

7-1-1969

Seizures of United States Fishing Vessels - The Status of the Wet War

Jane Shuttleworth Wiegand

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law of the Sea Commons](#)

Recommended Citation

Jane S. Wiegand, *Seizures of United States Fishing Vessels - The Status of the Wet War*, 6 SAN DIEGO L. REV. 428 (1969).

Available at: <https://digital.sandiego.edu/sdlr/vol6/iss3/6>

This Note is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

LAW NOTE

SEIZURES OF UNITED STATES FISHING VESSELS—THE STATUS OF THE WET WAR

I. INTRODUCTION

When Zeus, Poseidon and Hades shook lots in a helmet to determine the lordship of the sky, sea and underworld, Poseidon won the sea, and became its sovereign.¹ Man's attempts to determine sovereignty of the seas have proved more difficult. This problem is illustrated by the Wet War² in the Pacific—the tuna boat conflict between Chile-Ecuador-Peru and the United States.

On September 28, 1945, the United States issued the Truman Proclamations regarding the Continental Shelf and the Coastal Fisheries. These proclamations secured specific rights in the resources of the seabed and subsoil,³ and established conservation zones to be regulated by the United States, subject to the fishing rights of nationals of other nations.⁴ The proclamations did not extend sovereignty over off-shore waters beyond the limit of the territorial seas. Apparently, other nations misunderstood this point and construed the proclamations as heralding an extension of sovereignty, because the Truman Proclamations were followed by a spate of *pronunciamentos* by other nations. Included were those of Chile, Ecuador and Peru which claimed "sole sovereignty and jurisdiction over the areas

1. R. GRAVES, GREEK MYTHS 59 (1955).

2. The term "Wet War" was apparently first used by Senator Thomas Kuchel in 1963. See Weissberg, *Fisheries, Foreign Assistance, Custom and Conventions*, 16 INT'L & COMP. L.Q. 707 (1967).

3. *Policy of the United States With Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf*, F.R. Doc. 45-18176, 10 Fed. Reg. 12303 (1945). The Continental Shelf Proclamation was not the first such proclamation. Its forerunner was the United Kingdom-Venezuela Treaty of 1942, whereby the seabed of the Gulf of Paria (between Venezuela and Trinidad) was divided between the two signatories. However, the Truman Proclamation was the first clear-cut enunciation of the principle. Grunawalt, *The Acquisition of the Resources of the Bottom of the Sea—A New Frontier of International Law*, 34 MIL. L. REV. 111 (1966).

4. *Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas*, F.R. Doc. 45-18175, 10 Fed. Reg. 12304 (1945).

of sea adjacent to the coast of its own country and extending not less than 200 nautical miles'' from shore.⁵

The crux of the fishing vessel dispute is the disparity in the size of the territorial sea claimed by the three Latin American nations and that claimed by the United States. Chile, Ecuador and Peru claim a territorial sea of 200 miles breadth,⁶ while the United States claims a three mile territorial sea,⁷ and an exclusive fishing zone which extends from shore a distance of twelve miles.⁸

The dispute is 17 years old. More than 140 United States tuna ships have been seized, primarily by Ecuador and Peru, and innumerable others harassed in waters which the United States considers *res communis*.⁹ Typically, the tuna boats have been seized by patrol craft of the coastal nation, forced to proceed to port, charged with violating license and registration regulations, and forced to pay fines before being released. In some instances the vessels' fishing gear and catch have been confiscated as well.¹⁰ There have been strafings and shootings in which American tuna fishermen have been injured.¹¹ Exacerbating the controversy is the fact that naval vessels supplied under our military assistance program frequently have been used in these seizures.¹² Moreover, jet aircraft furnished the coastal nations by the United States government have been used to locate the tuna boats.¹³ In two

5. BISHOP, *INTERNATIONAL LAW* 541 (2d ed. 1962).

In the Santiago Declaration the word sovereignty was used, indicating a territorial sea was claimed. Subsequently, a statement was made to the effect that the claim was one of an exclusive fishing zone rather than a territorial sea in the strict sense. However, on July 27, 1969, all doubt was dispelled by the announcement that the area was indeed a territorial sea. *San Diego Union*, July 27, 1969 at A-9, col. 1 (Home Ed.).

6. BISHOP, *supra* note 5, at 541.

7. Traditionally the United States has claimed a three mile belt of territorial sea. See Jefferson's letter to the British Minister, Nov. 8, 1793, reprinted in BISHOP, *supra* note 5, at 482.

8. Pub. L. No. 89-658 (Oct. 14, 1966).

9. This figure was arrived at by using the sum of 130 seizures for the period through June 1967, as stated in *Hearing on Foreign Seizures of U.S. Fishing Vessels Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess., Ser. 90-8, 19 (1967) [hereinafter cited as 1967 *Hearings*]. To this sum was added the subsequent seizures as recorded by the American Tunaboat Association.

10. *Id.* at 58.

