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The sea is one of the last frontiers of mankind. And whereas the oceans have served historically as a means of transportation, it is only recently that the resources of the sea have gained prominence. The interest in both the sea and its resources is reflected in the current Law of the Sea Conferences where the nations of the world are negotiating new rules for both the use of the sea and the exploration of its resources. This has come at a time when nation states have been gradually expanding their jurisdiction in order to gain access to available ocean resources.

Whereas mineral resources were first exploited, in recent times states have been extending their jurisdiction to acquire access to the living resources of the sea, in particular fishes, crabs and lobsters. Access to fishing resources was accomplished by national legislation. The lobster, however, has been the subject of both international and domestic laws. Compared with fishing, lobster harvesting has been subjected to a greater degree of controversy.

On the Bahama Banks, an area between the United States and the Bahamas, lives the spiny lobster. This creature has been the subject of dispute between lobstermen¹ based in Miami and the government of the Bahamas. This dispute, which has been simmering for the past ten years, culminated in a confrontation in August 1978 between the Bahamas Marine Patrol and Cuban-American² lobstermen. In this particular incident three Bahamian patrol boats attempted to

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1 By lobstermen we mean those individuals engaged in the harvesting of lobsters as opposed to fishermen since the lobster is not considered a fish.

2 By Cuban-Americans we mean persons of Cuban birth domiciled in the U.S. but who are not American citizens.

intercept thirty-five U.S. based boats when gunfire erupted in which a fourteen year old Cuban-American was shot. Twelve boats with twenty-five Cuban-Americans aboard were captured.³

The 25 Cuban-Americans were taken to Nassau, charged and later released on bail. They returned to Miami. Only one returned to Nassau to face trial on 5 September 1978. He was tried, convicted and fined \$100,000 or ordered to serve five months in jail. His fine was subsequently paid, and his boat was later returned to him. The parents of the 14 year old boy who was shot brought a \$15 million lawsuit against the Bahamas government as a consequence of the shooting.⁴ This dispute, if not settled, could possibly escalate into intense feelings of nationalism among Bahamians, feelings of hostility toward the Bahamas by Cuban-Americans or other Americans, interruption of normal commercial relations between the two countries and even strained diplomatic relations. This would be unfortunate as the two countries have had a long history of friendly relations.

The central issue concerns access to the lobster and the right of the Bahamian government to exercise exclusive jurisdiction over it. This article will examine the significance of the lobster in the international law of the sea; the basis of claims by the Bahamian government; claims by the Cuban-Americans and their U.S. constitutional rights. Finally, the article will suggest possible solutions drawing on the experiences of past treaties. The study bears some relevance to similar Law of the Sea problems elsewhere in the Caribbean, specially in areas involving conflicting claims, for instance fishing disputes between Trinidad and Venezuela.

I

The principal issues involved in this conflict relate to the doctrine of the continental shelf; to the lobster as a creature of the continental shelf; and to the right of a state to exercise control over this resource of its continental shelf.

The concept of the continental shelf is of recent origin, dating back to a treaty in 1942 between the United Kingdom and Venezuela over the resources of the Gulf of Paria.⁵ In 1945 the United States became the first country to unilaterally claim jurisdiction over the

3 Since this incident the Bahamian Patrol has intercepted other Cuban-American lobster boats.

4 This case has remained unresolved.

5 R. Preiswerk, ed., *Documents on International Relations in the Caribbean*. Trinidad: Inst. of Int. Rel., 1970, pp. 657-659. This treaty delineated the continental shelf with respect to exploration of the soil.

resources of the continental shelf. In that year President Truman issued Proclamation No. 2667 which became known as the Truman Declaration.⁶ The President claimed for the United States sovereignty over the resources of the “seabed and subsoil” of the adjacent continental shelf to a depth of 200 meters. The 1958 Geneva Convention on the Continental Shelf, the first international attempt to develop rules pertaining to the sea, further elaborated the concept. Article 1 stated:

the term “continental shelf” is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.⁷

This definition, it would appear, may be amended by the current Law of the Sea Conference. The latest document of that conference, the Informal Composite Negotiating Text, Revision 1, limits the continental shelf to a distance of 200 nautical miles or beyond that in accordance with fixed formulae.⁸ The ongoing Law of the Sea Conference, however, has not reached final agreement on this, and until this happens, the 1958 Convention remains in effect.

