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THE PATRIMONIAL SEA TO THE RESCUE OF THE GULF OF CALIFORNIA

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What has been the historically official attitude of Mexico towards the Gulf of California, and what does international law provide for a marine area of that type?

During the last twenty years, several sectors of the Mexican community have alleged that the Gulf of California should be regarded as an integral part of the Mexican territory.[1] They have demanded that the Government proceed, in the national interest, to close the Gulf. To substantiate these allegations and demands, they have invoked the existence of a legal, historic title supported by international law.

While the President of Mexico toured fifteen countries of Africa, Asia, and Latin America in 1975, the Mexican Government announced, from Alexandria, Egypt, its definite plans to claim a two hundred mile patrimonial sea or exclusive economic zone, a measure which would have the logical and immediate effect of, among other things, closing the Gulf of California to foreign fishermen.[2] In order to proceed with these previously announced intentions,[3] the Mexican Government will introduce a bill to the Federal Congress.

Following is an analysis of the international law governing the regime of the waters of the Gulf of California, to facilitate a judgment on the legality of the Mexican action.

Mexico emerged in 1821 at the end of its war of independence to inherit its territory from Spain under the principle of *Uti possidetis.* The first occasion on which the Mexican Government took action to

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1. Professors Paul Cervantes Ahumada, Jose Salgado y Salgado, Modesto Seara Vazquez, and Cesar Sepulveda are among the main supporters of the idea of regarding the Gulf of California as an integral part of the Mexican territory. The opposition party of Mexico, Partido Accion Nacional, was among the promoters of the Gulf's closure. *See* note 8, *infra.*

2. *Cerrara Mexico el Mar de Cortes,* Ultimas Noticias, Segunda Edicion, Mexico, 5 agosto, 1975; *Reivindica 18 el Derecho de Mexico sobre 3 Millones de Kms.² de Mares,* Excelsior, 5 agosto, 1975.

3. In April of 1974, Foreign Minister Emilio C. Rabasa stated that Mexico would legislate its patrimonial sea at the time of the opening of the Caracas Session of the United Nations Conference on the Law of the Sea (June 20-August 28, 1974). The reason why this announced purpose was not carried out may be that the Mexican Government decided to wait for the results of the Conference, so as to back its claim with the support of the consent of the international community (Excelsior, 27 abril, 1974).

delimit precisely its marine sovereignty was in 1848. The Treaty of Guadalupe Hidalgo, concluded that year with the United States, set the Mexican territorial sea at 9 miles from shore.[4] In 1902, the Mexican legislature reduced the territorial sea to 3 miles,[5] a measure which was subsequently modified in 1935,[6] by returning to the breadth of 9 miles. In 1966, a claim was made for an additional, exclusive fishing zone of 3 miles.[7] None of the domestic legislative instruments referred to make a claim of internal character for the waters of the Gulf of California. These instruments should be understood to claim a territorial sea around the internal coasts of the Gulf. The waters contiguous to the territorial sea in the interior of the Gulf were regarded as high seas.

In 1965, the opposition party, the Partido Acción Nacional (PAN), unsuccessfully introduced a bill in Congress to extend the territorial sea of the country to 12 miles and to close the Gulf of California.[8] Had this initiative been approved, a line would have been drawn across the mouth of the Gulf, and the waters of the Gulf would have become internal waters of Mexico. The imaginary line across the mouth, then, woud have served as the base line for measuring the territorial sea to the South, toward the open Pacific Ocean. At the same time, a number of distinguished Mexican international lawyers formulated similar proposals.[9]

Despite the fact that the PAN initiative did not prosper in Congress,[10] the Executive decided to look into the matter. It formed an inter-ministerial commission whose task it was to propose a course of action under international law. The commission,[11] in analyzing the positive international law in force on the subject, found the following regime for gulfs or bays:

According to Article 7 of the 1958 Geneva Convention on the

4. Articulo V of the Treaty of Peace, Friendship and Limits, Feb. 2, 1948.

5. Aritculo 4/1, Ley de Bienes Inmuebles, Dec. 18, 1902.

6. Diario Oficial, Aug. 31, 1935.

7. Decree of Dec. 13, 1966. (Diario Oficial, Jan. 20, 1967). In 1969, the territorial sea was increased to 12 miles (Decree of Dec. 12, 1969; Diario Oficial, Dec. 26, 1969).

