NOTES

The Protection of Maritime Environment by the Courts of Third States: Some Difficulties

It is likely that protection of the maritime environment in general will be undertaken systematically on the international level within the next decade. In the past, of course, certain measures have been taken at the international level by co-operation. Such measures, adopted in treaties, are haphazard and incomplete when viewed in the light of overall marine protection.[1] Unilateral protection has also been afforded. States have enacted various laws relating to their territorial seas and fishing zones. The effect of these laws is to protect the marine environment on a limited geographical scale. However, the instrument of protection is here municipal law. Naturally, the permissible extent of such territorial seas and fishing zones in international law will determine the possible extent of unilateral maritime environment protection.[2] The question of the permissible extent of the territorial sea is, of course, a subject of much controversy[3] and it arose in a practical way in a recent case before the Cape Provincial Division of the Supreme Court of South Africa.[4]

The relevant facts in the *South Atlantic* case were as follows. In 1963, the applicant company was granted sole and exclusive fishing rights in the territorial waters of Tristan da Cunha, Inac-

---

[1] For examples of such measures relating to conservation of the resources of the high seas and pollution of the high seas, see: D.P. O'Connell, *International Law*, 2nd ed., vol. 2, (Stevens & Sons Ltd., London: 1970), at pp. 648-50, 652.

[2] Beyond the territorial sea, fishing zone, and possibly conservation zones permitted in terms of article 6 of the *Convention on Fishing and Conservation of the Living Resources of High Seas*, (Geneva, 1958) 450 U.N.T.S. 11, protection of the maritime environment would appear to depend primarily on international law created by international cooperation. It is true, however, that a state might unilaterally enact extra-territorial environmental measures for its own nationals or ships.

[3] The controversy in this respect is probably greater since the *Montevideo Declaration of the Latin American States on the Law of the Sea*, 9 I.L.M. 1081 (1970), and the *Declaration of Santo Domingo*, 11 I.L.M. 892 (1972).

[4] *South Atlantic Islands Development Corp. Ltd.* v. *Buchan*, 1971 (1) S.A. 234 (C).

cessible, Nightingale and Gough by the relevant authorities for Tristan da Cunha. At the time, the territorial waters in question extended three miles from low-water mark. In 1968, Tristan da Cunha extended these territorial waters to twelve miles from low-water mark.[5] In the same year, the applicant company was granted a sole concession to fish in the extended territorial waters. The respondent's attitude was that he was at liberty to fish anywhere beyond three miles from the Tristan Islands and he intended to fish there. He claimed that the unilateral extension of the territorial sea in 1968 by Tristan da Cunha had no validity in international law. Hence the concession was also invalid and the court should not enforce it. The applicant replied by asserting that as South Africa had itself claimed a twelve mile exclusive fishing zone,[6] it would, as a matter of international law, be estopped from denying the validity of a similar extension made by another power.[7] Thus, a South African court should uphold a claim arising under such an extension.

The court did not, however, give judgment on this interesting point of international law because it held, on other grounds, that it had no jurisdiction to give the relief sought by the applicant.

There would appear to be no doubt that the extension of territorial waters by Tristan da Cunha and the concessions granted to the applicant were unilateral measures of a conservational nature. The court here described the applicant's attitude as follows:

> Applicant took a serious view of the threatened poaching of its concession area since this might have a disastrous effect on the entire fishing activities at Tristan da Cunha. The islanders of Tristan da Cunha were solely dependent for a livelihood on the continuance of the business of the applicant company. There was a fully equipped factory on the island which had been established by the company at its own expense.[8]
>
> ...
>
> In a further affidavit, ... the general manager ... submitted that, if the *Golden Promise* were allowed to fish within the concession area, it would lead to heavy overfishing. The dumping of unground offal would also have a toxic effect on crayfish. He went on to give details of the con-

---

[5] Tristan da Cunha, Ord. 1 of 1968, enacted by the Legislature of St. Helena. The Tristan da Cunha islands are a dependency of St. Helena.

[6] *Territorial Waters Act*, 87 of 1963 (South Africa), s. 3.

[7] See: Michael Akehurst, *An Introduction to International Law*, (George Allen & Unwin, London: 1970), at p. 47, who says:

> Even writers who require a long time for the development of customary rules in international law concede that a state will be estopped from denying a new 'rule' if it has acted as if that 'rule' were already law...

[8] *South Atlantic* case, *op. cit.*, at pp. 236-37.

servation measures adopted by applicant and of the capacity of the *Golden Promise.*[9]

If we view the *South Atlantic* case from the point of view of environmental protection, we may make three interesting observations:

(1) An attempt is made in this case to enforce the marine conservational measures of one state in the courts of *another* state.

(2) The attempted enforcement of such measures is indirect, in that it is primarily the concession rights which are sought to be enforced.

