International Law Studies - Volume 61
Role of International Law and an Evolving Ocean Law
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FREEDOM OF THE SEAS

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The concept of freedom of the seas is long rooted in man's use of the seas for trade and commerce. The ability of men freely to use the seas as a reliable communications link has been essential to the development of an economically and politically interdependent modern world.

Freedom of the seas means that all states have a basic right to use the seas in support of their national and international aims. However, this does not mean an unrestricted usage, without regard for the interests of neighbors and trading partners. On the contrary, since the earliest times, limited restriction on the use of the seas has been generally accepted as necessary by the community of nations. For example, nations have tended to assert specific restrictive measures on the use of seas adjacent to their national coastlines. These measures have been asserted for reasons of security, economics, or other national interests.

However, the basic principle that the seas are and should be free for the use of all has not been substantially abridged. In fact, for the last 400 years a growing body of international law has been developed, principally in order to deal with those issues which have, from time to time, challenged the basic concept.

Much of this body of law has evolved through the individual actions of states, while in recent years more formal codification has been undertaken through the use of multilateral conventions and treaties. Whatever the source, the general thrust of the movement has been aimed at limiting or regulating the unilateral claims of states which have attempted to impose broad controls over the free use of the seas by all who wish to do so. Thus, it appears that the community of nations has long recognized that the general interests of the group would best be served by preserving this basic right.

Today, we may be thankful that these early efforts have been largely successful. The modern world is an economically interdependent entity, whose prosperity and security is based on seaborne commerce and whose unity is sustained by the threadlike sealanes which crisscross our global charts.

Although freedom of the seas is vital to global commercial operations, it is absolutely essential for the efficient operation of naval forces in peacetime. All navies must be concerned with any move to limit the movement of naval

forces by the extension of controls over the high seas, for those forces must be able to steam when and where the support of national and commercial interests requires them to go.

In this respect, the gradual evolution of rules for the free use of the seas has included the development of the right of innocent passage in order to facilitate the use of the seas for both commercial and naval interests. As a practical matter, the term "innocent passage" is subject to varied interpretations within the maritime community. Basically, however, passage of vessels through territorial seas is considered innocent so long as no acts are committed which are prejudicial to the security of the coastal state or contrary to existing law. This is as it should be, from our point of view as naval officers, for without such a right, the operations of naval forces would be greatly hampered, while commercial operations might become economically impossible.

Although we must be concerned by any reduction of the freedom of the seas, there are reasonable grounds for encouraging the continued development of the international law of the sea. This is so despite the probability that additional restrictions on the uses of the seas might be included. Some have claimed that events of recent times have threatened seriously to erode the concept of freedom of the seas. There have been precedent-setting unilateral actions by some nations in pursuit of their own national interests which have had the effect of challenging the right of all states to the free use of the seas. These actions, although cause for concern by the general maritime community, are at least deserving of our sympathetic considerations, for all nations should and will act in support of their own best interests. However, the problem often becomes that of accurately perceiving one's own best interest, both for the long term and for the moment.

For example, a small maritime state which declares the existence of a broad territorial sea thereby imposes duties on itself as well as claiming privileges. If the extent of territorial sea claimed is beyond the ability of the state to control, it is possible that other nations might use the area for mounting aggression against a third state, thus compromising the neutrality of the original declarer. Such considerations are relatively minor, however, when compared to the implications to a small maritime state of any meaningful erosion of the general right to free use of the seas. In the final analysis, a workable and consistent legal regime for the high seas is of greatest benefit to the smallest, weakest states. Large and powerful nations always will retain the capacity to defend their own interests through persuasive diplomatic, economic or military pressures. The entire thrust of the development in human society of a rule of law applicable to individuals and states alike has been to provide protection for the weak against the depredations of the strong.

Most of the recent developments have been directly attributable to the accelerating pace of technological change which has characterized the last few decades. In earlier times, political and technical events moved at a pace which allowed for the rational development of theories on international relations and law consistent with the universal desire of men for peaceful interaction with their fellows. But now, events frequently seem to outstrip the ability of precedent and practice to build rational and ordered guidelines for international conduct. A tendency is developing to assert claims now, in order to reserve privileges for the future. Many of these decisions have, of necessity, been made without appropriate regard for future implications.

It is manifestly true that we exist today in a world far different from that of our fathers. It is a world shrunken as much by advances in communications and transport as by the advent of

intercontinental weaponry. It is no small wonder that the historic definition of the width of the territorial sea as that distance within range of a cannonball now seems inconsistent with the times. Granted, the basis of this rule is archaic, but the 3-mile territorial sea is the only rule which has been universally accepted and thus provides the only basis for developing a new and more meaningful modern rule. Questioning of an existing rule is quite acceptable, for this is how the regime of law matures and becomes more useful; and such questioning is to be expected, particulary in light of today's changing world.

