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The Republic of China’s Claims Relating to the Territorial Sea, Continental Shelf, and Exclusive Economic Zones: Legal and Economic Aspects*

by Joseph W. Dellapenna**
and Ar-Young Wang***

I. PROBLEMS, PROSPECTS AND SOLUTIONS

For centuries the world’s oceans were regarded as belonging to whomever could assert control over them. As a result they were taken over, exploited and divided up by the powerful maritime nations with large navies which set about exploring unknown seas and appropriating new worlds.

In the 15th century, the Pope divided the “ownership” of the world’s oceans between Spain and Portugal which at the time had done the most maritime exploration. But this did not sit well with England, another great

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* This article is the final report of a study prepared for the National Executive Yuan of the Republic of China. Pursuant to the recommendations of this report the Republic by a decree issued September 6, 1979, enlarged its territorial sea to a breadth of 12 miles, and for the first time claimed an exclusive economic zone out to 200 miles from its coasts. The report has been edited slightly by the authors and footnotes have been added for purposes of publication. (Editor’s Note: This report is being reprinted in its entirety with explanatory footnotes and modifications as provided by the authors. The purpose of reprinting this report in this form is to provide the public with access to the report as it was submitted to the National Executive Yuan of the Republic of China.)

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2. COLOMBS, supra note 1, at 49; JONES, supra note 1, at 8.
maritime nation. When Philip II of Spain loftily warned Elizabeth I of England to order Francis Drake not to enter the "Spanish" waters in the Pacific she replied, "[T]he use of the sea and air is common to all; neither can any title to the ocean belong to any people [or] private man forasmuch as neither nature nor regard of public use permitteth any possession thereof."

Not long after that, the Dutch were told by the eminent jurist Grotius when he wrote about the right to sail the sea: "The ocean which encompasses the terrestrial home of mankind with the ebb and flow of its tides . . . cannot be held or enclosed, being itself the possessor rather than the possessed." He added: "Most things become exhausted with promiscuous use. This is not the case with the sea. It can be exhausted neither by fishing nor by navigation: That is to say, in the two ways in which it can be used."

Grotius's view, announced in 1609, became the basic rule of international maritime law, at least as far as the freedom of the "high seas" was concerned. However, with the passage of time, and mainly for defense reasons, it became the custom and practice that a coastal state had sovereign rights up to three miles from its shores, beyond which the freedom of the seas principle generally applied.

In 1793, Secretary of State Thomas Jefferson of the United States asserted his country's sovereignty over a three-mile-wide strip of water bordering the new nation's Atlantic coast, three miles being the distance of one marine league. The idea caught on and many other nations, seeing the advantage of a buffer zone between land and sea, followed suit with the same kind of declaration. This is sometimes explained as the range of land based cannon, but even when the range became much greater, three miles remained the internationally-recognized limit of a nation's sovereignty.

As recently as 1930 at the Conference on the Law of the Sea sponsored by the League of Nations there was general agreement of the law of the sea: the

3. COLOMBOS, supra note 1, at 50-51; FULTON, supra note 1, at 109-11; 1 OPPENHEIM, supra note 1, at 584.
5. Id.
6. BRIERLY, supra note 1, at 202-04; COLOMBOS, supra note 1, at 60-66, 87-95; JONES, supra note 1, at 10-13; 1 D. O'CONNELL, INTERNATIONAL LAW 454-59 (2d ed. 1970) [hereinafter cited as O'CONNELL]; 1 OPPENHEIM, supra note 1, at 584-91.
7. Note from Secretary of State Jefferson to the British Minister, Nov. 8, 1793, reprinted in 1 J. MOORE, A DIGEST OF INTERNATIONAL LAW 702-03 (1906).
9. C. BYNHERSHEOK, DE DOMINO MARIS DISSERTATIO 41-45 (1923); COLOMBOS, supra note 1, at 92-93; FULTON, supra note 1, at 558; 1 OPPENHEIM, supra note 1, at 490-92; Walker, Territorial Waters: The Common Shot Rule, 22 BRIT. Y.B. INT'L L. 210 (1945) [hereinafter cited as Walker].
10. Walker, supra note 9, at 230-31; but see 1 OPPENHEIM, supra note 1, at 491-92. See also JONES, supra note 1, at 56-60.
11. BRIERLY, supra note 1, at 203-07; COLOMBOS, supra note 1, at 103-08.
high sea was free for the use of all; a narrow, generally three nautical miles wide, belt of territorial seas were subject to the sovereignty of the adjacent state and several somewhat wider, but still essentially narrow, contiguous zones were recognized for the control of sanitary, defense, immigration and smuggling problems. After World War II this consensus rapidly disintegrated, so that in the 1958 United Nations Conference on the Law of the Sea, although it succeeded in drafting four conventions on the law of the sea, there was no agreement on the proper breadth of the territorial sea and other important matters, and the Convention on the Conservation of the Living Resources of the Sea failed to secure general ratification. What consensus there was in 1958 gradually disappeared in the face of advancing technology and increasingly divergent claims by the vastly enlarged community of nations. Two subsequent United Nations Conferences on the Law of the Sea — in 1960, and beginning in 1973 (this third conference recently opened its Eighth Session in Geneva) — thus far have failed to produce any new conventions, and seem only to have more sharply focused the differing perspectives of the industrialized North and the underdeveloped South.

The result of this apparent confusion in the law of the sea is a steadily emerging new consensus — emerging in the form of state practice rather than in the form of treaties. The resources of the sea are no longer viewed as inexhaustible, thanks largely to enhanced capabilities in the technologies for fishing and for extraction of mineral wealth. Even when used solely for navigation, increasing areas of the major sea routes are too busy to rely solely on regulation of each ship only by the nation whose flag it flies, while the consequences of navigational accidents may so substantially effect the neighboring


shore as to create a demand for shore-based control and regulation.\textsuperscript{18} While these technologies generate pressure to extend national claims into adjacent seas, at the same time advances in military technologies create the means to effectuate such claims. Such devices as aerial surveillance, radar, sonar, and high speed patrol craft give any nation willing to spend the relatively modest sums these devices cost the capability of effectively controlling ever wider expanses of sea. Thus tiny Iceland has three times in the last 20 years extended its claims to an exclusive fishing zone (to 12, 50, and finally 200 miles), and enforced it successfully in the face of at times serious opposition from the United Kingdom, despite the latter's vastly greater military and economic resources.\textsuperscript{19} The effect of this combination of motive and means has been a steady erosion of freedom of the seas — until 1950 the cornerstone of all thinking about the law of the sea.