11. Interview with August Felando, General Manager, American Tunaboat Association in San Diego, Calif., Apr. 1, 1969.

12. 1967 *Hearings*, *supra* note 9, at 42.

13. *Id.* at 64, 67.

seizures, those of the *Ronnie S.* and the *Determined*, the participating Ecuadorian crews had just completed a six month training tour in the United States.¹⁴ Meanwhile, the United States has given Peru and Ecuador over \$457,009,000 in foreign assistance.¹⁵ Further, the loss suffered by the tuna industry and the United States Treasury has been estimated at more than one million dollars.¹⁶

II. THE LATIN AMERICAN AND UNITED STATES POSITIONS VIS-A-VIS INTERNATIONAL LAW

A. *International Law Regarding the Proper Breadth of the Territorial Sea*

The sources of international law are international conventions, customary international law, general principles of law recognized by civilized nations, judicial decisions and writings of the publicists.¹⁷ A study of these sources demonstrates that they afford no definitive answer regarding the correct breadth of the territorial sea. The crux of the problem is that the present legal regime of the seas provides no solution for this international fishing dispute. More specifically, there exists no international convention governing disputes over the width of the territorial sea, since the nations of the world failed to reach accord on this issue at conferences at the Hague in 1930,¹⁸ and at Geneva in 1958 and 1960.¹⁹ Customary international law fails to provide an answer, since the three mile limit, adhered to for over 150 years by the major maritime powers, never achieved anything approaching universal acceptance.²⁰ General principles

14. *Id.* at 42.

15. *Id.*

16. Rep. Bob Wilson (R. Calif.) described the losses this way: "Since 1955 our tuna industry has paid \$489,470 in fines to Latin American countries. This is in addition to license and registration fees which have totaled \$61,603 since 1961. These costs do not include the economic losses incurred by our fishermen because their boats were detained in Latin American ports. It has been estimated that the economic loss of the vessels seized since 1961 totals \$544,105. This is the value of the catch these boats would have landed had they been able to fish the days they were under detention. In short, these Latin American countries have extracted more than \$1 million from our tuna industry and the U.S. Treasury under the guise of sovereignty." *Id.* at 22.

17. Stat. of International Court of Justice (1945) art. 38, para. 1.

18. Sorensen, *The Law of the Sea*, INT'L CONC. NO. 520, 196 (1958).

19. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 539-47 (1962).

20. Traditionally, the Scandinavian countries claimed a four mile belt; certain

of law recognized by civilized nations meet with the same arguments as does customary international law, i.e.—the general principles are diverse; there is no consensus as to the correct width of the territorial sea. Judicial decisions do not provide an answer because decisions of international tribunals are not binding precedents. The doctrine of *stare decisis* has never been a part of international law.²¹ Lastly, the publicists disagree, and moreover, traditionally their opinions have been given little weight.²²

B. *The Latin American Position*

The Latin American position regarding its right to the biological riches of the seas contiguous to their coasts is based on the premise that the geographical and biological characteristics of the coast have created that richness. The seas off Peru, for example, are teeming with fauna and flora. The Peruvian rivers cut through highly mineralized zones in the Andes from which they take “physiological minerals” whose presence is of great value in the vital processes of marine vegetation. Further, guano droppings, which have high fertilizing power, add to the enrichment of waters adjacent to that state. This constant shower of vital elements, operating for thousands of years, has produced a “broth” that produces plankton as food for the anchovies that in turn provide feed for the birds and larger fish, thus closing a biological circle or “eco-system.”²³

The ichthyological wealth of the seas stands in contrast to the impoverished sun-scorched soil of the coast, which makes

Mediterranean countries claimed six miles; and Czarist Russia claimed twelve miles. Sorensen, *supra* note 18, at 242.

21. BISHOP, *supra* note 5, at 37-38.

22. BISHOP, *supra* note 5, at 35-36. As Justice Cockburn said:

For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of nations who are to be bound by it. This assent may be expressed, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of the theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements

Queen v. Keyn, 2 Ex. D. 63, 202-04 (1876) as reprinted in BISHOP, *supra* note 5, at 36.

23. Cisneros, *The 200 Mile Limit in the South Pacific: A New Position in International Law with a Human and Juridical Content*, A.B.A. SECT. OF INT'L & COMP. LAW, 1964 PROC. 59.

farming, except by expensive artificial irrigation, impossible. The Peruvian is forced to live, whether he wants to or not, from fishing, because he has no other means of subsistence. The fertility of the seas, then, was offered by nature as compensation for the desert provided by the climatological conditions on the coast. Thus, in proclaiming a 200 mile territorial sea, the Peruvian government has fulfilled its duty of protecting the natural resources and prosperity of its peoples.²⁴

The Latin Americans do not feel that they are attacking international law, since in their opinion Grotius' theory of the inexhaustibility of fish has been proven false.²⁵ Moreover, it is pointed out by the C.-E.-P. nations that prior to the Latin American declaration, the United States had asserted its right to establish "conservation zones" to protect fishing resources otherwise within the high sea zones next to their coasts.²⁶ The Latin American countries feel they enjoy that same right.

