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EVOLUTION OF THE LAW OF THE SEAS—DESTRUCTION OF THE PRISTINE NATURE OF BASIC OCEANOGRAPHIC RESEARCH

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The 1973 Law of the Sea Conference holds the most potential for destruction of the "majesty and rightness" of law since Hugo Grotius fabricated the myth in 1609 that the high seas are *res communis* to all maritime nations; and that freedom of the seas was premised upon some concept—of high and exalted origin—vaguely understood, but firmly grasped, as the "right of innocent passage." That courageous Dutch jurist took it upon himself to initiate the distant sire of a vast body of law built upon a mythical principle of unassailable social contract, i.e., the supranational right of all nations to use the high seas without interference.

Strangely, "freedom of the seas" seems to have evolved over the centuries into the catch-phrase for a mosaic of customary and formal law embodying the preservation of all that is good and unencumbered in relations among nations and individuals. "Freedom of the seas" has become accepted as a conglomerate principle of law ensuring the existence of certain vast bodies of water where all nations meet in their separate tasks on a parity with each other. However, it was not the equality, the equity of interest, the sense of uninhibited brotherhood, that moved Grotius to argue for *Mare Liberum.* To the contrary, the increasing colonial trade and exploration among the great sea powers at the time were directly responsible for the Grotius manifesto—national economics and domestic politics were responsible for its anonymous publication. Evolution of that manifesto has led to its propagandized status of the present day "44-40 or fight" battle joinder—"complete Freedom of the Seas, or nothing at all."

Although this slogan is most often uttered by the basic research scientists in oceanography and the apologists for unilateral establishment of jurisdiction over portions of the high seas and certain activities conducted therein, it is only a small minority voice—albeit an important one. To determine the majority view of nations regarding the present status of the law of the seas it is essential to review briefly the attitudes, politics, technology, and economics influencing use and potential use of the oceans. Of primary concern in

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this matrix of attitudes, technology, and uses is the fact that the law of the seas serves as the foundation of all spirit, if not legal substance, upon which international economic, political, etc., agreements and treaties rest.

PRESENT ATTITUDES REFLECT SHAMBLES MADE OF OCEANS LAW BY POPULATION AND TECHNOLOGY

Grotius' concept of *Mare Liberum* prevailed for better than three centuries over John Selden's *Mare Clausum*, or closed seas concept. Although freedom of the seas might well have been a concept tarnished by compromise and growing questions of credibility during times of peace as well as war, it was a successful, and therefore acceptable, concept to the extent it served a majority of interests. However, today the concept is being subjected to an almost overwhelming attack—both frontal and on the flanks. The deep-rooted fundamental reasons are three: The incredible size of the world's population; increased accessibility of the high seas and substrate resources proportionate to the expanded state of basic sciences and new levels of technology; and the increasing geopolitical phenomenon of international racism and parochial interests manifest in ever-tightening, nationalistically oriented societies. Economics and some rather intricate and sophisticated views of national defense operations have combined, as a result of these three basic precipitants, to create dissension among nations, since World War II, as to what the width of the coastal State territorial sea should be, will be, could be, and from what geographic and jurisdictional reference points it will be measured.

Although there was almost unanimous accord before World War II that the seas extending beyond 12 nautical miles were "high seas" and "not subject to the territorial jurisdiction of any state," subsequent contentions between advocates of the 3 nautical miles and 12 nautical miles limits, and now the 200 nautical miles limit, has made international agreement on territorial limits seem impossible. On the other hand, both the extremity and adamancy of certain positions taken by several countries, regarding jurisdiction over territorial waters, combined with the politics of national and transnational economics and military planning requirements, may force early compromises leading to international accord—at the expense of less pressing issues, such as freedom of basic research in existing coastal waters, or what may become coastal waters through unilateral actions and mulilateral compromise.

The 1958 and 1960 Law of the Sea Conferences amounted to relatively Herculean efforts to codify the law of the seas at the point

of evolution it had reached. Regardless of the efforts, however, the Conferences were a culmination of little more than clarification fora regarding both the state of maritime law and non-law. The various jurisdictional issues, critical and sensitive at the same time, were not addressed. Since those Conferences, technological advances and the ever-growing number of unilateral claims to maritime jurisdiction—broad in scope and varied in objective—have generated conflicts between different users of the same ocean space. For example, as pointed out by John R. Stevenson, Legal Advisor of the U.S. Department of State,

> seabed drilling and mining may interfere with navigation and fishing, spills from tankers with recreation on beaches, and pollution control measures with maritime trade.[1]

In any event, an intricate and subtly shifting pattern of unilateral claims, to certain uses and jurisdictions over areas heretofore considered international waters, airspace, and substrate of the high seas, is evolving into a *de facto* patchwork of seemingly surreptitious, or even blatant, expressions of parochial nationalisms.