This erosion of the freedom of the sea poses several problems for the Republic of China. First, because of its exclusion from the United Nations,\textsuperscript{20} it has not been permitted to participate in the currently ongoing Third United Nations Conference on the Law of the Sea. Thus it has not been able in any formal way to make its views known on the many troubling questions which that Conference has been struggling with — so far unsuccessfully. Second, as more and more states come to assert exclusive claims to areas of the seas adjacent to their coast, Chinese interests are being progressively excluded from these areas.\textsuperscript{21} At the same time, by refraining from making similar claims itself, alien interests, often from the same nations which claim to exclude seas by foreigners, are free to extract wealth from waters up to three miles from the coasts of the Republic of China. As the Republic of China finds fishing one of its major industries, and as this Chinese fishing industry is developing an increasingly advanced technological base, which both permits extensive operations in distant waters and intensive operations in nearby waters, important economic interests in the Republic of China face serious loss. Furthermore,

\begin{itemize}
\item \textsuperscript{20} The Republic of China withdrew from membership in the U.N. on October 24, 1971.
\item \textsuperscript{21} As will be developed below, the Republic has developed a substantial deep-sea fishing industry which is progressively excluded from ever greater parts of the ocean by claims of 200 mile exclusive fishing zones by ever increasing numbers of nations. \textit{See}, e.g., \textit{The Fishery Conservation and Management Act of 1976, 16 U.S.C.} § 1801 (Supp. 1977).
\end{itemize}
should the extraction of important minerals from seabeds near the Republic of China become feasible, these resources also are not yet effectively controlled by the government. Even should the government decide to permit foreign investment in such extractions, there should be administrative means for regulating the activities of such investors, and for realizing national revenues from their activities. Should the Republic of China develop the necessary technologies itself, and attempt to extract minerals from more distant seabeds, it would once again encounter nearly universal claims around the world to exclude foreigners from such activities. Fortunately thus far, assertions of power to regulate pure navigation have been especially limited, and generally have not threatened interests of the Republic of China. Should claims be made which do interfere with navigation interests of the Republic of China, however, the Republic’s adherence to the narrow, traditional claims gives it little negotiating leverage in any attempt to resolve such difficulties.

The problems presented to the Republic of China by these ongoing developments in the Law of the Sea are peculiarly difficult because of the frequently adverse diplomatic situations confronting it. Not only is the Republic excluded from the Third United Nations Conference, but it also has unusual impediments in bilateral relations with many nations. In the face of these difficulties merely to negotiate any solution to such disputes as from time to time arise makes it desirable for the Republic of China to be in a position to give rights or privileges to the other nations, as well as to claim rights or privileges for itself. On the other hand, making such claims is likely to create a new source of discord with other nations, when there might appear to be difficulties enough already.

As mentioned above, the immediate and most serious problems the Republic of China faces will be the restriction of fishing within the exclusive fishing zones, which have been announced by many coastal states. Some brief reviews of various coastal states’ claims on these 200-mile exclusive zones will, therefore, be necessary.

In 1947, Chile and Peru, both with long coastlines made unilateral claims of “protection and control” out to a distance of 200 nautical miles to reserve for their own exclusive use the rich anchovy fishery created by the offshore upwelling of the nutrient-rich Humboldt Current. In 1952, these two countries


with Ecuador signed the Declaration of Santiago, jointly asserting 200 mile claims. 24 Other nations followed their lead.

The United States 200-mile fishing limit law, which took effect on March 1, 1977, 25 appears to have won general but cautious approval of the fishing industry. The United States intended to ensure that stocks of fish found within 200 miles of the coast are properly conserved and that its fishermen obtain the maximum benefit from those stocks. It provides that fish, which are surplus after conservation needs and the requirements of the U.S. recreational and commercial fishermen have been met, may be allocated to foreign vessels to catch under certain tightly controlled circumstances. 26

Foreign vessels must apply for permits to fish the U.S. Fishery Conservation Zone. Each foreign fishing vessel is charged a fixed annual access fee of $1 per gross registered ton, not to exceed $5,000 per vessel. 27 In addition, each foreign nation with fishing vessels in the zone is charged a fee of 3.5 per cent of the total dockside value of pounds of fish allocated to that nation. Foreigners are not able to keep any salmon, Pacific halibut, or creature of the continental shelf such as crabs, unless authorized. The possibility of expanding trawl fishing is exciting considerable interest among U.S. west coast fishermen. This is evidenced by the number of new trawlers being built, others being converted and the rush to buy sophisticated electronic fish finding and catching gear.

Canada's management of the 200-mile offshore fishing zone, which went into effect on January 1, 1977, has given Canada an area of more than 600,000 square miles of high seas to patrol and manage. 28 As a condition of licensing, foreign fishing vessels must supply the Canadian authorities with information on catch and fishing effort. About 1000 at-sea and in-port inspections of foreign vessels took place in 1977. Maximum fines on a single charge are $25,000; other possible penalties are loss of catch, vessel and fishing licenses. Jail sentences can go up to two years. Given sufficient justification, Canada could also take away the licenses of all other vessels from the offender's country.

Australia, which announced a 200-nautical mile fishing zone on March 31,


26. Id. §§ 1821-1825.

27. Id. § 1824(b)(10). See 50 C.F.R. § 611.22 (1978).

1978,29 has the second longest coastline of any country in the world, about 20,000 km. Although the continental shelf is fairly narrow along much of the coast, the area of shelf adjacent to Australia is also great — about 2 million square km., which places Australia about third in comparison with other countries. In spite of this immense coastal area Australia ranks low among the fishing nations. It is not even among the first 50 fishing nations.