8. Congreso de los Estados Unidos Mexicanos, Cumara de Diputados. "Iniciativa para reformar Los articulos 27, 42 y 48 de La Constitucion Politica de Los Estados Unidos Mexicanos para incluir expresamente el Golfo de California dentro del territorio nacional, bajo el dominio de la Federacion, suscrita par los C.C. Diputados a La XLVI Legislatura, miembros del Partido Accion Nacional." Mexico, Nov. 18, 1965.

9. *See* note 1, *supra.*

10. Antonio Gomez Robledo suggests that the reason why the proposed bill did not prosper might have been the fear of the PAN House Representatives that their allegations could be challenged successfully by the United States. (*El Derecho del Mar en La Legislacion Mexicana. Sinopsis Historico Evolutiva,* in Mexico y el Regimen del Mar (vol. I), Secretaria de Relaciones Exteriores, Mexico, at 101 (1974).

11. Basic Documents in International Law (Ian Brownlie, ed.), 2d Ed., 79-88 (1972).

Territorial Sea and the Contiguous Zone,[12] a bay may be regarded, geographically, as such when its total area is equal to or larger than the area enclosed in an imaginary semi-circle whose imaginary diameter is a line drawn across the mouth of the alleged bay. Once a bay can be regarded as a geographical bay under the terms of the Convention, Article 7 provides that its waters may be considered as internal waters of the country in question when the imaginary line drawn across the mouth of the bay does not exceed 24 miles.

Because the mouth of the Gulf of California is comparatively narrow when compared with the extension of the Gulf to the north, the required semi-circle encloses an area much smaller than the total area of the Gulf. Thus, the Gulf of California is a geographical bay, under the provisions of the Convention. However, the imaginary line which is drawn across the mouth of the Gulf of California exceeds the 24 mile requirement. It measures approximately 110 miles. In other words, the Gulf of California cannot be regarded as internal waters of Mexico, and this situation was recognized and accepted by the Commission.

However, the Commission found that Article 4 of the Convention provided an alternative system to measure the territorial sea where deep indentations in the coast or a series of islands along the coast exist. Briefly, in this system, designed in 1951 by the International Court of Justice in its decision in the Anglo-Norwegian Fisheries Case,[13] the coastal State may draw straight baselines between the outermost points of the indentations or islands, and the waters enclosed by the baselines could be regarded as internal waters. The baselines, then, would serve as the point for measuring the territorial sea outwards.

Fortunately for Mexico, nature located a series of islands just above the middle of the Gulf of California. These are the islands of San Esteban and Turrera, the latter being immediately to the south of Tiburón Island. Also, along the western side of the Gulf, to the south of these islands, and in a few places on the eastern side of the Gulf, several series of islands and deep indentations exist.

The Commission proposed straight baselines wherever possible; as a result, almost the entire northern half of the Gulf may be closed by straight baselines. The waters enclosed became, officially, internal waters, on August 30, 1968, when a decree was issued to that effect.[14] The areas in the western and eastern sides of the southern

12. I.C.J. *Reports*, at 132 (1951).

13. Diario Oficial, Aug. 30, 1958. Numerous amendments to errors in the Decree were published in the Diario Oficial of Oct. 5, 1968.

14. L. Bouchez, The Regime of Bays in International Law 28 (1964).

half of the Gulf were also enclosed, to give Mexico about 50% of the area of the Gulf. The remaining southern half of the Gulf, outside the area of the territorial sea parallel to the coast, remained as high seas.

Most of the Mexican jurists who had advocated the total closure of the Gulf expressed their unhappiness with the decree, and criticized the Government for not complying with their conception of the legal regime applicable to the Gulf. Even though they had to admit that conventional law was not on their side, they alleged that the Gulf of California was Mexican, since it was an "historic bay."

Is the Gulf of California an Historic Bay?

The historic bay is an institution which is far from being clearly and definitely regulated by customary international law; it is not included in the conventional law integrated by the 1958 Geneva Conventions on the Law of the Sea. It applies to certain waters which, not being bays in the legal sense described by the 1958 convention due to the excessive breadth of the mouth, may still be claimed by the coastal State, provided that a series of requirements are fulfilled.

According to L. J. Bouchez,[15] the foremost authority on the subject, there are five indispensable requirements for a valid claim to an historic bay:

> 1. The claimed marine zone must be adjacent to the coast of the claiming State.
> 2. The waters must be claimed by the State in its capacity as a sovereign.
> 3. The pretended sovereignty must be effectively exercised and for a sufficiently prolonged period of time.
> 4. The situation thus created must be a matter of common knowledge, at least by the States directly interested.
> 5. The international community of States and the States directly affected must have expressed their acquiescence in respect to the claimed territorial rights.