For example, in the last decade, the minds of men have been stimulated to high excitement by visions of new possibilities for the exploitation of the resources of the sea and the seabed. The advancement of technology, combined with the proliferation of states who must look increasingly seaward for food, minerals, and jobs for their expanding populations, has made it mandatory for all of us to get on with the task of using the ocean and its resources to the fullest practical extent.

Although the imagination of mankind has been sparked by prospective new uses for the seas, it must not be forgotten that the most valuable immediate and future use of the oceans is their historic utility as an economical means of transport and communications.

The development of swift, efficient, and spectacular means of air transport may seem to some to have reduced the value of the seas as a medium of commercial intercourse. The opposite is true. Reliable estimates predict that world seaborne trade will double every 20 years for the foreseeable future. The world's present total freight costs are estimated to be between $12 and $15 billion per year. Air transported cargoes now constitute less than 3 percent of international world trade, while trade in bulk raw materials remains almost 100 percent seaborne. In 1966 the seaborne trade of the United States alone was valued at over $30 billion, and this figure will continue to increase. Clearly, then, we should neither be blinded by speculation on possible new uses of the seas nor forgetful of the proven and increasing value of the oceans as highways.

The interdependence which has been fostered in modern society, principally through seaborne cultural and trade links, now dictates that no one state can make unilateral reductions in the area of the seas available for the use of all without vitally affecting the well-being and security of almost all other states. For that reason, as well as to prevent, wherever possible, points of friction between nations, it is necessary that we look to the possibilities of improving the existing rules for the use of the sea.

I have pointed out that a growing body of international law has been formulated in support of the concept of freedom of the seas. The American philosopher, Henry Ward Beecher, once said that "Laws . . . are constantly tending to gravitate. [or become unbalanced] Like clocks, they must be occasionally cleaned . . . and set to true time." Perhaps now is the time for us to investigate to what degree the laws of the sea have become unbalanced and their need to be set in step with the times.

International law, as you know, is based on two principal sources. First, customary international law—that is, the practices of states—forms precedents on which to build rules of conduct. Secondly, conventional international law—formal agreements or treaties among nations—provides written guidelines for specific situations.

Precedents become highly valued and reliable sources for the rules of conduct between nations if based on principles of mutuality and reciprocity. That is, the precedents are based on mutual interests and recognize that any other

state has the right to reciprocate with the practice established by the state setting the precedent. The usefulness of precedents is further enhanced if they describe the consistent practices of most states. Such consistency of practice, however, is difficult to establish over a brief period of time, particularly if the diverse and competitive interests of states are in a condition of flux during that period. This is the situation today. Competition and diversity of interest have never been at such a peak as they have over the last decade, and the current, confused status of the legal regime of the seas reflects the times.

Because of the apparent growing unreliability of precedent as a basis for future actions, it may be that the world community must now look more to the formulation of conventions and treaties as the best means of reestablishing order within the legal regime of the seas. Certainly, we must consider possible courses of action along this line.

Of course, because treaties and conventions operate to limit future action by signatory states as well as to define their privileges, they are very difficult to draw up. This difficulty is increased when the specific future interests of states are unforeseeable, and it may be for this reason that we should hope that such conventions or attempts at codification be as simple and as conceptual as possible. However, it is clear that the broad interests of all maritime states can be well served by reasoned analysis of the problems affecting the freedom of the seas. In my mind they will be well served if they tend only to state principles rather than detailed regulations. For those who may believe that unilateral actions by states in this area are feasible and sufficient for now, I suggest that they consider all aspects of such actions. In many cases, the unilateral actions of a state can become just as binding on its own future options as a formal multilateral treaty. Further, it is not unreasonable, in these changing times, to presume the existence of circumstances where premature unilateral action by a state could deprive it of all future advantage from as yet unrevealed technology or political circumstance and thereby limit its options. For this reason, if for no other, it seems that all members of the community of nations can best protect their interests through encouragement of formal, reasoned agreements on some of the most pressing questions now affecting the freedom of the seas.

The Geneva Conferences on the Law of the Sea in 1958 and 1960 made substantial gains in restating historic principles and in approaching new concepts more appropriate to the times. Yet, more remains to be done to regularize state practices while at the same time preserving freedom of the seas. Points which are in growing need of clarification include:

1. A general agreement on the width of the territorial sea which updates the existing rule and which provides for the specific protection of the interests of individual states as well as the general interests of the world community in the preservation of the wide high seas to the maximum extent possible.