C. *The United States Position*

The United States position regarding the fishing vessel controversy is based on its historic opposition to the enlargement of territorial waters. The United States decries extensive territorial seas because an expansion of the territorial seas results in a contraction of the high seas. When any nation increases the width of her territorial seas, the rights of all nations to sail on, fly over or otherwise use the high seas is correspondingly curtailed.²⁷

If a wide territorial sea were claimed by all nations knotty problems would develop in areas such as the Mediterranean, the Caribbean, the Baltic, Melanesia, Polynesia and Micronesia. In island areas enlargement of the territorial seas would result in isolated "pockets" of high seas. Access to these pockets would be controlled by the nations to whom the territorial seas appertained.²⁸

Especially burdened would be the international straits. For

24. *Id.*

25. *Id.* at 58. *But see* M. MCDUGAL & W. BURKE, *supra* note 19, at 468.

26. *Id.* at 60.

27. Dean, *The Geneva Conference, on the Law of the Sea: What was Accomplished*, 52 AM. J. INT'L LAW 610 (1958).

28. *Id.*

example, an extension of the territorial sea in the Straits of Gibraltar to six miles would make the entire strait a territorial sea, with no area of high seas remaining. While it is arguable that all states afford commercial ships the right of "innocent passage" through such straits from one part of the high seas to another, the fact remains that the right of "innocent passage" is a limited one, subject to the "laws and regulations enacted by the coastal states" and subject, in special circumstances, to suspension.²⁷

Were the high seas diminished, military vessels would encounter tremendous difficulties. Warships have no right of "innocent passage" through territorial seas. They must receive permission in order to traverse the territorial waters of a coastal state. Thus, the extension of the territorial seas would reduce the effectiveness of naval operations. This is thought to be a major reason why the Iron Curtain Countries, wary of the West's naval supremacy, have persistently urged a wide territorial sea, or alternatively, that each nation is competent to fix its own limit.³⁰

One of the most important ramifications of a wide territorial sea would be that air travel by all nations could be curtailed. The airspace above territorial waters, like that over land, is within the sovereign purview of the coastal nation.³¹ But, unlike commercial ships, commercial airlines enjoy no right of "innocent passage." Therefore, an extension of the territorial seas would necessitate revision of existing treaties allowing overflight, the creation of new ones, or costly circuitous routes.³²

Additionally, in support of the United States position, it has been argued that the maintenance of a three mile limit by the United States and other nations which are responsible for 80 percent of the world's maritime traffic comes close to being customary international law.³³ Further, it is argued, the United States proclamation establishing a conservation zone differs in two significant respects from the Latin American declaration.

29. Franklin, *The Law of the Sea: Some Recent Developments*, 33 SO. CALIF. L. REV. 368 (1960).

30. Sorensen, *supra* note 18, at 201. The U.S.S.R. has been called the first rank power in submarines. Dean, *supra* note 27, has pointed out how wide territorial seas could prove very advantageous for submarine operations.

31. Franklin, *supra* note 29, at 368.

32. *Id.*

33. *Id.* at 366 n.41.

First, the United States did not claim sovereignty over the high seas which comprise the zones. Second, the United States expressly recognized the rights of the nationals of other nations to fish within the area pursuant to international agreements.³⁴ Moreover, it is argued, the doctrine of biological unity between the continent and the adjacent sea is a "highly doubtful hypothesis" which is virtually unsupported by reliable scientific evidence. At the International Technical Conference on the Conservation of the Living Resources of the Sea, held in Rome in 1955, the C.-E.-P. nations' "eco-system" theory failed to win acceptance from the experts as a proper basis for conservation or management programs.³⁵

III. RESPONSES TO INDUCE A NEGOTIATED SETTLEMENT

The Wet War rages on. The United States has tried for 17 years to resolve the conflict. This country made continual efforts to negotiate the matter. These requests for negotiations were met by refusal on the part of Chile, Ecuador and Peru, who made it clear that their juridical position was not open to question or debate.³⁶ Further, United States proposals to submit the matter to the International Court of Justice or to an arbitral tribunal were ignored.³⁷ Until recently, the United States response was limited to attempts at negotiation in order not to jeopardize long range policy goals in Latin America—particularly, the Alliance for Progress, which has been called the cornerstone of United States foreign policy in the Western Hemisphere.³⁸ However, in

34. See BISHOP, *supra* note 5, at 539.

35. D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 336-37 (1965).

36. 1967 *Hearings*, *supra* note 9, at 59.

37. *Id.*

38. Weissberg, *supra* note 2, at 714. One sector of the United States populace would like to see the policy of "toleration" which has existed for 17 years continued. They reason that the economic loss to one interest-group, i.e., the tuna fishermen, is little when balanced against the interests which might be jeopardized if a major rift developed between the C.-E.-P. nations and the United States, as a result of a harsher response to the fishing vessel controversy.