Interest over the continental shelf first developed around natural resources. Both the 1942 treaty referred to earlier and the Truman Declaration of 1945 dealt essentially with the possibility of oil or gas deposits. The continental shelf, however, is important for other mineral resources and living organisms. The most important of the latter is the lobster.

The first point to note about the lobster is that it is not a fish and has a vague definition in international law. The 1958 Convention on the Continental Shelf defined living organisms without particular reference to lobsters. Living organisms were defined as those which are unable to move except in constant contact with the seabed. Article 2, Sec. (4) states:

The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms

6 The text of the Proclamation is found in *American Journal of International Law* 40 (1946): Supplement, 45-46.

7 The text of the Convention is reproduced in *American Journal of International Law* 52 (1958): 858-862.

8 United Nations, *Third Conference on the Law of Sea, Eighth Session (A/CONF. 62/W. P.10/Rev. 1)*, 28 April 1979, Article 76.

which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.⁹

When the Senate ratified this Convention, the U.S. did not recognize the lobster as a creature of the continental shelf.¹⁰ This was clearly stated in response to written questions submitted to the Department of State.¹¹

Even as late as 1964 when the United States sought to exercise jurisdiction over the resources of the continental shelf with the passage of an Act "To Prohibit Fishing in the Territorial Waters of the U.S.," the lobster was not included among such resources.¹² In 1974, however, the U.S. changed its position by amending the 1964 Act to include the American lobster, found off its Northeast coast, as a protected continental shelf resource.¹³ This action was taken as a result of demands of the area lobstermen who were facing intense competition from foreign lobstermen.¹⁴ However, objections were raised to the inclusion of the lobster as a continental shelf resource by the U.S. State Department and the National Oceanic and Atmospheric Administration. Serious concerns were expressed that such action would precipitate similar claims by other countries. Particular mention was made of the spiny lobster. In his prepared text Ambassador Donald McKernan stated:

We believe that a unilateral action by the U.S. to declare the lobster to be a creature of the shelf could lead other nations to unilateral action. . . this would then lead to serious problems. . . for the American fishermen engaged in fisheries for such species, and conflicts between the U.S. and nations taking such action.¹⁵

The right of a coastal state to exercise control over the resources

9 Convention on Continental Shelf, *AJIL* 52 (1958): 858-862.

10 U.S. Congress, *Convention on Law of the Sea, Hearings*, 86th Congress, Second Session on Executives, J, K, L, M, N, 86th Congress, Second Session, 20 January 1960 (Washington, D.C.: Government Printing Office, 1960).

11 *Ibid.*, see question 18.

12 Public Law 88-308, 78 Stat. 194.

13 As amended by the Offshore Shrimp Fisheries Act of 1973, Public Law 93-292, 87 Stat. 1061, Section 15.

14 Six bills were introduced between 8 March and 9 May 1973 to declare the lobster a creature of the continental shelf. At the hearings six members plus commercial lobster interests from the Northeast states testified in support of the bill. U.S. Congress, Senate, Committee on Merchant Marine and Fisheries, *Hearings Before the Sub-Committee on Fishes and Wild Life Conservation and the Environment*, 93rd Congress, 1st Session, on HR 4760 and others, 17 May and 30 July 1973 (Washington, D.C.: U.S. Government Printing Office, 1973).

15 *Ibid.*

of the continental shelf is exclusive. These resources may not be exploited by other nations without the express consent of the coastal state. This right is embodied in the 1958 Convention on the Continental Shelf.¹⁶ It has been reaffirmed in the previously cited Informal Composite Negotiating Text, Revision 1.¹⁷

II

A Bahamas Order-in-Council approved in 1948 while that country was a colony of Britain, determined that the boundaries of the Bahamas include the area of the continental shelf which adjoins the coast of the Bahamas. Later, in 1969, the Fisheries Act (No. 13 of 1969) was approved which outlined the regulation of the fishing industry in the Bahamas, and which permitted the country as well to enter into an agreement with a foreign state for reciprocal fishing rights if it was considered to be in the national interest. This Act was amended in 1975 after independence and repealed in 1977. It was replaced by the Fisheries Resources Act of the same year. Control over the continental shelf, first claimed in 1948, was strengthened by the passage of the Continental Shelf Act of 1970. This Act conforms with the definition of the continental shelf in the 1958 Geneva Convention on the Continental Shelf. Thus by 1977 the Bahamas had passed legislation to exercise jurisdiction over its continental shelf and resources in accordance with standard international practice.