There is no doubt that Mexico is in a position to fulfill the first two requirements. This is not the case, however, with the other three. Unfortunately, Mexico could have but did not claim effective and continued sovereignty over the Gulf from the time it became independent.[16] This was probably the result of the ignorance or lack of foresight of its governments.

15. This is also the opinion of Bernardo Sepulveda Amor, *Derecho del Mar. Apuntes sobre el sistema Legal mexicano,* 50 Foro Internacional, El Colegio de Mexico, octubre-diciembre, at 253 (1972).

16. *See* note 4 *supra.*

Defenders of the "historic bay" thesis advance the following arguments:

1. Mexico inherited the Gulf from Spain. In that case, Mexico, as a new nation, rather than notifying its claim to the Gulf persistently regarded its waters as being part of the High Seas. Internal legislation makes no mention of the Gulf being an integral part of Mexican territory. On the other hand, in the previously mentioned 1848 treaty with the United States,[17] a 9 mile territorial sea was established and no reference made to a claim to the Gulf's waters. Also, during the first and second World Wars, the presence in the Gulf of foreign military vessels, some of which, like the Japanese in World War II, were enemy vessels, were not the object of a protest by the Mexican government. This silence must be interpreted to say that Mexico regarded those waters as High Seas. Had that not been so, Mexico would have regarded the navigation of those vessels through the waters of the Gulf as an invasion of its territory. Thus, if Mexico really inherited the Gulf from Spain, it did all possible to abandon the Gulf once it became independent. This abandonment of sovereignty, if sovereignty existed, was the result of ignorance, lack of interest or foresight of the Mexican authorities.

2. The defenders of the "historic bay" thesis advance only two examples of the will of Mexico to exercise sovereignty over the Gulf. First, they resort to the Provisional Statute of the Mexican Empire, issued by Maximilian in 1865. Article 51 expressly includes as part of the national territory "the Sea of Cortés or Gulf of California." True, under international law, the international act of a State produces legal effects whenever undertaken by the authority in effective control of the country. From that standpoint, it makes no difference that the Statute was issued by an invader who was usurping the legal authorities of the nation whose leader was Benito Juarez. However, Maximilian's government was far from being the internationally recognized government of Mexico, with full capacity to handle its external affairs. Second, the presence of foreign vessels in the Gulf during the Mexican Revolution in 1914 was in fact the object of a protest by the Mexican government. It should be noted, however, that these two cases are isolated, two assertions of sovereignty in a period of almost 150 years, as opposed to more than a dozen cases during the same period in which the Mexican government treated the Gulf as High Seas. This is certainly not an example of effective, continuous sovereignty.

3. Both the 1848 Treaty of Guadalupe Hidalgo[18] and the 1853

17. Art. VI.
18. Art. IV.

Mesilla Treaty[19] included a clause which provided the right for the citizens and vessels of the United States, at all times, of free and noninterrupted transit through the Gulf of California and through the Colorado River and not by land, without the consent of the Mexican government.

The defenders of the historic bay thesis contend that through this clause the United States tacitly recognized Mexico's sovereignty over the Gulf. In other words, interpreting the clause *a contrario sensu,* they say that if the United States had not recognized such sovereignty, it would not have had the need to agree on this right of transit with Mexico.

It must be understood that for a U.S. vessel to navigate to the Colorado River from the Pacific, and vice versa, it would have to navigate through the territorial sea of Mexico at the very top of the Gulf (which was set in that treaty at 9 miles), and through Mexican internal waters, namely, the portion of the Colorado River between the Gulf and the border. This author is inclined to interpret the "freedom of transit" provision in the treaty as applying solely to the above mentioned Mexican waters, and not throughout the entire Gulf.

As Professor Gomez Rovledo explains,[20] when the Colorado ceased to be a navigable river due to the uses and abuses to which the former waterway was subjected in U.S. territory, Mexico had a clear opportunity to derogate the right of transit of U.S. citizens and thus ratify its sovereignty. This could have been done by invoking the termination of the clause of the treaty based on *rebus sic stantibus,* that is, a fundamental change of circumstances. Mexico did not take such action precisely because it had no intention of ratifying something which it had never claimed.

Moreover, when the clause says that such transit should be made through the Gulf and not by land, it clearly refers to the land between the northernmost point of the Gulf and the border in San Luis Colorado, and not to the land on either side of the Gulf, that is the entire peninsula of Baja California on the west, or the states of Sinalos and Sonora to the east. Therefore, this transit provision applies only to the land between the top of the Gulf and the border, and not to the 1,166.5 kilometers between the mouth and the top of the Gulf.