Another sector of the United States populace argues that it is not the fishermen alone who are involved. Each seizure of a fishing vessel and fine results in money flowing from the taxpayers' pocket to reimburse the fishermen under the terms of the Fishermen's Protective Act. Further, if the situation is allowed to continue unabated, a trend may develop in which more nations may make similar extensive claims, thereby amplifying the problems involved herein. Moreover, it is clear that the ever-present *anti-yangoismo* may be triggered regardless of any actions on the part of the United States. In fact, the most recent anti-American episode occurred when the new military junta in Peru used the

May, 1969, the United States invoked the Foreign Military Sales Act,³⁹ which forbids the sale of military goods or services to any nation seizing United States fishing vessels in international waters.⁴⁰ Shortly thereafter, Chile, Ecuador and Peru, for the first time, consented to come to the conference table.⁴¹ Whether the proposed conference will resolve the conflict remains to be seen.

International law, as mentioned earlier, provides no answer to the fishing vessel *imbroglio*. There are merits to each side. What follows indicates that the United States has a variety of means available to it with which to induce a negotiated settlement. Some of these responses represent old tools—long used in the international arena for persuading nations to negotiate; others are new—especially created by Congress to deal with the fishing vessel seizures. These responses include political, military, economic and judicial alternatives.

A. Political Responses

1. Regional Agreements

Regional agreements have been suggested by some writers as the ideal solution to fishing disputes.⁴² However, the history of repudiation and non-membership surrounding an existing regional agreement does not augur well for the use of this alternative. The existing agreement is the Inter-American Tropical Tuna Commission, created in May 1949. This open-ended treaty is aimed at maintaining populations of yellowfin and skipjack tuna and other kinds of fish taken by fishing vessels in the eastern Pacific Ocean.⁴³ Ecuador, originally a member, recently withdrew in order to protect her 200 mile claim. Peru had never joined, probably for the same reason.⁴⁴

expropriation without compensation of Standard Oil of New Jersey's 200 million dollar assets as a mechanism for the unification of the Peruvian society and consequent consolidation of its power. See *Report from Lima*, *Fortune* 55, Mar. 1969. Apparently the Nixon Administration believes that the 17 year period of "toleration" or permissiveness should come to an end, since it is the first Administration to take a firmer stand on the fishing vessel seizure conflict.

39. Pub. L. No. 90-629, 82 Stat. 1320.

40. *San Diego Union*, May 19, 1969, at 1, col. 1 (Home ed.).

41. See *San Diego Union*, July 27, 1969, at A-9, col. 1 (Home ed.).

42. JOHNSTON, *supra* note 35, at 458.

43. Interamerican Tropical Tuna Commission Treaty, May 31, 1949, 1 U.S.T. 231, T.I.A.S. No. 2044.

44. Interview with August Felando, *supra* note 11.

In favor of this alternative it can be said that a regional agreement would represent a non-violent solution to the conflict, produced by those fishing nations directly involved (as opposed to resolution by a larger body such as the United Nations or the Organization of American States which have non-seafaring members). Moreover, recently created regional agreements promise to be effective in other parts of the world.⁴⁵ If a newly-devised regional agreement could escape the malaise which has afflicted the Inter-American Tropical Tuna Commission Treaty, it may well prove to be the most satisfactory solution to the fishing vessel controversy.

2. *Convene a Third United Nations Conference on the Law of the Sea with the Objective of Settling the Territorial Sea Issue*

Another possibility would be for the United States to work toward convening a third United Nations Conference on the Law of the Sea, in order to settle the territorial sea issue. However the community of nations has failed to reach agreement on the breadth of the territorial waters at the Hague in 1930 and at Geneva in 1958 and 1960.⁴⁶ Moreover, assuming that a third United Nations Conference were convened and agreement reached on the width of the territorial sea, such a rule would be binding only on those nations which consented to be bound.⁴⁷ Assuming further that a nation signs and ratifies a treaty, it cannot be forced to comply with its provisions; there is no international machinery to compel performance. Finally, this is a very time-consuming alternative—perhaps an interim response would be necessitated.

In favor of this alternative the following arguments could be made. First, there is ground for optimism that, if careful groundwork were done beforehand, accord on the size of the territorial sea could be reached, since the Canadian-United States compromise proposal, introduced at the last conference, failed by only one vote.⁴⁸ If just one state voting against it had

45. See Jessup, *The Law of the Sea Around Us*, 55 AM. J. INT'L L. 104 (1961); McKernan, *Fisheries and Oceanography*, OCEAN SCIENCES 215 (E. Long ed. 1964).

