EU Unilateralism and the Law of the Sea

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Introduction: Unilateralism in the Law of the Sea

The subject of this paper is plainly inspired by the EU’s introduction of regulations which will progressively restrict single hull oil tankers from using EU ports.¹ In summary, such tankers will not be permitted to carry heavy oil, they will be subject to an accelerated phasing-out scheme and there will be more stringent structural inspections for older ships. These regulations are unilateral only in the sense that the EU has chosen to advance their entry into force ahead of the date for amendments to the MARPOL Convention agreed at IMO.² They are otherwise neither unprecedented nor opposed by other maritime states. Moreover, this is by no means the first time that unilateral action has altered the rights of other states at sea, and before turning to the specific question of the opposability of the EU regulations to vessels of non-EU states, it is necessary to stand back and view the EU’s practice in a broader context.

First, let us look briefly at how unilateral action has influenced—or in some cases failed to influence—the law of the sea. Some of the most important developments in the law of the sea since 1945 have been the product of unilateral actions by a single state or a small group of states. The Truman Proclamation claiming jurisdiction over the contiguous continental shelf is the best-known example of a claim by a single state leading to the emergence of a whole new body of law, later codified in the 1958 Convention on the Continental Shelf and subsequently confirmed as customary law in the 1969 North Sea Continental
The crucial element which led to this outcome was the positive response of other states, in some cases claiming their own shelf, in others simply acquiescing in claims made by other states. No state contended that the US claim to continental shelf jurisdiction was illegal or a violation of the rights of other states over the high seas. Nor had any state previously claimed that continental shelf resources were the common property of all states, but the matter had until then scarcely seemed worth considering. The US was in effect asserting an entirely novel rule in respect of resources that were previously unclaimed and largely unknown. When the claim did come, its effect was almost immediately formative of new law.

Iceland’s attempt to extend coastal state jurisdiction over high seas fisheries was a less successful example of unilateralism. Iceland opposed the establishment of the six-plus-six-n.m. formula for costal state jurisdiction over fisheries proposed at UNCLOS I and II. For this reason it did not participate in the 1964 European Fisheries Convention. Its declaration of a 12-mile territorial sea provoked the first dispute with the UK, but this was settled by negotiation. The extension of its exclusive fishery zone to fifty n.m. in 1972, however, provoked further disputes with the UK and Germany which were submitted to the International Court of Justice. In the Icelandic Fisheries cases the Court was asked to decide on the legality of Iceland’s unilateral extension of its fisheries jurisdiction, on the rights of the UK and the Federal Republic of Germany to continue to fish in this area, and on requirements for co-operation in adopting conservation measures. The Court found that Iceland’s claim to a 12-mile exclusive zone was not unlawful, but that the UK and Germany had not acquiesced in or accepted Iceland’s claim to an exclusive zone beyond that limit. The fifty-mile exclusive zone claimed by Iceland was therefore “not opposable” to these states. The UK and Germany retained rights to fish beyond Iceland’s 12-mile zone, based on historic exercise of high seas freedoms, but Iceland did have preferential rights in the allocation of quotas.

Here we can see the risks of unilateralism when not acquiesced in or generally supported by other states. What this case shows is that existing law cannot be changed unilaterally. The rights of other states cannot be taken away without their agreement or acquiescence. That is the most fundamental weakness of acting alone. However creative or desirable in policy terms, such action is only effective if others also follow the lead. If they do not, a dispute is inevitable.