(3) The means sought for enforcement is the *interdict.*[10]

Here, in effect, two orders were sought (in the alternative):

(a) An order restraining the respondent (who was present in Cape Town) from sailing from Cape Town on his vessel the *Golden Promise* with the purpose of fishing from such vessel within Tristan territorial waters. The court held that an interdict is essentially a practical remedy. If it is cast in a form which will not afford protection to the applicant the court will not grant it. In the instant case it was sought to interdict an *intention.* This was not practical for if the respondent stated to the Sheriff of the court that he did not intend to fish at Tristan, the Sheriff must allow him to leave. And further he might change his mind after leaving Cape Town.[11]

Though the court couched its judgment in terms of practicality here, it was in fact saying that an interdict such as that sought would be ineffective and so would not be granted.

(b) An order prohibiting the respondent from fishing in the waters of Tristan. The court refused to make this order and gave two reasons for its refusal.

(i) Such an order would be ineffective, in that the court could not enforce it. Diemont, J. held:

Where the relief asked for is such that it will not be enforceable, the judgment becomes illusory and the court should not undermine its authority by giving such a judgment. This no doubt is why it has been repeatedly stated that the principle of effectiveness is the basis of jurisdiction...

---

[9] *Ibid.*, at p. 237. The *Golden Promise* was the ship in which the respondent intended to fish in Tristan waters. At the time of the proceedings, it was berthed in Cape Town.

[10] The *interdict* is the practical equivalent in Roman-Dutch law of the common law injunction.

[11] *South Atlantic* case, *op. cit.*, at p. 239.

> [I]t is power to give an effective judgment and not merely power over the defendant which is the test of jurisdiction. In other words the fact that the respondent in this case may be temporarily resident within the jurisdiction of this Court is of no consequence — the question is whether this Court can enforce an order against him if and when he starts fishing in the waters of Tristan da Cunha. Seen in that light it seems to me that there can be little doubt that this court will be powerless to enforce its judgment if Buchan choses to ignore the interdict.[12]

(ii) If the court were to grant the order sought, it would be deciding that the applicant had an exclusive right to fish under the law of Tristan da Cunha. The applicant's claim to sole fishing rights was in the nature of a title action or action *in rem.* But real actions should be brought in the *forum rei sitae* and mixed actions are properly referable to the same jurisdiction. Such actions will not therefore lie elsewhere than in the *forum rei sitae.* Diemont, J. concluded:

> I cannot see how it can be said that it is the duty of this Court to determine who is entitled to fish in the territorial waters, or the restricted waters, of Tristan da Cunha. That is the task which this Court cannot undertake.[13]

For the above reasons the court held that it had no jurisdiction to give relief.

It would appear from the above judgment that courts would have two main difficulties in enforcing, directly or indirectly, the maritime conservational laws of other states:

(1) The ineffectiveness (or perhaps impracticality) of its orders.

(2) The undesirability of determining the content of real or mixed rights which arise under and by virtue of the conservational laws of another state, the courts of the latter being a more appropriate *forum* for the decision of such matters.

We might now comment briefly on two questions which arise out of the above difficulties.

(1) Could these difficulties be overcome so as to reinforce the protection of a state's maritime environment by giving it not only the sanction of its own courts but also those of the courts of other states, where appropriate?

It might be possible to create such protection by a Convention relating to the reciprocal enforcement of judgments. Such a convention would have to contain novel features in that it would have to extend specifically to issues which involved the environmental

---

[12] *Ibid.*, at p. 240.
[13] *Ibid.*, at p. 242.

laws of the parties, to interdicts and injunctions relating to the same, and to the determination of real and mixed actions arising therefrom.[14]

(2) It may be asked whether such a novel convention on reciprocal enforcement would be desirable. Certainly a convention containing such provisions would involve difficulties of some magnitude. For instance, if a court gave judgment in a real or mixed action arising under the laws of another country, would the matter be deemed to be *res judicata* in such other country? Such a position would appear to be undesirable especially in cases where the courts of such other country might conceivably have come to a different conclusion. On the other hand should the matter not be *res judicata*, would it be possible to re-open the proceedings in the *forum rei sitae*? In effect, this would mean that the original judgment would be enforceable unless successfully challenged in the courts of the other country. But this would involve double proceedings which would scarcely be desirable since it would lead one to question the purpose of seeking enforcement measures at all in a court other than the *forum rei sitae* if one was, in any event, and in all probability, going to end up in the latter court.

From the above we might conclude that if the proceedings in the *South Atlantic* case had been brought in the first place in the appropriate court for Tristan da Cunha, that tribunal would not have been faced with the difficulties which confronted Diemont, J. in the Cape Provincial Division of the Supreme Court of South Africa.

D. J. Devine *

---

[14] For an example of the provisions of what might be termed an ordinary convention in the field of the reciprocal enforcement of judgments, see article 16(1) of the *European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 8 I.L.M. 229 (1968), which gives exclusive jurisdiction in matters involving rights *in rem* in real property to the *forum rei sitae*.

* B.A., LL. B. (N.U.I.), LL. B. (South Africa), Solicitor (Ireland), Advocate (Kenya); Senior Lecturer in Law, University of Cape Town.