46. See notes 18 and 19 *supra*.

47. W. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 333 (1957).

48. The United States-Canadian compromise proposal was a six-mile territorial sea coupled with a further six-mile zone over which the coastal state would have exclusive fishing rights subject to certain prior rights of other states. BISHOP, *supra* note 5, at 490.

abstained, the 54 vote total necessary for adoption would have been reached.⁴⁹ Second, as to the refusal of a given nation to sign the convention, it could be argued that a rule approved by the major world powers can be expected to "become part of the universally received law of nations within a moderate time."⁵⁰ Third, even though there is no machinery with which to compel a signatory's performance, it is universally recognized that one of the most fundamental rules of international law is that treaties must be performed in good faith; the rule of *pacta sunt servanda*.⁵¹ Fourth, although it is a time-consuming alternative, it is not mutually exclusive vis-a-vis other responses. It could be combined quite readily with a response aimed at swift termination of the seizures. Lastly, this alternative has the advantage of being a fair, peaceful and permanent solution to the fishing vessel dispute, since it strikes at the very heart of the problem.

A variation of this alternative would be to convene a Law of the Sea Conference to consider the fisheries issue as separate and distinct from that of the territorial sea matter. A resolution to that effect was adopted by the House of Delegates of the American Bar Association. It was thought that, since the territorial sea question is fraught with security and economic considerations, the nations could reach agreement more readily if the two issues were sundered.⁵²

3. *Vest Sovereignty over the Living Resources of the Sea in the United Nations*

Much has been written with regard to vesting sovereignty over the bed of the sea in the United Nations or some similar international agency;⁵³ less has been written in this area regarding the living resources of the seas. Recently, however, two such plans were presented. One was a fairly concrete scheme presented by Ambassador Arvid Pardo, Malta's Permanent Representative

49. *Id.*

50. Pollack, *The Sources of International Law*, 2 COL. L. REV. 511-12 (1902).

51. BISHOP, *supra* note 5, at 134.

52. JOHNSTON, *supra* note 35, at 252 n.346.

53. See generally Bernfield, *Developing the Resources of the Sea - Security of Investment*, INT'L LAWYER 73-74 (1967); Grunawalt, *supra* note 3, at 132; Rich & Englehardt, *A Proposal From a U.S. and a Soviet Scientist: Ocean Resources and Developing Nations*, BULL. OF THE ATOMIC SCIENTISTS No. 2, 1 (1968); Young, *Limits of the Continental Shelf and Beyond*, PROC. AM. SOC. INT'L L. 234 (1968).

to the United Nations. This plan, unlike the original proposal made by Malta before the General Assembly, envisioned international control of the living resources of the oceans. Importantly, this plan favored vesting authority in an agency separate from the United Nations itself, but perhaps, having a loose tie such as that which links the World Bank to the United Nations.⁵⁴

The other plan covering both organic and inorganic resources of the seas was sponsored by United States Senator Claiborne Pell. His proposal called for a Treaty of Ocean Space. Senator Pell cited the international treaties relating to Antarctica and outer space as precedents for establishing similar agreements with respect to the oceans.⁵⁵ This alternative has the obvious advantage of enabling all of mankind to benefit from the ocean's resources. Its disadvantage is that it may be premature. The paucity of scientific knowledge concerning the ocean's wealth and the means of exploiting it make it an unattractive alternative to the United States at the present time.⁵⁶

4. *Fish Elsewhere*

Tuna, like most fish, are most commonly found in commercial quantities in the relatively shallow waters above the continental shelf, adjacent to the great continental land masses. It is in these waters that the light, temperature, nutrient elements and other factors combine to produce the most favorable ecological conditions. Thus, the intense concentrations of fish exist in some proximity to particular coastal states.⁵⁷ For this reason, when the San Diego-based tuna fleet pursues the catch into waters off the coast of Latin America, they do so not of choice but of commercial necessity. Moreover, by fishing on the challenged waters, the fishermen are upholding the rights of the United States which might otherwise be atrophied or lost.⁵⁸

54. Address by Arvid Pardo, Malta's permanent Ambassador to the U.N., Panel, *Whose is the Bed of the Sea*, PROC. AM. SOC. INT'L L. (1968).

55. BUSINESS WEEK, Nov. 11, 1967 at 68.

56. Hull, *The Political Ocean*, 45 FOREIGN AFFAIRS 500 (1967). *Contra*, Eichelberger, *The United Nations and the Bed of the Sea*, 6 SAN DIEGO L. REV. 339 (1969).

57. M. McDUGAL & W. BURKE, *supra* note 19, at 458.

58. As was reiterated at the House Hearings of June 1967, in support of the proposed legislation to aid the fishermen:

It will be the right of the United States, under international law and not that of the individual fisherman, which is being tested. The only means the United

B. Military Response—Send a Military Escort to Protect Tuna Vessels

It has been suggested by several legislators that the United States should respond to the seizure of United States fishing vessels by assigning a military escort to protect the fishing fleets.⁵⁹ This has proven efficacious in halting other fishing vessel seizures. Recently a Coast Guard patrol was used to protect United States' shrimp boats operating in the Gulf of Mexico. This was an effective deterrent to seizures by Mexico, as well as an inducement to negotiate. The "Shrimp Patrol" was terminated in January 1969 upon agreement by Mexico and the United States concerning fishing rights in that area.⁶⁰ Further, before United States involvement in World War II, and after our formal entry into the war, Navy "guard crews" were assigned to the merchant vessels to discourage surface attacks by enemy submarines.⁶¹ Also, Presidents Monroe,⁶² Jackson,⁶³ Van Buren⁶⁴ and Fillmore⁶⁵ dispatched military escorts for the protection of United States fishing and merchant vessels. This response has been employed by other nations as well. France stopped the seizure of her ships off the coast of South America by sending a destroyer to protect her fishing fleet.⁶⁶