On Australia's northern shelf, a Taiwanese scientist, H. C. Liu, has estimated the demersal fish stock of this area at 2 million tons,30 and he suggests that in this area the sustainable yield may be as high as 50 per cent of the unexploited stock size of one million tons.31 Since 1970, the fishing fleet of the Republic of China has fished in this area, and caught annually about 80,000 tons,32 which occupied about 9 per cent of the Republic’s annual fishing catch.33 However, the Sino-Australian fishing agreement, signed in spring 1979, has only permitted the Republic’s ships to catch 37,500 tons annually in future years.34

In order to manage its resources properly, Australia would have to acquire sufficient knowledge and understanding of them to enable her to do so.35 Thus in deciding on the conditions under which other nations should be permitted to fish within the Australian zone, three main considerations are involved. These are: support for the Australian economy and assistance to the Australian industry in developing the capability to utilize these resources itself; proper management of the resources; and assistance in acquiring the knowledge necessary to establish good management practices.

Before examining proposals which the Republic of China could adopt, we must first realize that the fishery industry is one of the most important industries in the Republic. The number of fishermen in Taiwan, the Republic of China, at the end of 1977 numbered 301,518, of whom 190,302 were full-time and 111,216 were part-time.36 The total fisheries production in 1977 reached 854,784 mt. The breakdown among the four categories of fisheries is shown in the following Table 1. In the same Table, we will also show the production goals, planned by the authorities, of these four categories to the end of 1986.

29. Allen, Extended Fishing Zone Calls for Major Increase in Research Efforts and Budget, in AUSTRALIAN FISHERIES 3 (Dec. 1977) [hereinafter cited as Allen].
30. Liu, The Demersal Fish Stock of the Waters of North and Northwest Australia, 6 ACTA OCEANOGRAPHIC TAIWANICA 185 (1976) [hereinafter cited as Liu].
31. For a detailed discussion of the bioeconomics of sustainable yield, see Smith, Economics of Production from Natural Resources, 58 AM. ECON. REV. 409 (1968).
32. See Liu, supra note 30.
33. FISHERIES YEARBOOK OF THE TAIWAN AREA 30 (Provincial Gov't of Taiwan 1978) [hereinafter cited as FISHERIES YEARBOOK].
34. Data provided by the Fishery Division of the Sino-American Joint Commission on Rural Reconstruction (JCRR) (copies available from the authors).
35. Allen, supra note 29.
36. See FISHERIES YEARBOOK, supra note 33, at 18.
TABLE 1

<table>
<thead>
<tr>
<th>Fisheries</th>
<th>1977 (mt)</th>
<th>1986 (mt)</th>
<th>Rate of Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>854,784</td>
<td>1,500,000</td>
<td>75.4%</td>
</tr>
<tr>
<td>Deep Sea</td>
<td>339,411</td>
<td>700,000</td>
<td>106.2%</td>
</tr>
<tr>
<td>Inshore</td>
<td>342,753</td>
<td>460,000</td>
<td>34.2%</td>
</tr>
<tr>
<td>Coastal</td>
<td>32,992</td>
<td>40,000</td>
<td>21.2%</td>
</tr>
<tr>
<td>Aquaculture</td>
<td>159,628</td>
<td>300,000</td>
<td>114.0%</td>
</tr>
</tbody>
</table>

The four categories of fisheries are arbitrary classifications and may be defined as follows:

a. Deep-sea fisheries are fisheries that operate fishing vessels of over 50 tons in size. They are mainly trawlers and tuna long-liners.

b. Inshore fisheries are fisheries that operate powered vessels of less than 50 tons in size, which are mainly drag-netters, purse-seiners, long-liners, handliners and spear fishing boats.

c. Coastal fisheries are fisheries that make use of nonpowered boats or operate without boats. They are mainly set net fishing, fishing with light, beach seining and gill-netting.

d. Aquacultural includes culture of fish, shellfish, etc. in brackish and fresh water and in shallow seas.

Imports of fishery products in 1977 totaled 109,845 mt, valued at U.S. $85,800,000. The exports totaled 205,966 mt, valued at U.S. $468,700,000. The capital investments in fisheries in 1977 totaled U.S. $61,050,000.38

Needless to say, the main obstacles to prevent the fisheries production from reaching these goals will be the restriction of access, which results from the claims to extend exclusive fishing zones announced by the coastal states. Thus now is the time for protecting the interests of the Republic's citizens by seeking an adequate policy to resolve these imminent problems.

There are essentially three approaches available to the Republic of China in response to these problems. First, it might do nothing to change its existing law, thereby avoiding the provocation of any new diplomatic difficulties with those who now use the waters and seabeds near its coast (this we shall term the Minimal Solution). But this does nothing to enhance or protect Chinese interests in more distant areas. This approach also precludes the meaningful articulation of a Chinese position in the arena of state practice — the arena where the new law of the sea is being created. Second, the Republic might make a claim coextensive with the broadest claim presently nearing acceptance among the nations of the world39 (this we shall term the Maximal Solution). Such a

37. Id.
38. Id.
39. See note 22 supra.
claim would entail enlarging the Territorial Sea from its present width of 3 nautical miles, to a width of 12 nautical miles, and the further assertion of effective and exclusive dominion over the adjacent continental shelf out to its geographical terminus, and over an exclusive economic zone extending to a maximum of 200 nautical miles from the Republic’s shores. This claim is most likely to create some period of diplomatic contention, particularly with the Republic’s neighbors, but it also proffers substantial opportunities to resolve those disputes in mutually beneficial ways. Or third, the Republic could assert some claim greater than its present claims, but less than the maximum now coming to be accepted (which we shall term the Moderate Solution). For reasons to be discussed below, this should take the form of limiting the claim on the continental shelf to places where the superjacent waters have a depth of 200 meters or less, and to limiting the exclusive economic zone to a width of 50 nautical miles from the Republic’s shores. This solution would offer some protection to Chinese interests while generating fewer diplomatic disputes. On the other hand, it would also provide fewer mutually beneficial ways of resolving such disputes as will arise, for this solution provides little diplomatic leverage to the Republic of China for negotiating settlements for these disputes.

The remainder of this paper will analyze in detail the three foregoing solutions, both from legal and economic perspectives, before finally recommending the course the Republic of China should adopt. To help in your reading the following analyses, it may be useful to know that we shall recommend the Maximal Solution.

II. Evaluating Solutions

The following section will closely examine the three possible approaches for the Republic of China to resolve the Law of the Sea problems outlined above. The solutions are diagrammed below in the order in which they will be examined.