2. A clear definition of the rights of all nations to free access through multinational straits and bays.

3. Elimination of the existing ambiguity affecting the definition of the Continental Shelf. The existing convention specifies the 200-meter line but also adds "or to the limit of exploitability." Despite the further test of "adjacency," the real possibility for successful exploitation of seabed resources at depths well in excess of 200 meters makes further clarification necessary.

4. Establishment of basic international criteria for national fishing rights in the contiguous zones.

When we consider the new vistas opened by technology and the resulting absence of appropriate historical prac-

tices, together with the intensifying competition among nations for oceanic resources, we cannot afford to delay. Objectively drawn, inclusively oriented international agreements are needed, and needed now.

It is clear that, in spite of these compelling considerations which bring an air of urgency to the need for enlarged codification of the law of the sea, it will be extremely difficult to construct a convention covering all these points. Further, if agreement is to be reached on these matters, there will have to be substantial adjustment by many nations, large and small, from positions which they now appear to hold.

Is it possible that the desires of the world community for the retention of the concept of freedom of the seas might be inconsistent with the growing necessity for full exploitation of ocean resources? I believe not.

It appears to me that if reasonable order is to be maintained in the use of the oceans, then the fundamental concept of freedom of the seas will provide the only essential basis upon which to continue to build that order. It is clear that the extreme opposite case, where each nation might stake out unilateral claims to vast ocean areas limited only by their ability to apply national power to enforce the claim, can lead only to chaos, international conflict, and gross injustice to the weaker nations. The less-developed states of the world would be doubly handicapped in such a free-for-all arrangement. Not only are they in more urgent need of the resources of the sea in order to solve immediate and pressing problems of economics and population, they are also the least able, technologically speaking, to carry out an efficient exploitation of whatever resources might be conceded to them.

From an exclusively military, or naval, point of view, any general abandonment of the concept of freedom of the seas can have only one ultimate result. No navy can operate in a peacetime environment without the guaranteed freedom of maneuver provided by the concept of freedom of the seas.

Thus, it seems clear that the future development of the law of the sea must be squarely based on long-standing precepts arising from the doctrine of freedom of the seas. It may well be that the specific dimensions of the sea available for the free use of all will be reduced from that of today, but the general concept must remain the keystone of world maritime activity.

How then can the demands of modern society be reconciled with a doctrine rooted in antiquity?

I do not believe these demands are inconsistent or unattainable. In every case where unilateral state action has been taken to erode the concept of freedom of the seas based on economic reasons, an equally good case may be made for compensating economic advantage to be gained from reversion to claims of lesser dimension. For example, world shipping schedules and routes which are not constrained by broad territorial sea claims are certainly more economical and do return broad benefits to all. Also, an unwarranted extension of national responsibility over ocean areas too large to police can impose burdens on a state, burdens which it may grow unwilling to bear in exchange for the benefits originally foreseen. In other words, there appear to be inherent pressures toward self-regulation built into the concept of freedom of the seas. From time to time, these stabilizing tendencies are slow in coming into operation. However, in the absence of deliberate obstruction, they will operate; to elect an opposite course of action is destabilizing and inevitably contrary both to the interests of individual states and the community of nations.

Gentlemen, I have pointed out some serious points of potential conflict among nations, and I suggest that it is

not enough for us as naval officers to merely take note of them and then pass on to problems more easily solved. Because of our shared heritage as professional seamen, we should be better able to call forward the spirit of mutual understanding and cooperation needed than others whose training and professional experience are based solely on political or diplomatic careers. The old seaman's maxim, "one hand for yourself and one hand for the ship" seems appropriately parallel to the situation we face today. In the matter of freedom of the seas, our countries and our world order each demand a hand from us if they are to weather the squalls on the horizon.

I suggest that there are several actions we should undertake. First, we should keep open the channels for exchange of ideas which we will establish here this week. Perhaps you will consider in your seminars today the proposition that these dialogs may be continued in the future—perhaps by a system of "committees of correspondence," perhaps through regular regional or international naval convocations.

Second, we should remain alert to detect the implications of advancing marine technology as it may have an effect on freedom of the seas.

Third, we should take whatever individual action we are able to encourage the promotion of international conventions which will continue the work of codifying the law of the sea, keeping always in mind the view that the keystone of such codes must be freedom of the seas.

Finally, we should beware of practices or declarations which promote unreasoned exclusiveness without sufficient regard to widely shared interests.

In conclusion, I would like to express my belief that institutions such as the Naval War College and convocations such as this symposium can be of immense value not only in promoting mutual understanding through reasoned discussions, but also in helping each of us to recognize the fine balance between national and international interests and their effect on freedom of the seas.

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