Thus, in favor of this response, it must be said that it has proven to be an effective method of ending seizures of fishing

States has, in practice, to maintain these rights is to continue their exercise by its fishermen. Unless the owners of the vessel can be assured of the protection of their government and the acceptance by their government of a share of the economic risk of exercising such rights, they cannot continue to take the risk of sending their vessels into such waters. Unless, on the other hand, they do continue to fish in the challenged waters, these rights of the United States will stand in danger of being atrophied and lost.

1967 *Hearings*, *supra* note 9, at 44.

59. San Diego Independent, Feb. 27, 1969 at 1, col. 1. Rep. Lionel Van Deerlin (D-Calif.) proposed that Marines "ride shotgun" on American fishing vessels operating off Latin America.

60. 1967 *Hearings*, *supra* note 9, at 82; Interview with August Felando, *supra* note 11.

61. San Diego Independent, Feb. 27, 1969 at p. 1, col. 1.

62. J. Monroe, 7th Annual Message, Dec. 2, 1823, 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 213 (1896).

63. A. Jackson, 3rd Annual Message, Dec. 6, 1831, *Id.* at 552.

64. M. Van Buren, 4th Annual Message, Dec. 5, 1840, 3 *Id.* at 618.

65. M. Fillmore, Special Message to the House of Representatives, Aug. 9, 1852, 5 *Id.* at 158.

66. San Diego Union, Sept. 8, 1967 at 7, col. 7 (Home ed.).

vessels. Further, this action has the attribute of being closely related to the conflict, whereas it is arguable that some possible sanctions, such as cutting off foreign aid, are not. On the other hand, this alternative has the serious drawback of being potentially violent. Resort to armed force is prohibited by the United Nations Charter.⁶⁷ It is arguable that even though Peru and Ecuador have backed their position with force, it behooves the United States to choose a different response. Also, it is possible that the assignment of a military escort for our tuna fleet would serve to escalate the Wet War rather than ending it.

C. *Economic Responses*

1. *Cut Off Foreign Aid*

Despite the seizure of 140 fishing vessels during the past 17 years, the United States has continued to make enormous expenditures in these republics. In the period from 1961 to 1966, for example, the foreign assistance given to Peru and Ecuador totaled \$457,009,000.⁶⁸

The cessation of foreign assistance to nations as a method of sanction has strong supporters and detractors. In opposition to the suspension of foreign aid, it has been argued that it could result in an upsurge of anti-American sentiment; the heretofore diverse public opinion could become unified against the United States; the Communists could take advantage of the situation to reiterate their cries of Yankee economic imperialism. This, it is argued, would frustrate the United States' long range foreign policy objectives. Further it has been argued that a response so unconnected with the fishing dispute should not be utilized.⁶⁹

Those supporting the termination of foreign assistance to recalcitrant nations point out that when the United States cut off foreign aid to Ceylon in the 1960's in the only enforcement of the Hickenlooper Amendment⁷⁰ to date, the anti-American

67. U.N. CHARTER art. 33, para. 1.

68. 1967 *Hearings*, *supra* note 9, at 42.

69. Weissberg, *supra* note 2, at 714.

70. 76 Stat. 260-61 (1962), as amended, 22 U.S.C. § 2370(e)(1) (1964). The Hickenlooper Amendment, as this subsection has come to be called, provides that the President shall suspend aid to any country which expropriates American-owned assets without paying "speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof." The Hickenlooper Amendment has not been applied to the seizure of fishing vessels because this activity is considered "harassment" rather

reaction was ephemeral; the United States' long range goals were not thwarted.⁷¹ Further, it is argued, this sanction has proven effective. The World Bank has used this measure with spectacular success. That organization will not make loans to nations that refuse to honor their contractual obligations with private investors, or that refuse to compensate foreign entrepreneurs for property which has been expropriated. This policy is known to the would-be borrowers. Thus, they are on notice that if they engage in conduct which is proscribed by the World Bank, they will be ineligible for assistance.⁷² The record of the World Bank since its inception shows not one default.⁷³ On the other hand, the World Bank has primarily economic rather than political consequences to consider.

A variation of the alternative of cutting off *all* foreign aid to a given nation, would be the deduction of foreign assistance in an amount equal to the fines imposed upon the fishing vessels. This alternative has the approval of Congress as is evidenced by the enactment of the Fishermen's Protective Act of 1967,⁷⁴ which amends the 1954 act of the same name.⁷⁵ The deduction of foreign assistance commensurate with the fine has an elemental

than expropriation. Interview with Rep. Bob Wilson (R-Calif.) in San Diego, March 11, 1969.