The Bahamian 1975 amendment to the Fisheries Act of 1969 was a literal copy of the U.S. law; it declared the spiny lobster a creature of its continental shelf and gave the Bahamian government exclusive control over these resources. This jurisdiction is currently exercised by the Fisheries and Resources Act, 1977. Therefore, it is illegal for non-nationals to catch lobsters on the Bahamian continental shelf. However, this jurisdiction is subject to the international legal principle of the median line relating to overlapping jurisdictions.

III

The Bahamas declaration led to an inevitable uproar, particularly among the lobster industry of South Florida, for increasingly Florida's lobstermen had been drawing their catches from the Bahamas waters. During the years 1965 to 1971, 28.3 million pounds of lobster were caught in Florida's waters compared to 19.1 million pounds in

16 Convention on Continental Shelf, *AJIL* 52 (1958): 858-62.

17 See Article 77.

“foreign waters,” meaning the Bahamas. However, during 1972-74, 16.70 million pounds of lobster were taken in Florida’s waters as against 16.80 million pounds in foreign waters.¹⁸ The catch of 1972 in foreign waters, amounting to 58 per cent of the total landings, was almost double that taken from the same waters in the previous year.¹⁹ It has been estimated that during the past few years about 100,000 lobster traps are regularly placed in Bahamian waters by Florida’s lobstermen.²⁰

Cuban-American lobstermen claim that they have a historic right to trap lobsters in the Bahamian waters.²¹ They claim that their ancestors exploited those waters during the days when the Bahamas was a colony. After their arrival in Florida in the early 1960s, they simply continued to make their livelihood trapping lobsters there. In addition, increasing competition with other Florida based fishermen in U.S. waters led to the steady depletion of domestic resources. This has made the Bahamian waters an added attraction for U.S. based lobstermen. As previously noted, while the catch in foreign waters was comparatively small—17 percent of total in 1965—by 1972, 58 percent of the lobster catch was from foreign waters.²² Cuban-Americans argue that increasingly, therefore, their livelihood is dependent upon being allowed in Bahamian waters. Further, in the past U.S. based fishermen were licensed in the U.S. to fish in international waters. Thus, numbers of Cuban-Americans obtain these licenses although the importation of lobster was permitted only during the open season from August 1 to March 31.

IV

The dispute over the harvesting of lobsters between the Bahamian government and Cuban-Americans based in Florida is not insurmountable. There are enough rules of international law, acceptable practices, peace-seeking institutions and precedent to find an amicable solution to this problem. The problem, however, will not solve itself, nor would it go away.

It is unthinkable, unnecessary and unlikely that the U.S. would

18 U.S. Congress, *U.S. Fishing Industry – Present Condition and Future Marine Fisheries: Report to the Congress by the Controller General* (Washington, D.C.: Government Printing Office, 1976), volume 11, p. 164.

19 *Ibid.*

20 Bahamas, “Bahamas Government Position on Fishing Talks with U.S. Government” (Nassau: Bahamas Information Service, 28 August 1975), mimeographed.

21 This claim is repeatedly made by Cuban-American lobstermen. See, for instance, *Miami Herald*, 5 September 1978.

22 U.S. Congress, *U.S. Fishing Industry Report by Controller General*, 1976.

use its superior might to force the smaller, weaker Bahamas into submitting to an agreement that would be more acceptable to the United States than to the Bahamas. The only alternative is through diplomatic negotiations. These negotiations would examine the issues involved within the particular diplomatic context of the problem, and hopefully some agreement or understanding will emerge.

Diplomatic negotiation takes place within a particular context, which is important for an understanding of the limits of the negotiation. The U.S. and the Bahamas have always had friendly relations. They share common economic and political systems, with a flourishing trading relationship. They are members of the same organizations, for instance, the Organization of American States and the United Nations. Admittedly, the Bahamas is more dependent on the U.S. than the other way around. American interests in the Bahamas are principally strategic. Geographic proximity would mean that the U.S. would not tolerate an unfriendly regime in the Bahamas, but this is unlikely. The U.S. also has important underwater bases in the Bahamas which were acquired from Great Britain when the Bahamas was one of its colonies. The Bahamas is an important resort area for many Americans.