<table>
<thead>
<tr>
<th>Territorial Sea</th>
<th>Continental Shelf</th>
<th>Exclusive Economic Zone</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Minimal Solution 3 nautical miles</td>
<td>to 200 meters of none water depth; few regulations</td>
<td></td>
</tr>
<tr>
<td>B. Moderate Solution 12 nautical miles</td>
<td>to 200 meters of 50 nautical miles water depth; detailed regulations</td>
<td></td>
</tr>
<tr>
<td>C. Maximal Solution 12 nautical miles</td>
<td>to geographic limit of shelf; detailed regulations</td>
<td>200 nautical miles from shore</td>
</tr>
</tbody>
</table>
A. The Minimal Solution

The solution least likely to generate any diplomatic confrontations is to preserve the present laws of the Republic of China regarding the Law of the Sea. These existing laws establish a breadth of 3 nautical miles for the territorial sea — the least now claimed by any nation. As to the continental shelf, sovereignty would be claimed pursuant to the 1958 Convention on the Continental Shelf.40 This claim would be out to a water depth of 200 meters or to the yet-to-be defined limit of exploitability.41 If the goal is to avoid confrontation with other nations, then the circumspect approach would be to claim only to the 200 meter isobath, and to neglect to claim any part of the seabed under deeper waters, although this Convention (ratified by the Republic of China) would permit a greater claim under the exploitability test. Finally, although there might be very narrow claims of protective contiguous zones,42 there would be no claim of any exclusive economic rights in the waters beyond the limits of the territorial sea. Even as to the economic rights in the continental shelf little effort would be made to develop its resources or to regulate its use.

This solution has the considerable advantage of avoiding virtually all diplomatic difficulties which might ensue from the assertion of any wider claims. This is because these claims are beyond dispute. They are the least any nation is entitled to make with regard to the waters adjacent to its coasts. Such claims are fully approved by the existing 1958 Conventions on the Law of the Sea, specifically the Convention of the Territorial Sea and the Contiguous Zone, and the Convention on the Continental Shelf. Although the Republic of China has only ratified the Convention on the Continental Shelf,43 the Conventions on the Territorial Sea and the Contiguous Zone, and on the High Seas, are in general terms expository of customary law. This has specifically been announced by the International Court of Justice in the North Sea Continental Shelf Case,44 and appears equally true of the other two conventions mentioned above.

As to the practice of states the 3 mile breadth is, as noted above, the least claimed anywhere. As of December, 1974, only 30 nations of 128 (23.4%) claimed as little as 3 nautical miles.45 In the intervening three years, this

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41. Id. art. 1.
42. Convention on the Territorial Sea and the Contiguous Zone, supra note 12, art. 24. This Convention has not been ratified by the Republic of China.
43. TREATIES IN FORCE, supra note 13, at 384.
number has further declined. Thus such a claim is beyond challenge on legal grounds.

Similarly, claim to the adjacent continental shelf up to the 200 meter isobath is beyond question. Such a claim is permitted by the Convention on the Continental Shelf — which is the most widely ratified of any of the 1958 Conventions, and which alone has been directly held by the International Court of Justice to be declarative of the customary law. By neglecting either to develop its shelf or to regulate the use of its shelf, the Republic would further minimize the prospects of controversy over its use with any potential competing users.

Claims of contiguous zones could be of two types — protective or economic. Protective contiguous zones are provided for in the Convention on the Territorial Sea and the Contiguous Zone, Art. 24. The zones were to be solely for the prevention of infringement of customs, fiscal, immigration, or sanitary regulations. This article did not merely declare existing customary law in at least two respects. First, it did not exhaustively list the purposes for which such zones had in fact been established. At the least, it omitted mention of national security zones. Second, the article specified a narrower width than many nations had in fact claimed. Thus the United States claimed a customs zone with a maximum possible width of 62 miles, and an Air Defense Identification Zone extending at least 150 miles to sea. Nor did the Convention provide for exclusive fishing or economic zones.

Increasing numbers of nations claim an exclusive economic or fishing zone of up to 200 miles in breadth. The United States claimed such an exclusive fishing zone for itself from March 1, 1977. Nearly all the proposals made in the Third United Nations Conference on the Law of the Sea have provided for some such exclusive economic zone, although varying in their details as to the breadth and limitations on the rights of the coastal states.

The foregoing should demonstrate that the assertion of protective contiguous zones, without any economic contiguous zone, as contemplated by the

46. Convention on the Continental Shelf, supra note 40, art. 1.
47. TREATIES IN FORCE, supra note 13.
53. See note 25 supra.
1958 Conference on the Territorial Sea and the Contiguous Zone would almost certainly result in no controversy with any other state. This is the great advantage of continuing the Minimal Solution as the law of the Republic of China regarding all three areas: territorial sea; continental shelf; and contiguous zones.

The great disadvantage of the Minimal Solution is that it secures diplomatic ease at the cost of abandoning major interests of the Republic of China and its people. Opportunities to control access to the waters adjacent to China's coasts for military, economic, and other purposes are restricted to the narrowest scope claimed by any other country, and the day can not be far off when these claims will be less extensive than any other country as more and more nations move to enlarged claims. As these claims are so restricted, they afford the Republic and its citizens far less protection than most other countries claim for themselves and their citizens. This not only permits interests to intrude into nearby waters of the Republic, but it also prevents the Republic from being able to offer reciprocal concessions in attempting to protect the access of Chinese fishermen to waters near foreign shores, or other similar interests of China and its citizens in distant waters. The claims of the Republic of China under this Minimal Solution are so restricted that there is almost no room for concessions by the Republic in favor of other nations, and should some concessions be devised they would be so limited in scale that they could scarcely provoke any meaningful counter-concessions from other countries.

To be more specific, the Republic of China is a high consumer of animal protein — about 150 kg. per person per year, of which about 37.4 kg. comes from fish products. At the beginning of 1977, the population of Taiwan, the Republic of China, was 16,508,000. As the population increases steadily, about 300,000 per year, the people living in this small island will increase to about 20 million by the end of 1986. This is one of the most important pressures on the Republic's fisheries to promote their fisheries production.

The exports and imports of fish products of the Republic contributed a surplus of 400 million U.S. dollars in 1977. Being predicted and planned to increase in the future years, this is also another serious pressure on their fishing activities.