71. Olmstead, *Foreign Aid as an Effective Means of Persuasion*, 1964 AM. SOC. INT'L L. 206.

72. *Id.* at 208.

73. W. FREIDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 92 (1964).

74. 22 U.S.C. 1971-77 (Supp. 1969). The significant section of the Fishermen's Protective Act of 1967 is the following:

Sec. 5. The Secretary of State shall take such action as he may deem appropriate to make and collect claims against a foreign country for amounts expended by the United States under the provisions of this Act (including payments made pursuant to section 7) because of the seizure of a vessel of the United States by such country. If such country fails or refuses to make payment in full within one hundred and twenty days after receiving notice of any such claim of the United States, the Secretary of State shall withhold, pending such payment an amount equal to such unpaid claim from any funds programmed for the current fiscal year for assistance to the government of such country (as shown in materials concerning such fiscal year presented to the Congress in connection with its consideration of amendments to the Foreign Assistance Act of 1961). Amounts withheld under this section shall not constitute satisfaction of any such claim of the United States against such foreign country.

75. 22 U.S.C. 1971-76 (1964). The 1954 Fishermen's Protective Act provided for reimbursement to fishermen of fines paid to foreign countries as a result of unlawful seizures.

justice about it. However, this statute has not been utilized as of this writing.

2. *Terminate Loans of Ships*

Under existing agreements the Latin American countries involved in the tuna boat conflict have been loaned the following United States vessels: Chile has seven vessels (including two destroyers); Ecuador has seven; Peru has nine vessels (including two destroyers).⁷⁶ Some of these ships have been used in the seizure of American tuna boats.⁷⁷

The Naval Vessel Loan-Extension Act⁷⁸ provides for the termination by the United States of naval vessel loan agreements upon a seizure of any United States fishing vessel because of its activities in international waters. The State Department has considered and then rejected the alternative of terminating naval vessel loans. The precise reasons for rejection of this response comprise classified information.⁷⁹ However, one might speculate as to the factors motivating the State Department's decision. First, there exists the possibility that termination of loan agreements on military ships would incense the Latin Americans, and thereby imperil our broad foreign policy objectives in Latin America. This prospect, however, should not deter use of this alternative, since any sanction the United States might impose carries this danger. Second, by recalling our naval vessels we would be endangering the security of the Latin American nations, and, indirectly, our own. However, we have naval vessel loan agreements with other Latin American nations.⁸⁰ These latter vessels would be available for protection of the Western Hemisphere in event of a crisis. This factor diminishes the security risk involved in terminating the loans to the recalcitrant nations.

The response of recalling our naval vessels has been approved by Congress after consideration of all the ramifications of such an act.⁸¹ Subsequently, Congress went further, and in 1968,

76. 1967 *Hearings*, *supra* note 9, at 65.

77. *Id.* at 42.

78. Pub. L. No. 90-224, 81 Stat. 729 (1967).

79. 1967 *Hearings*, *supra* note 9, at 72.

80. *Id.* at 65-67.

81. See note 77 *supra*.

passed the Foreign Military Sales Act,⁸² which called for more drastic reduction of military assistance than was envisioned in the Naval Vessel Loan-Extension Act. Furthermore, this response also has the desirable characteristic of being closely related to the conflict since, in some instances, the very ships loaned to the Latin American nations⁸³ seized the tuna clippers. This alternative appears to be a relatively mild sanction. Its non-violent nature makes it doubly attractive.

3. *Economic Boycott*

Another possible response to the fishing vessel dispute is the use of economic reprisals against South American exports. This response has the attribute of being a pacific manner of settling the international controversy as is advocated by the United Nations Charter.⁸⁴ However, this approach could have serious ramifications in this half of the Western Hemisphere as well as the other. In Ecuador, for example, a United States corporation, the United Fruit Company, accounts for 19 percent of Ecuador's total banana exports.⁸⁵ Ownership of the United Fruit Company is widely dispersed.⁸⁶ It has almost as many United States stockholders as it has tropical employees.⁸⁷ Therefore, many United States investors would be affected by a United States refusal to buy Ecuadorian bananas. Also, North American importers, jobbers and retailers would be adversely affected. Undoubtedly the use of this alternative would penalize Ecuador (financially as well as labor wise) since bananas constitute over 50 percent of her total exports.⁸⁸

Most importantly, an economic boycott would tend to discourage private United States investment in Latin America. One of this country's broad foreign policy objectives is the encouragement of such private investment.⁸⁹ An immense flow of capital is needed to raise the standard of living in Latin America, and investment by both governmental and private sectors is

82. Pub. L. No. 90-629, 82 Stat. 1320 (1968).

83. 1967 *Hearings*, *supra* note 9, at 65.

84. U.N. CHARTER art. 33, para. 1.

85. S. MAY & G. PLAZA, *THE UNITED FRUIT COMPANY IN LATIN AMERICA* 175 (1958).

86. *Id.* at 115.