The conflict over the lobster is not a strategic one, nor one of economic importance for the U.S. as a whole. Fishing and lobster harvesting affect the State of Florida, and particularly Dade County. Looked at in this context of U.S.—Bahamas relations, then, the conflict over the lobster is one that affects only a part of the U.S., that is, Southeast Florida. Given the history of American-Bahamian relations, it is unlikely that the U.S. would pursue this issue vigorously. In fact, it would appear that the United States would be quite willing to maintain normal diplomatic relations with the Bahamas in the absence of an agreement. It is within this context that the issues must be examined.

Both governments did attempt, in August 1975, to resolve the dispute through diplomatic negotiations. The Bahamian position was based on three principles: that any agreement entered into would have to be in the national interest of the Bahamas; that it would have to provide for reciprocal fishing rights; that any such agreement could only apply to boats owned by citizens of the United States. The government further stated that lobsters were an important resource, contributing greatly to the Bahamian economy. Therefore "it was not in the national interest to allow further exploitation of its fisheries resources by non-Bahamians even if they agreed to pay for them."^{2 3}

23 Bahamas, "Bahamas Government Position on Fishing Talks." 1975

The U.S. requested that 350 of its boats be allowed to take lobster from the Bahamas Banks and offered reciprocity to Bahamas fishermen on the U.S. continental shelf. Also, the U.S. offered technical and economic assistance in three specified areas: U.S. Coast Guard assistance in policing the Bahamas Banks; that there be a joint scientific examination of the lobster stocks on the Banks; and the establishment of a training scheme for Bahamian fishermen.²⁴ Since neither party was willing to accept the other's proposals the talks ended without an agreement.

V

This conflict involves both economic and legal issues. The Bahamian position is based on economic need and supported by legal practices. The fishing industry, of which the catching of lobster is a major component, plays an important role in the Bahamian economy. Because of smallness of size and general deficiency of natural resources, the economy of the Bahamas is largely based on tourism, service industries, agriculture and fishing. The vast potential of the fishing industry has gained recognition only in the past few years and it is estimated that by 1985 it will have a value of over \$25 million. Presently about 3.5 million pounds of lobster are caught each year. This figure, it is estimated, will grow to 10 million pounds by the late 1980s.²⁵

The legal basis for the Bahamian position is the 1958 Convention on the Continental Shelf and the precedent established by the 1974 U.S. amendment to the 1964 Act which provided the basis for similar Bahamian legislation. The 1958 Convention clearly gives the Bahamas jurisdiction over the resources of its continental shelf. Bahamas' reaction to the U.S. declaration, in 1974, of the lobster as a creature of the continental shelf, was not unexpected. Indeed, in the hearings conducted previous to the 1974 declaration, one of the State Department's objections was based on the anticipated reaction by other states. Specific mention was made of the spiny lobster, anticipated problems for American fishermen and potential conflicts between the U.S. and other nations.

Like the Bahamians, Cuban-Americans base their claim to trap lobsters on the Bahamas continental shelf on grounds of economic necessity. They also invoke "historic rights." It is true that Cuban-Americans have invested heavily in lobster traps, boats and other equipment. It is also true that the influx of Cubans into Miami in the

²⁴ Ibid.

²⁵ *Handbook of the Bahamas*.

early 1960s greatly increased competition among fishermen for lobsters with the constant and steady depletion of this resource from U.S. waters. However, the condition of economic necessity does not create a right to trap lobsters in waters of another state. Indeed, the U.S. has acknowledged that economic necessity does not of itself allow other states to exploit U.S. waters. Thus the U.S. placed restrictions on the exploitation of its own waters by foreign fishermen.²⁶ Further, the 1958 Convention emphasizes that continental shelf rights belong to coastal states, to the exclusion of all other states even if those rights are not immediately exercised. Finally, it is worth noting that subsequent to the breakdown of talks between the American and Bahamian governments in 1975, the former provided financial assistance to Cuban-American lobstermen to compensate for loss of fishing privileges in Bahamian waters and to refit vessels for other types of fishing activities.