The deep-sea fisheries and inshore fisheries are two major fisheries of the Republic and occupy 39.8% and 40% respectively in total fish production of this nation in 1977. These two major fisheries will occupy about 46.7% and 31% respectively in the total fish production planned by the authorities in 1986.

54. Gih, Present Status and Further Development of Fisheries Resources of the Ocean, JCRR Fisheries Series No. 16 (Mar. 1975) [hereinafter cited as Gih].
55. Statistical Yearbook of Taiwan (Republic of China 1979).
56. Id.
The deep-sea fisheries use fishing vessels of over 50 tons in size, consisting mainly of otter trawl (single vessel operation), bull trawl (pair vessels operation) and tuna long-line. There are presently 344 vessels totaling 46,649 tons of otter trawl and 368 vessels of bull trawl totaling 79,342 tons, both operating mainly in the area of Taiwan Strait, East China Sea, South China Sea, Sunda Shelf and North Australian Sea, some larger vessels even reaching to the coasts of Alaska and West Africa. There are presently 680 vessels, aggregating 139,995 tons, of tuna long-line. Their fishing extends to the Pacific, Indian and Atlantic Oceans.

The announcements of 200-miles exclusive economic zones and/or fishing zones by various coastal states threaten to decrease about 50% of the fish catching of the Republic's deep-sea fisheries. The plausible compensatory approaches to make up this loss the Republic of China now faces are first, to negotiate with various coastal states about mutual fishing cooperation, and second, to more intensively exploit the abundant migrating fish resources in Taiwan's adjacent waters. Unfortunately, the Republic of China does not have any room available to offer concessions in favor of another nation in negotiation on the basis of mutual benefit. Thus it is difficult to expect success in the first approach if the Republic still adopts the Minimal Solution. On the other hand, the Republic of China does not possess any exclusive right under the Minimal Solution to exploit the abundant migrating fish resources such as mackerel, anchovy, amber fish, bonito, mullet, skipjack, etc., which exist in the waters around Taiwan.

The inshore fisheries are using powered vessels of less than 50 tons in size, consisting mainly of drag-netters, purse-seiners, long-liners, hand-liners and spear fishing boats. There are presently 10,477 vessels totaling 146,526 tons, fishing within 30 nautical miles of the Republic's surrounding waters. Even this, the narrowest inshore fishery area in the world at the present time, still faces serious threats from foreign vessels since the Republic of China claims only 3 nautical miles of sovereignty under its present law regarding the sea.

In sum, the Minimal Solution neither protects important interests of the Republic of China and its citizens, such as most other nations now protect, nor does it provide the means whereby mutually beneficial solutions might be negotiated. Since much more can be claimed without provoking serious diplomatic difficulties in view of the present developments in the Law of the Sea, little or nothing is gained by continuing the Minimal Solution, while much is lost.

B. The Moderate Solution

Once one defines the Minimal and Maximal Solutions, the Republic could for good reasons settle on any intermediate solution as a compromise between its various competing interests. In this context those interests are the adequate
protection of the economic and security interests of the Republic without provoking diplomatic contentions which could rebound to the serious injury of the economic or security interests of the Republic. Any new claims by the Republic should contain two elements: a breadth of 12 nautical miles for the territorial sea; and a clear assertion of authority over the continental shelf to a depth of 200 meters for the superjacent waters, in the form of detailed regulations designed to promote and to regulate its use. Further, there should be declared an exclusive economic zone for the use of licensees from the Republic out to some appropriate distance from shore. With the goal of maximizing protection of the economic interests of the Republic while minimizing the risks of confrontations with its neighbors, we have here used the distance of 50 nautical miles, which is wide enough to assert control of substantial resources, but narrow enough to avoid overlapping the claims of neighboring states. Certain other contiguous zones might be created or continued for protective purposes, but most of these would be absorbed into the enlarged territorial sea.

The 12 mile territorial sea represents the emerging consensus of the practice of nations. In December, 1975,57 56 (43.4%) of 128 nations had asserted 12 miles as the breadth of their territorial sea. Only 24 (18.8%) asserted any greater breadth. In the three years since the consensus on 12 miles, it has become even more pronounced. Even the United States, long the staunchest supporter of the 3 mile limit, has publicly accepted the 12 mile breadth while insisting that this be accompanied by international agreements to preserve free navigation in international straits of greater breadth than 6 miles, but less than 24 miles.58 Thus the 12 mile limit is unlikely today to provoke any dispute, especially as there are no international straits under the control of the Republic of China which are less than 24 miles wide. Such a territorial sea would also be sufficient for the purposes of protective contiguous zones as provided in Article 24 of the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone.59 These purposes are to prevent infringement of customs, fiscal, immigration, or sanitary regulations. Article 24 limits the breadth of such zones to 12 miles from the shore. Full authority for these purposes would exist in the territorial sea, so no special zones would be necessary. Nor would such a widened assertion of authority interfere with freedom of navigation since there would still exist within the territorial sea the right of innocent passage.60 There is some dispute whether this right extends to

57. LIMITS IN THE SEAS, supra note 45. Cf. O'CONNELL, supra note 6, at 461-65.
60. Id. arts. 14-23.
military ships, and it does not permit submerged navigation. While these restrictions are of concern to the major navies of the world with regard to international straits, there are no such straits involved in the present situation. The Republic of China's national security reasonably requires control of such navigation in waters within 12 miles of its coasts. Indeed, the Republic could reasonably claim a special national security contiguous zone of much greater breadth under existing international law.

Similarly, the Republic should make effective its claims to the adjacent continental shelf. As with the 12 mile territorial sea, an effective assertion of control out to the 200 meter isobath is beyond legal challenge. It is the minimum authorized by the 1958 United Nations Convention on the Continental Shelf, which has been ratified by the Republic of China. Special provisions must be made for negotiating demarcation lines with Japan and the Republic of the Philippines, and some limitation on development of the continental shelf in the direction of those countries pending agreement on the lines of demarcation should be made. This should be seen not, however, as an invitation for discord with neighbors, but as an opportunity to develop new cooperative links pursuant to successful negotiations conducted in a spirit of mutually beneficial exchange. Effective assertion of control over the continental shelf would, of course, have to be suspended with regard to the shelf adjacent to coasts currently held by the rebel regime pending recovery of the mainland.