4. A number of additional arguments are advanced by the sup-

19. *Supra* note 10, at 104.

20. Professor Modesto Seara Vazquez advances most of the following arguments in *La Politica Exterior de Mexico. La Practica de Mexico en el Derecho Internacional.* Mexico. Editorial Esfinge S.A., at 59 (1969).

porters of the thesis under consideration.[21] They allege:

a) *Geographical reasons:* it is said that the Gulf is within and surrounded by Mexican territory. However, again, the requirements of international law are not fulfilled by the geography. It is also said that the 24 mile criterion is not fair to the Gulf, given the width-length proportion of its mouth and extension. Its width is 110 miles, and its length 1,166.5 kilometers, a condition not found in any other gulf in the world whose coasts belong to one State only. As the case and configuration of the Gulf is unique, it may seem unfair that the laws of nations do not provide for this special circumstance, yet Mexico has taken no action, particularly at the three United Nations conferences on the Law of the Sea, to remedy the situation through a proposal to adapt the law.

b) *Economic reasons:* these undoubtedly are the main concern of those who have pressured to close the Gulf. They insist that it should be totally Mexico's because the population and economics of the Mexican States on the coasts of the Gulf depend very heavily on the Gulf's resources. Economic reasons, as will be seen here, may substantiate a claim, but are insufficient to close the Gulf as internal waters.

c) *Political-strategic reasons:* it is said that navigation through the Gulf endangers the national security of Mexico. This position, in an era of sophisticated weaponry and transcontinental missiles, seems rather obviously uninformed and illadvised, particularly in peacetime.

In conclusion, the above reasons and arguments are propositions *de lege ferenda,* which would not allow the government to satisfy the demands of said points. If the above proofs of the fact that Mexico did not intend to exercise effective and continuous sovereignty are insufficient, the 1966 decree creating a 3 mile exclusive fishing zone[22] adjacent to the then 9 mile territorial sea should be convincing, if not conclusive. Mexico, after that decree, recognized the historic rights of the U.S. and Japan to fish within 3 miles of the coasts of Mexico and including the coasts of the Gulf. In 1968, both the U.S. and Japan agreed to treaties providing for a 5 year phaseout system[23] during which those countries would have the right to con-

21. *See* note 7 *supra.*

22. The treaties were concluded in accordance with Transitory Article 3 of the 1966 Decree.

23. The "Agreement between the United States of America and the United Mexican States on traditional fishing in the exclusive fishery zones contiguous to the territorial seas of both countries," of Oct. 27, 1967, may be found in United Nations Legislative Series. National Legislation and Treaties Relating to the Law of the Sea, U.N. ST/LEG/SER.B/16 New York, 494-99 (1944). In the same publication at 502-05 the "Agreement between

tinue fishing.[24] The fact that Mexico, through those treaties, expressly limited its rights to the 12 miles from the coast (9 of territorial sea and 3 of fishing zone) clearly indicates that it regarded the rest of the Gulf as High Seas.

The 1968 decree, which internalized the waters of the northern half of the Gulf, using the system of straight baselines, as some of the advocates of the total closure of the Gulf painfully admitted to themselves, implied the incontestable proof of Mexico's recognition of the High Seas character of the southern half of the Gulf.

However, the Law of the Sea will have the effect of closing the Gulf through the 200 mile economic zone or patrimonial sea thesis. The thesis, which originated in some countries of South America almost thirty years ago,[25] is no longer a proposition *de lege ferenda;* it is now a proposition *de lege lata.* It has received the support of 115 countries at the 1974 Caracas Session of the Third UN Conference on the Law of the Sea.[26] Mexico has embraced the thesis since 1972[27] and was waiting to implement it until the conclusion of a treaty by the Conference. Since the Conference is nowhere near concluding its work, since the concept of the patrimonial sea was agreed upon in Caracas through a customary legal channel, and since Mexico feels it cannot wait to protect its resources from foreign abuse, Mexico feels it is time to make its patrimonial sea claim. This claim is in keeping with the spirit of the law being developed by the

Japan and the United Mexican States on fishing by Japanese vessels in the waters contiguous to the Mexican territorial sea," signed on March 7, 1968, may be found.