With regard to the doctrine of "historic rights," there are strong precedents for a state to establish such rights in international law. These rights, however, reside with the state, not with individuals in their personal capacity. Further, this right may be established only after long uninterrupted practice. Cuba has had a historic right to fish in the Gulf of Mexico, a right that was recently recognized in the 1976 agreement between the U.S. and Cuba.²⁷ With regard to the Cuban-American claim of historic rights, therefore, there are some interesting legal points to be noted. First, Bahamas has been independent only since 1973. It could, therefore, object to the exercise of such rights and legislate to prohibit them only after 1973. The original demarcation was made in 1948. Second, the Bahamas government may recognize such rights, if they exist, and indeed grant them in a formal treaty. Third, historic rights, if they exist, reside with the state of Cuba. It follows, therefore, that individuals who may be of Cuban ancestry but who no longer reside in Cuba cannot claim such international legal rights. Such rights reside with the sovereign state of Cuba.

The first major obstacle to be overcome before any meaningful resolution of the problem is a clarification of the relationship of Cuban-Americans to the U.S. government in terms of international law. A state may normally be responsible for acts committed by its

26 See, for instance, An Act to Prohibit Fishing in the Territorial Waters of the United States, Public Law 88-308. Also, Fishery Conservation and Management Act of 1976, Public Law 94-265.

27 See agreed Minutes to the Agreement Between the U. S. Government and Government of the Republic of Cuba Concerning Fisheries off the Coast of the United States, T.I.A.S. 8689.

citizens on the international level. However, a basic pre-requisite of this responsibility is the bond of nationality expressed in the status of citizenship. In order to negotiate on behalf of and represent the Cuban-Americans the U.S. government must assume international responsibility for them. This can be accomplished through domestic legislation. Indeed this lack of international responsibility was one of the reasons for the failure of the 1975 talks.²⁸

Since it appears that Cuban-Americans cannot claim a valid international legal historic right to gather lobsters on the Bahamian continental shelf their interests must be accommodated within the context of American-Bahamian relations. International negotiations, therefore, between the U.S. and Bahamian governments appear to be the appropriate means for resolution of the problem. Given their legal and economic positions on the issues, it is not surprising that the Bahamas is reluctant to negotiate. The U.S. on the other hand is in a unique position to offer material benefits for the right to gather lobsters off the Bahamian coast.

An agreement signed between the United States and Brazil regarding shrimping could provide possible guidelines for the resolution of the lobster dispute.²⁹ The original agreement signed in 1972 was later revised and finally replaced by the 1977 agreement. The latest agreement provides for 90 U.S. fishing vessels of a specific size to harvest shrimp in a designated area and at specified times. The license fee is \$3,600.00 per vessel. The United States is financially responsible for treaty violations committed by American vessels in the designated areas. In addition, the U.S. has signed fishing agreements with Cuba³⁰ and Mexico.³¹ Agreements with the Bahamas and Canada remain to be negotiated. Elsewhere in the hemisphere shrimping agreements have been signed between Trinidad and Brazil. In all the examples cited, however, the licenses were granted to the states involved and not directly to the individuals. This is simply an accepted principle of international law that only states and not individuals are responsible at the international level.

As was stated at the outset, the sea is one of the last frontiers of mankind. And as land resources become depleted the resources of the sea will inevitably gain in importance. There has been much discussion concerning the exploitation of and jurisdiction over the

28 Bahamas stipulated that an agreement must apply only to citizens of the United States.

29 Shrimp Agreement, United States and Brazil, signed on 1 May 1977. T.I.A.S. 8851.

30 Agreement between the United States and Cuba, signed on 27 April 1977.

31 Agreement between the United States and Mexico, signed in Washington on 26 August 1977. T.I.A.S. 8852.

seas.³² Indeed, as previously noted, a number of multilateral and bilateral agreements have already been concluded. The resolution of the dispute between Cuban-American lobstermen and the Bahamian government lies in negotiation between the two governments. There is precedent for such negotiation.

32 As evidenced by the different Law of the Sea Conferences. The current one (1979) has also included such questions as pollution and scientific research.