Increasing numbers of nations now assert either exclusive fishing zones or exclusive economic zones over waters of varying widths from their coasts, up to a maximum of 200 miles. Such a zone has been included in all of the various proposals before the Third United Nations Conference on the Law of the Sea. While varying widths have been suggested for such a zone, sometimes called the "patrimonial sea," there appears now to be increasing agreement on 200 miles as the maximum permissible width. Also, various limitations have been proposed on the powers of the coastal state in this zone, particularly with a view to enhancing the rights of landlocked states. There is as yet no discernible agreement on such limitations. Today the major resource to be gained from such a claim is fish, since mineral rights are generally already protected by the claim with regard to the continental shelf. There is no reason,
however, not to anticipate future technologies and to claim authority over the economically usable resources of these waters of whatever nature. Given the increasingly general acceptance of such zones, the only real problem should be defining its width.

If the purpose of such a zone is to enhance the economic growth of the Republic, and particularly its fishing industry, then the broader the zone the greater the likelihood it will achieve its purpose. On the other hand, there is also greater likelihood of diplomatic confrontation with other nations which use the deep ocean fisheries near to the Republic. This risk can be minimized by selecting a narrow width, particularly one which does not overlap waters which are closer to other nations than to China, such as the 50 miles width selected for this proposal. Any other width might, in fact, be selected, but the principles of the analysis would remain unchanged.

The advantage of selecting a relatively narrow width for the exclusive economic zone is that it gives some protection of the Republic's fishing industry while reducing the risk, and circumscribing the nature of subsequent diplomatic confrontations. Such a narrow zone would not, however, prevent all diplomatic controversies since several nations, notably Japan and the Republic of Korea, already have substantial fishing interests within 50 miles of the Republic's coasts. And such a claim by the Republic would be an excuse for the diligent prosecution of such claims against Chinese fishing boats, as the claims of Japan and Korea are out to 200 miles. The smaller breadth of the claim of the Republic of China could hamper any attempt to negotiate mutually beneficial concessions with nations making broader claims. Indeed, it is not inconceivable that some countries will decide that they have more to gain from excluding the Chinese from a 200 mile zone around their coast, than they will gain from securing access within a 50 mile zone near the Republic's coasts. Such a narrow limit may even hinder reaching agreements to demarcate the boundaries between islands under differing sovereignties. Thus, if Japan claims 200 miles, and the Republic of China only 50 miles, what concession can the Republic offer the Japanese for their surrender of part of their claim since the Republic has already foresworn any claim on the Japanese side of these waters. It would be better to assert a broader claim in such a way that friendly and mutually beneficial solutions are invited rather than to unilaterally renounce any claim which might intrude upon a neighbor. Such a broader claim would also enhance protection of Chinese interests where there are no other lands in close proximity.

In sum, the Moderate Solution gives some considerable protection to the interests of the Republic and its citizens while foreswearing any assertion of authority which might in the least provoke confrontations with neighboring

countries. While such an approach may appear attractive, it is illusory. Confrontations with neighbors are inevitable as more and more nations make ever broader assertions of authority over nearby seas. Confrontations in such circumstances can only be avoided if the Republic is prepared to forewear protecting or asserting the interests of its citizens in the waters of its neighbors, while the successful negotiation of mutually beneficial solutions of these difficulties is hindered, if not altogether prevented, by excessive caution in the claims asserted by the Republic. The greater the initial claim by the Republic, the greater the concessions it can offer in exchange for concessions for the other side. The process is not hampered if the initial assertion of these claims is made in such a fashion as to invite cooperative determination of mutual rights where mutual interests exist. The form of the claim, not its content, is where unilateral concessions should be made.

C. The Maximal Solution

The Maximal Solution would incorporate the same features as the Moderate Solution with regard to the territorial sea and protective contiguous zones. The discussion of these matters need not be repeated here. The approach to the continental shelf and the exclusive economic zone would be considerably different in that it would be considerably broader. Even here, however, the claim would not be as extensive as the broadest assertion now made — a 200 mile wide territorial sea. Rather the claims to be asserted here would be the broadest likely to gain acceptance from other nations, and the claims should be asserted in a way to invite discussion leading to mutually beneficial solutions where other nations rightly feel that the Republic of China’s claim impinges on their national interests.

With the foregoing general points in mind, the specific assertions of authority contemplated under the Maximal Solution are: over the adjacent continental shelf to water depth as far as the true geographical limits of the shelf; and over an exclusive economic zone to a maximum breadth of 200 miles from shore. Both of these claims should be suspended as to those parts of the Republic not actually under the effective control of the government pending restoration of its authority. And such claims should be temporarily suspended where they would reach into waters or seabeds closer to other nations than to the Republic of China to provide a reasonable opportunity to negotiate fair demarcation lines. Such an approach not only affords maximum protection to Chinese interests, it also becomes a channel for further positive experiences between the Republic and other nations with whom it will have to deal regarding these claims. Not only immediate neighbors will be affected by these new

68. LIMITS IN THE SEAS, supra note 45.
claims. Thus, these claims will become the occasion for favorable exchange even with distant nations.

Using the United States as an example of a distant nation which will be interested in these claims, its reaction can be predicted with some accuracy. There may well be the formality of a protest, but in fact the position of the Republic of China can only be enhanced. The major real interests of the United States in the water of the area can easily be accommodated. By restricting the enlarged territorial water claim to 12 miles, no real interference is threatened to the movements of the U.S. Navy. Even should an enlarged National Security Zone or Air Defense Identification Zone be proclaimed or enforced, this could easily be structured so as to accommodate U.S. military needs. The other potential U.S. interest in the region would be in the exploitation of the mineral resources of the continental shelf. This interest is still only potential, not actual, and thus can be accommodated to the extent the Republic of China chooses in light of the benefits to be achieved from accommodating it. Thus licensing U.S. companies to extract these resources could speed their development while forging new ties of mutual interest between the countries. On the other hand, restricting such extraction to Chinese, while foregoing the former advantages, does not impinge directly on substantial existing interests of the United States.