24. The first 200 mile claims were made by Chile and Peru, on June 23 and Aug. 1 of 1947, respectively. U.N. LEG/SER.B/1, at 6-8 and 16-18, respectively (1951). Since then, several other Latin American countries have made similar claims to either a 100 mile territorial sea (Brazil, Ecuador and Panama) or an economic zone or patrimonial sea (Argentina, Costa Rica, Honduras, El Salvador, Nicaragua, and Uruguay).

25. *See* records of the 21st to 42nd Plenary Meetings of the Conference (Docs. A/CONF.62/SR.21 to 42), in *Official Records* of the Third United Nations Conference on the Law of the Sea, Vol. 1, 59-189.

26. At the Third Session of the United Nations Conference on Trade and Development (UNCTAD) on April 19, 1972, President Luis Echeverria stated that Mexico would struggle at the World Conference on the Law of the Sea for the juridical recognition, through conventional means, of a 200 mile patrimonial sea (El Trimestre Economico, Vol. XXXIX, Num. 155, at 665-73 (1972). Also, Mexico participated very actively in the adoption of the Declaration of Santo Domingo of June 7, 1972, which supported a patrimonial sea (U.N. Legislative Series, ST/LEG/SER.B/16, at 589-601 (1974). Subsequently, Mexico cosponsored, with Colombia and Venezuela, a document entitled "Draft Articles of a Treaty" which was submitted to Subcommittee II of the United Nations Sea-Bed Committee on April 2, 1973 (Doc. A/AC.138/SC.II/L.21), which proposed a patrimonial sea. Finally, at the Caracas Session of the Third U.N. Conference on the Law of the Sea in 1974, Mexico introduced, together with Canada, Chile, Iceland, India, Indonesia, Mauritius, New Zealand, and Norway, a working paper which advocated a 200 mile economic zone (Doc. A/CONF. 62/L.4, of July 26, 1974).

27. *See* note 3 *supra.*

Conference, and in accordance with the expressed will of the international community. Mexico might have acted much earlier on the 200 mile economic zone but, as this paper established, the country has traditionally been, at least in the field of the Law of the Sea, respectful of the international law in force.

The first important effect of the upcoming 200 mile patrimonial sea claim is that the resources of the Gulf of California will be exclusively Mexico's. For resource purposes, the Gulf will be closed. Freedom of fishing in the area will thus be derogated. As the government announced, the other three traditional freedoms of the High Seas will be respected, namely, the freedoms of overflight, of navigation, and of the laying of submarine cables and pipelines. The general international law, not Mexico alone, is giving the Gulf of California to Mexico. Together with exclusivity over the living and non-living resources in the waters, soil and subsoil of the 200 miles, Mexico will prevent the pollution of the Gulf's environment in order to fully protect its delicate ecological balance.

Some of the jurists who originally asked for total closure of the Gulf are not yet content. They still feel that the Gulf should be nationalized and all traditional freedoms derogated. Their position is not congruent with the intentions that led them originally to embrace closure. Their concern was primarily, if not exclusively, economic. All their concerns are completely remedied by the implementation of the patrimonial sea, since:

a) The Gulf will be closed for fishing purposes;
b) The Colorado has ceased being a navigable river from the Gulf; thus the Gulf and navigation through it lead nowhere, and no foreign State needs navigate the Gulf;
c) Given the geographical configuration of the Gulf, no State is interested in laying submarine cables and pipelines across the Gulf;
d) The international community will cease to have an interest in potential rights in the Gulf; international law will cease to have a practical application in the zone. Does an international law rule subsist when the interest of the international community it seeks to protect has ceased? Here again, *rebus sic stantibus* may be the answer.

Mexico should promote among the members of the international community an agreement to close the Gulf of California for all purposes, since only Mexico has an effective interest in it. Mexico should do this, instead of acting unilaterally, especially at this moment in time when any action outside the expressed spirit of the Third

United Nations Conference on the Law of the Sea might endanger the possibilities for success of the Conference.

As can be appreciated, the question of Mexico's claim to the Gulf of California has been affected more by internal differences on the conception of the applicable *lege lata* than external differences.

The party most adversely affected by the implementation of the patrimonial sea in the Gulf is the American Tunaboat Association. These fishermen have, for the most part, abused the freedom of fishing that until recently has prevailed in the southern half of the Gulf, through indiscriminate, arbitrary and unreasonable fishing practices. They are not in a position to contest this designation of patrimonial sea, since its legality and desirability has already been internationally supported by their own country. This expressed international support by the United States of the patrimonial sea concept and the bill now pending passage in the American Congress to create a patrimonial sea off the coasts of the United States are an additional guarantee that the economic disclosure of the Gulf of California by Mexico is a more than feasible reality.