87. *Id.* at 117.

88. *Id.* at 53.

89. Olmstead, *supra* note 71, at 206-07.

deemed necessary.⁹⁰ Therefore, any response which would directly impair the flow of capital to Latin America by private United States investors should be weighed with regard to the foreign policy objectives.

D. Judicial Responses

1. *Bring Suit in the International Court of Justice*

Perhaps the ideal solution to the fishing vessel dispute would be to bring suit in the International Court of Justice, the judicial organization of the United Nations. However, no would-be plaintiff can compel another state to have their differences adjudicated in the I.C.J. The Court has no jurisdiction unless both parties agree to submit the matter to it.⁹¹

Attempts have been made to confer upon the I.C.J. automatic jurisdiction over international disputes. One such attempt was the formulation of the "optional clause" for compulsory jurisdiction of the court.⁹² Thereunder, states may give in advance their consent to being sued by declaring:

that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court, in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.⁹³

The United States' acceptance of compulsory jurisdiction under the "optional clause" carried an important qualification. The United States agreed to compulsory jurisdiction except "with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."⁹⁴ The words "as determined by the United States of America" were rejected by the Senate Committee on Foreign Relations, but were added on the floor of

90. *Id.* at 206.

91. BISHOP, *supra* note 5, at 63.

92. International Court of Justice Stat., art. 36, para. 2.

93. *Id.*

94. 61 Stat. 1218; 15 Dept. of State Bull. 452 (1946).

the Senate.⁹⁵ This qualification is known as the Connally Amendment. Efforts have been made to eliminate this "self-judging" reservation of America's acceptance of the Court's mandatory jurisdiction. Significantly, when states do submit disputes for legal adjudication, they normally carry out the judgment.⁹⁶

Thus, resort could be had to this procedure for resolving the fishing vessel controversy only if the offending nations deigned to litigate the matter, and, if the I.C.J. was not forced to dismiss the case for lack of jurisdiction due to the Connally Amendment.⁹⁷ The United States has offered to submit the matter to the I.C.J. and Chile, Ecuador and Peru have ignored the proffer.⁹⁸ It is, therefore, quite unlikely that they would consent to being party-defendants unless other measures were taken to persuade them to do so.

2. *Submit the Matter to an Arbitral Tribunal*

Another possibility would be to submit the dispute to an arbitral tribunal. International arbitration involves the settlement of conflict among states by applying rules of law to the facts found.⁹⁹ Arbitration is a judicial process, distinguished from adjudication before a permanent international court by the ad hoc character of the tribunal and the extent of the tribunal's control.¹⁰⁰

This alternative is attractive since it would provide for a hearing of the dispute by a relatively impartial forum. Also, it would constitute a peaceful and, hopefully, a just solution to the fishing vessel controversy. However, it meets with the same objection as the suggestion of bringing suit in the International Court of Justice, i.e., there is no way to force another country to arbitrate. Chile, Peru and Ecuador have not only not answered the United States' offers to arbitrate,¹⁰¹ but have explicitly stated

95. BISHOP, *supra* note 5, at 64.

96. *Id.*

97. Dismissal occurred when France, who like the United States, qualifiedly accepted compulsory jurisdiction of the I.C.J., tried to sue Norway (whose acceptance of the Court's jurisdiction was complete and unqualified). BISHOP, *supra* note 5, at 65.

98. 1967 *Hearings*, *supra* note 9, at 23, 59, 68.

99. BISHOP, *supra* note 5, at 60.

100. *Id.*

101. 1967 *Hearings*, *supra* note 9, at 23, 59, 68.

that their juridical position is not open to question or argument.¹⁰²

IV. CONCLUSION

The tuna boat conflict arises from the variant territorial sea claims made by Chile-Ecuador-Peru and the United States. The present law of the seas is inadequate to resolve such claims on a right-wrong basis. Arguments are persuasive for both sides of the issue; but conviction depends upon the point of view. The developing C.-E.-P. nations appear intent upon protecting their sovereignty and immediate national needs. The more powerful United States, while protecting a limited immediate interest, seeks solutions which will not jeopardize its broader international goals and involvements.

Some resolution must be reached. The United States has a wide variety of tools available for persuading the other side to negotiate a settlement. The first firm American response—terminating military sales to Ecuador and Peru—has apparently induced the C.-E.-P. nations to come to a conference table after many years of refusal. However, hope that a compromise solution would be reached was diminished by the Peruvian declaration on the eve of the conference. Peru announced that her 200 mile claim was to a territorial sea, thereby clarifying and buttressing her juridical position. If, despite this latest evidence of an uncompromising stand on the part of the Latin American contingent, the conference does produce a workable regional solution to the fishing dispute, there will eventually have to be agreement, preferably multi-national, on the territorial sea issue to preclude other Wet Wars.

JANE SHUTTLEWORTH WIEGAND

102. *Id.* at 59.