In one area the interests of the Republic even in distant waters will be enhanced. Since March 1, 1977, fishing by unlicensed foreign fishing vessels has been prohibited within 200 miles of the coast of the United States except as to highly migratory species of fish. Licenses may be issued only pursuant to a valid international fishery agreement, and then only on a basis of reciprocity, that is, only if the second nation is prepared to grant like privileges to U.S. fishing vessels. The enlarged breadth of claim puts the Republic of China in a position to offer reciprocal permits. If few or no American fishing vessels choose to avail themselves of this privilege, it would still qualify Chinese boats for such permits from the U.S. pursuant to a suitable agreement. Since any new agreement to enlarge permitted Chinese catches in U.S. waters would have to be approved by Congress, now would be an opportune

69. Defense Dep't Press Release, supra note 58, reprinted in Knight, supra note 24, at 332.
72. Id. § 1813.
73. Id. § 1821.
74. Id. § 1823.
time to attempt to secure agreements. Such an agreement would be a further tangible token of support for the Republic of China without directly controvring any other agreements to which the U.S. is a party. This would appear to fit the mood of Congress particularly well at this time. But such an agreement is made much easier by the opportunity to offer reciprocal privileges to American fishermen which in turn requires the assertion of some substantial exclusive economic claim of the Republic's coasts.

Japan, as an illustration of the opportunities presented for negotiating mutually beneficial solutions with neighboring nations, would have similar interests and similar responses as to the matters discussed with regard to the United States. Japan would also be concerned with precisely delineating the boundaries for the continental shelves, and for exclusive economic or fishing zones, where Japanese and Chinese claims overlap. If properly phrased, the proclamation of the new claims by the Republic of China could be an invitation to negotiate these boundaries rather than an occasion for confrontation and discord. Presented as such, neither side of the negotiating process need fear loss of face. It is true that these negotiations, as with the United States, will have to be conducted through what are technically unofficial channels. That cannot be helped. However, the settlement of such important matters through "unofficial channels" cannot but underscore the absurdity of the present posture of these governments vis-a-vis the Republic of China, and this must in the long run rebound to the benefit of the Republic.

The Republic of China has many strong bases on which the 200 mile exclusive economic would be justly claimed. First, protection of the livelihoods of inshore fishermen living in the Republic. Second, conserving the natural resources, including both replenishable and nonreplenishable stocks, at sustainable levels for all people. And third, for helping to develop better utilization of these resources.

Regarding protection of the livelihood of the Republic's inshore fishermen, many biologists and economists have deeply analyzed this problem from different perspectives. For illustration, the purse seine fishery operating in northeastern Taiwan's waters will be a good example. There are more than 5,000 full-time fishermen and more than 400 small size fishing vessels, scaling from 20 to 30 tons, in this fishery. A research project found the following:

(1) The rate of return on investment (ROI) is relatively small: the ROIs of 1973, 1974 and 1975 are 4.9%, 2.2% and 8.4% respectively.

75. Gih, supra note 54; Liu, supra note 30.
(2) The average fisherman's income is lower as compared with that of other economic segments. The average income per month in 1973, 1974 and 1975 was U.S. $61.5, $53.1 and $72.4 respectively.

(3) The calculated income statements in 1973, 1974, 1975 show that 51.7%, 58.8% and 36% of industry in the respective years are in net loss.

(4) The most troublesome factor influencing the operations is that the fishery resources are badly deteriorated.

(5) The degree of resource scarcity is aggravated by the fact that the productivity per ship decreases annually at the rate of $1.97 \times 10^3$ kgs.

(6) That new fishing grounds near to traditional ones exist and are abundant in migratory fish is proven by the fact that Japanese large purse seine ship groups catch over 300,000 tons annually in the southern area of the East China Sea. The Japanese ships operate mainly within 100 nautical miles of the Republic's coast. The quantities caught by Japanese are more than 10 times the quantities caught by the Republic's inshore fishermen in the same area.

Although several strong recommendations have been addressed to ship owners and the authority for resolving this serious problem, the threat to the livelihoods of the Republic's inshore fishermen will continue as long as the Republic of China does not have any right to exclude foreign vessels.

There are abundant migratory fish resources existing in the waters around Taiwan such as mackerel, anchovy, amber fish, bonito, mullet and skipjack. The principal opportunity for expansion in the Republic's region lies with the bonito and skipjack tuna, which are species of tropical and subtropical waters, especially in the southern Pacific Ocean. At present a major survey of the skipjack tuna stocks with a high degree of feasibility for being caught, are 1.2 million tons in this area. A suitable exploitation of this resource will solve most of the problems the Republic now faces.

The central spirit of the Third United Nations Conference on the Law of the Sea is not merely to provide coastal states the exclusive rights to exploit their adjacent resources, but to give these nations suitable responsibilities for conserving and managing its resources. The sixth session, held in New York, produced a “composite negotiating test” — a single comprehensive

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80. E. Borgese, Pacem in Maribus (1972); Logue, supra note 66; Mirvahabi, Conservation and Management of Fisheries in the Exclusive Economic Zone, 9 J. MAR. L. & COMM. 225 (1978); Symposium on the Exclusive Economic Zone, 4 MAR. POL. & MANAGEMENT 313 (1977).
document of 303 articles and seven annexes which was, in effect, a draft of a new Law of the Sea. A revised version of this was being discussed again in March, 1978, in Geneva. The sections of the "composite negotiating text" for a new Law of the Sea which are of most interest to fishermen and fisheries, and administrators, are found in Part V of the text which deals with the establishment of Exclusive Economic Zone.

Based on these sections in the text, the diplomatic dispute between the Republic of China and other neighboring countries is less likely to arise if the Republic of China announces her Maximal Solution to extend to 200 miles an exclusive economic zone. The main provisions of this text are as follows. In the exclusive economic zone, the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources. The coastal state shall promote the objective of optimum utilization of living resources in the exclusive zone. Where the coastal state does not have capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other states access to the surplus of the allowable catch. The coastal state, taking into account the best scientific evidence available to it, is to determine the allowable catch of living resources in its exclusive economic zone.

By enacting the jurisdictional powers and economic rights within the claimed exclusive economic zone, the Republic of China will not merely obtain rights, but also obligations to the whole world. Like other coastal states which claimed exclusive economic or fishing zones such as Australia, Canada and the United States, the Republic of China will find it necessary to provide the scientific, economic and biological data available to determine the allowable catch. Diplomatic disputes with other countries will be less likely to arise if the Republic of China asserts her exclusive economic zone subject to responsibilities similar to those accepted by other coastal states already.

