zone", there was a regional agreement for inclusion in the Draft Treaty of a 200-mile natural resource zone. The Group of 77,[37] following the principles espoused by many Latin American intellectual leaders,[38] easily formed a larger consensus on the creation of new oceanic zones.

According to Ann Hollick, during the preparatory meetings of the Seabed Committee of the United Nations Conference, "U.S. policy on offshore jurisdiction adapted itself to prevailing domestic and international coastal pressures."[39] On the international front, the United States was so outnumbered on the issue that acquiescence seemed to be the only feasible course of action. By 1974 the United States delegation had approved the 200-mile economic zone. This policy was enacted into law in 1977.[40] The chief opponent to the 1952 Santiago Declaration is now officially a member of the "200-mile Club."[41] In the same period Canada, Iceland, Norway, India, the United Kingdom, France, Germany, the Soviet Union and other countries with crucial maritime interests also opted for the 200-mile zone. Ross D. Eckert points out:

> Even Japan, the nation with perhaps the most to lose from coastal fisheries enclosures, ceased to oppose the trend. Japan announced its intention to establish its own 200-mile zone and begin to negotiate bilaterally for continued access to the

35. M. Morris and P. Ferreira, *Latin America, Africa, and the Third United Nations Conference on the Law of the Sea: Annotated Bibliography*, 9 OCEAN DEV. AND I.L. 102 (1981).

36. U.N. Doc. A/AC. 138/80 (1972).

37. The Group of 77 is presently composed of over 100 less developed countries.

38. Dr. Raul Prefisch was one of these.

39. A. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 280 (1981).

40. 16 U.S.C. § 1811 (1977).

41. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331.

fisheries zones of other nations at reduced levels of catch.[42] As early as the opening of the 1974 Caracas UNCLOS III session, more than 100 states had approved the inclusion of the zone in the Draft Treaty.[43]

CONCLUSION

A broad definition of the term "regime" is "a set of rules, norms or institutional expectations that govern a social system."[44] The emergence of an international regime rests upon the hope that the 200-mile zone will gain the status of customary law. One scholar who applied the legal preconditions of custom to the fishery zone found that the zone "has achieved unanimity of practice" and that "customary law is reflected in the majority claim to living ocean resource jurisdiction to a distance of 200 miles."[45] The desire to protect endangered whales and the realization that overfishing leads to the irreversible depletion of many other species of marine life are two more reasons swaying the international community toward the creation of a new regime for fisheries.

In this study, we have seen that the underlying reason for the "magic" number of 200 miles is to be found in early claims by Chile, Ecuador, and Peru.[46] These claims were based, in great measure, upon the biological limit of the Peru Current and the theory of the biome. In general, while Latin American jurists continue to recognize these origins of the new regime for fisheries, legalists from other regions have hardly noticed this significant contribution to the development of the law of the sea.

42. R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES 129 (1979).

43. Mirvahabi, *Significant Issues in the Law of the Sea Conference: Illusions and Realities*, 15 SAN DIEGO L. REV. 493, 497 (1978).

44. *See generally* Hopkins and Puchala, 32 *Int. Org.* 581 (1978).

45. C. Hudson, *Fishery and Economic Zones as Customary International Law*, 17 SAN DIEGO L. REV. 685 (1980).

46. R. Galindo Pohl, 7 OCEAN DEV. AND I. L. 73 (1979).