For the most part, there is merit to both sides of the issue of whether unilateral claims to jurisdiction over portions of high seas is justified. The simple glaring fact is that the presently evolved body of law applicable to use of the high seas is totally inadequate to satisfy the economic standards and needs of the entire international community which have been shaped by the multitudinous facets of modern technology. There are many of the world's leading jurists who firmly believe that unless a rational, sophisticated, and organic reformation of the law of the seas is undertaken on a broad multilateral basis, the unilateral jurisdictional partition of the oceans—reasonable or not—will lead to fairly rapid disintegration of that body of law and inevitable wide-scale conflicts. In this context, it should be clearly understood that the "law of the sea lies at the heart of modern international law as it emerged in the 17th century." This body of law is, in fact, the foundation upon which rests the majority of the international community's innumerable unilateral and multilateral treaties, agreements, and "understandings" relating to matters ranging from economic accords, and commercial aircraft overflight rights, to political alliances for military and ideological objectives. If the law of the sea undergoes an undisciplined upheaval, it is rather easy to recognize the vast and substantive effects it will have on the legal stability of the entire international community. As observed by John Stevenson, in a statement before the House Subcommittee on

1. 6 Int'l Lawyer 468 (1972).

International Organizations and Movements, April 1972, should the law of the sea

> collapse under the weight of conflicting unilateral actions based almost exclusively on immediate national interests, the result will be a severe blow to the prospects for the rule of law not only in the oceans, but in the international community generally.[2]

From the above sketch, it is fairly obvious that critical, expansive, and sophisticated interests are at issue presently, and will be the subject of intensive negotiation, compromise, and accord at the 1973, et seq., Law of the Sea Conference to be convened under the aegis of the United Nations. Of singular significance, also, is the fact that resolution of conflicting jurisdictional interests within a peaceful framework will be accomplished not by the so-called maritime super-powers, but by effective and often annoying participation of a multitude of nations often referred to in a diplomatically condescending manner as the Lesser Developed Countries. Without equivocation it can be said that one of the most, if not the principal, expendable items in the anticipated multilateral negotiations is the scientific research of the oceans. The reasons for such expendability lie in the views and relative influential posture of coastal States, impelling needs of the three or four major military countries, and the scientists themselves who are directly involved in investigation of the oceans.

A DEFINITION OF SCIENTIFIC INVESTIGATION OF THE OCEANS—ATTITUDES OF NON-PARTICIPATING COASTAL STATES

Several countries have stated publicly their firm convictions that scientific research of oceans is of benefit to all mankind. For this reason alone, they feel that such research should be open to all and that there sould be maximum freedom of scientific research in the oceans. However, certain of the coastal States have denied the efficacy and ultimate equity of this reasoning on the basis of their inability to (1) participate effectively in such research and utilize the resultant data in a beneficial way; (2) to protect national interest in resources in an area of recognizable jurisdiction; and (3) prevent environmental degradation of coastal waters and shorelines by mining, drilling, farming, etc., operations resulting from scientific research.

2. *Hearings on Law of the Sea and Peaceful Uses of the Seabeds Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 92nd Cong., 2nd Sess., at 2 (1972).

The general response to such national concerns is reflected in the observation of John Stevenson, that

> [a] new and more vigorous approach to the problems of training, participation, and technology sharing may provide the basis for an accommodation that protects freedom of scientific research and assures that it is of maximum benefit to all, including developing countries.[3]

To the developing country that happens to be a coastal State, the two basic interests in expanding and confirming their jurisdictional holds over territorial waters [as well as supra- and subjacent resources] are economic participation and/or leverage in international negotiations, and national defense interests. In the first instance, a coastal State with minimum or no ability to participate in oceanographic science or commercial exploitation of such research, arrogation of high seas jurisdiction can be used in direct or indirect negotiations of any nature with other countries capable of, and interested in, exploitation of resources located in such areas. This unilaterally assumed jurisdiction can be employed both as a quid-pro-quo in negotiations, or as an effective leverage to obtain action or compromise.