In sum, the Maximal Solution combines maximum protection to the interests of the Republic of China and its citizens, while also affording the greatest opportunity for negotiating mutually beneficial solutions with other interested nations. If approached properly, it encourages international cooperation at a time of strained relations between the Republic and some of the other interested nations. The only real drawback is the need to enforce the

83. I.C.N.T., supra note 81, art. 56.
84. Id. art. 62.
85. Id.
86. Logue, supra note 66, at 606-15.
claim once it is made, but if little Iceland, with neither a navy nor an airforce, could enforce its claims against the United Kingdom, then certainly the Republic of China could do so as well. The real danger here is to be careful both in defining and in enforcing the claims so that overzealous subordinates do not convert this opportunity for mutually beneficial cooperative solutions into sources of discord and enmity.

III. SPECIAL PROBLEMS FOR THE REPUBLIC OF CHINA

There are two special problems which deserve at least a few words: first, the problem of the mainland; and the second, the special problems of waters around, or between, islands.

A. The Mainland

Special care must be taken to assure that negotiations with other interested nations do not become confused with contentions relating to the ultimate authority of the Republic over all of its territory. Nor should such claims become the excuse for premature military or economic confrontations with the so-called government on the mainland. Both of these goals should be achieved by including in any law or proclamation of these new assertions of authority provisions to suspend its application with regard to the mainland prior to its recovery. Particular attention must be given to delineate the area of suspension within the Straits of Taiwan as these waters are only 120 miles in breadth at their narrowest. We would suggest drawing a line west of the Penghu Islands, but do not at this time suggest any particular line.

B. Island Filled Seas

A number of nations have asserted a special archipelagic theory of territorial waters. An archipelago is a group of closely interrelated islands forming a distinct or distinguishable unit. The word itself was originally Greek, and means an "island filled sea." This theory is most significantly espoused by the Republics of the Philippines and Indonesia, but it is also followed by

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88. See note 19 supra.
90. I.C.N.T., supra note 81, art. 46(b).
several smaller island nations,\footnote{93} and by several continental nations with regard to off-shore archipelagoes.\footnote{94} This theory involves the drawing of straight baselines connecting the outermost edges of the island groups.\footnote{95} The waters within the baselines become internal waters within which there may be no right of innocent passage.\footnote{96} The territorial sea is then measured out from the baselines, as would also be measured any exclusive economic or fishing zone.\footnote{97}

Such a system of baselines has a certain superficial appeal for the Republic of China's presently controlled territory, but any attempt to assert such lines around the entire groups of islands it controls can only invite difficulties for no comparable gain. The difficulties arise from the result that large areas of waters would be enclosed and claimed as internal waters, not subject to the right of innocent passage, thus substantially interfering with the purely navigational — military and civilian — interests of other nations. Such interference will certainly be ill-received. On the one hand, as most of the outlying islands are located in the Straits of Taiwan, any substantial moving outward of the boundaries of the exclusive economic zone would only have to be suspended anyway, and thus very little, if anything, would be gained.

Nor can one be so certain of the resolution of the ensuing difficulties. The United States has thus far refused to recognize the claims of the Philippines and Indonesia, and still occasionally sends submarines or other military craft through the waters they claim in order to effectively challenge their claims.\footnote{98} The criteria for judging the propriety of baselines are vague.\footnote{99} These criteria are that the baselines must not depart to any appreciable extent from the general direction of the coast, that the sea areas within the baseline be sufficiently closely linked with the land domain as to justify a regime of internal waters, and recognition may be given to particular local economic interests clearly evidenced by long usage. Such vague criteria are simply not conducive to the ready negotiation of agreements for international recognition. Thus, proclaiming a baselines system around the entire groups of islands would be more trouble than it is worth. At any appropriate future time the Republic might well consider a system of baselines linking the Province of Taiwan and other off-shore islands to its mainland territory, but now is clearly not an ap-

\footnote{95} I.C.N.T., supra note 81, art. 47. Cf. Convention on the Territorial Sea and the Contiguous Zone, supra note 12, art. 4.
\footnote{96} Id. art. 5; I.C.N.T., supra note 81, arts. 50, 52-53.
\footnote{97} Id. art. 48.
\footnote{98} Dean, supra note 14, at 753.
\footnote{99} Convention, supra note 12, art. 4; I.C.N.T., supra note 81, art. 47. For an analysis of these standards, see Dellapenna, Canadian Claims, supra note 18, at 414-15.
appropriate time for this step. As an interim measure, however, baselines might be drawn around clearly identifiable groups of islands now controlled by the government — such as the Penghu Islands.

IV. SUMMARY AND CONCLUSION

The emerging new consensus on what is permissible in the Law of the Sea presents an unusually favorable opportunity for the Republic of China to extend its protection of its vital interests, and enhance its economic development without producing any serious difficulties for its relations with other nations. Indeed, properly handled, these new claims could become an important occasion for developing new cooperative mutually beneficial links with both nearby and distant nations.

The foregoing results can best be achieved by enlarging the breadth of the territorial sea from 3 to 12 nautical miles, claiming effective control of that portion of the Asian continental shelf adjacent to the territory presently controlled by the Republic of China, and the assertion of an exclusive economic zone of 200 miles breadth from the baseline of the territorial sea. There might also be enforcement of one or more national security, or air defense identification zones, and a system of straight baselines around small groups of islands. All of these claims must be clearly suspended with regard to those portions of the territory of the Republic not presently under its actual control. These claims must also be asserted and enforced in ways which encourage other interested nations to seek mutual accommodations which most effectively enhance the interests of both nations.

The foregoing proposal not only permits the Republic of China to protect its own interests, but also gives it an important role in the arena of state practice where the new international Law of the Sea is being forged. This to a considerable extent should make up for the enforced absence of the Republic from the Third United Nations Conference on the Law of the Sea — an absence of less importance as the Third Conference now appears to be nearing failure. Even should the Conference unexpectedly succeed, its conventions are not very likely to differ substantially from the recommendations made here, as these recommendations reflect the growing consensus of the international community as to what is permissible to the coastal state. It is this very agreement of these recommendations with the new consensus which leads us confidently to predict a successful outcome to any ensuing bilateral negotiations.