The coastal State need not be a world power to enforce its jurisdiction; all that is needed is a reasonably effective gunboat of fairly modern vintage. World politics and effective public condemnation of retaliation by "super powers" against annoying action of "lesser developed countries" involves minimal risk in the use of such gunboats. Further, covert unilateral accord between a coastal State attempting to extend its jurisdiction over high seas areas, and a State that continues to require free passage through such areas, permits maintenance by both parties of a public image that avoids confrontation and conflict. A coastal State can establish a *de jure* jurisdiction with the contesting State in fact obtaining its requirement of innocent passage—at the same time offering a minimum of face-saving remarks about the degradation of established international law and spirit of comity among nations.

In the second instance, expansion of jurisdiction or control can serve as a buffer, against foreign intelligence gathering, for developing countries which are unfortunate to have hostile neighbors, or which are the objects of extant colonial exploitation by other nations. Unpalatable as they may be, these are hard facts giving rise to national paranoia and xenophobia which will require more to dissipate than the virtuous orations of even basic research scientists.

The important aspect is that the principal issue is not the collection

3. 109 Cong. Rec. E 8934 (1972).

of data by foreign nationals in the waters of a coastal State; rather it is the use to which the research data is put, by nations having access to such data from the international science community, which may abuse or be hostile to the best economic, political, military, etc., interests of the coastal State concerned.

This is very much the same problem that the international community is struggling with regarding use of the present Earth Resources Technology Satellite, or the aeronautical and satellite remote resource sensing devices. Concisely, what is beneficial scientific data to one country, may be to another State a divulgence of vital economic or military intelligence to hostile or commercial adversaries. Again, palatable or not, these are realities that now must be dealt with by those involved in scientific research. They are facts which if not appreciated by the scientific community, certainly must be respected as legitimate concerns and accommodated in any new procedural and organizational restructuring of international law of the sea.

Scientific investigation of the high seas and territorial waters can best be defined, for present purposes, by the characteristics of types of investigation. Although scientific study and investigation very legitimately can be conducted in such a way as to obtain no more than systematized knowledge of a given subject or object, it more often than not must be related to the use to which it is put, or is capable of being put. In short, it must be evaluated within the context of existing political, economic, nationalistic, and technological realities.

LEVEL OF AWARENESS OF THE SCIENTIFIC INVESTIGATOR

Although certain private institutions and advisory bodies, such as Scripps Institute of Oceanography and the National Academy of Sciences, have sounded the clarion to battle for freedom of the seas, the efforts seem to have been quite limited both in scope of evaluation and in terms of informing scientific investigators of the seriousness of the forthcoming Law of the Sea Conference regarding freedom of scientific research. There has been no real success in establishing a sophisticated position regarding scientific investigation of coastal waters, and the expansion of territorial waters jurisdiction. The response of many scientists seems to be "no compromise—freedom of the seas or nothing at all!!" Although this places a heavy burden on governmental officials, particularly in the United States, who are responsible for evolving positions to negotiate with other nations, it can simplify matters to the extent it already has, i.e., freedom of

scientific research is easily and readily compromised for more important economic and military interests.

It appears that a working conference to educate scientists as to what is happening to the law of the sea and how the changes will affect oceanographic research is long overdue. Hopefully, detailed awareness of the situation may result in an effective influence of ocean scientists of the official positions negotiated by U.S. and other governments. Although freedom to conduct scientific research on the high seas always has been a myth, it certainly will not be detrimental to the interests of scientific investigators of the oceans if a rational approach to multilateral control of such investigations in coastal waters—regardless of ultimate seaward limits—is formulated by the user scientists and protected by the major maritime nations with advanced technology necessary for scientific research.

In any event, the controlling factor at this time should be recognition, by scientist and lawyer alike, that present accommodations for oceanographic research in foreign coastal waters and much of the area presently considered the high seas will not remain unchanged. Further, they will not become less complicated and easier to achieve. At best, if not traded cheaply through inattention of delegates to the 1973 Law of the Sea Conference, freedom of basic research of the oceans will become the object of a sophisticated legal framework and enervating controls sufficient to make scientists leave the subdisciplines of oceanographic research in frustration and disgust. Concisely, the time for rhetoric is long passed—the time for serious, realistic involvement of scientists is quite at hand.