

5-1-1980

Ixtoc I: A Test for the Emerging Concept of the Patrimonial Sea

Alan T. Leonhard

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law of the Sea Commons](#)

Recommended Citation

Alan T. Leonhard, *Ixtoc I: A Test for the Emerging Concept of the Patrimonial Sea*, 17 SAN DIEGO L. REV. 617 (1980).

Available at: <https://digital.sandiego.edu/sdlr/vol17/iss3/7>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

Ixtoc I: A Test for the Emerging Concept of the Patrimonial Sea*

ALAN T. LEONHARD**

The Ixtoc I blowout of June 1, 1979 raised many issues concerning the status of the concept of the "patrimonial sea." This article examines the emergence of this concept from the perspective of Latin American jurists who adhere to the tradition of regional particularism in international law; and considers the question as to whether or not the "patrimonial sea" is lex lata or lex ferenda. The realities of the development of new laws of the sea at the international and regional levels shattered the ideas that the vastness of the oceans would prevent serious pollution and that the wealth of the seabed is a "common heritage of mankind." Some conclusions are made concerning liability for oil spills from offshore drilling operations and obstacles to the enactment of domestic, regional and international rules aimed at avoiding future disasters like Ixtoc I.

INTRODUCTION

On June 3, 1979, when gas and oil from a damaged wildcat offshore well surfaced and caught fire, sending 30,000 barrels of crude oil per day gushing into the Bay of Campeche, petroleum troubleshooters had a difficult time speculating about the potential magnitude of the disaster. Petroleos Mexicanos (Pemex) immediately played down the seriousness of the catastrophe and continued to stave off domestic and international criticism

* The author wishes to express his appreciation to Commander John C. Watson, Special Lecturer on the Law of the Seas at the University of New Orleans, for his comments on this article and to Gregory P. Orvis for his editorial assistance.

** Associate Professor, University of New Orleans. B.A., Tulane University, 1960; M.A., Tulane University, 1961; Ph.D., Duke University, 1967.

through its Director General, Jorge Diaz Serrano.¹ Although a team of 500 experts from eight countries under the direction of Paul "Red" Adair successfully capped the well, it blew out again on June 24, causing the famous firefighter to abandon the project. Pemex officials hope either to close off the well's valves with the aid of divers or to bring the spill under control by drilling two relief wells several hundred meters away from the site of the blow-out. The crisis is clearly destined to become the largest oil spill in the history of the petroleum industry as the volume of crude that spewed into the Bay of Campeche and drifted into the Gulf of Mexico exceeded the record spill from the *Amoco Cadiz* off the French coast in 1978.

The circumstances surrounding the massive spill are fraught with polemics emanating from environmentalist and political critics.² This paper, however, attempts to answer some questions that might be posed by students of international law concerning: (1) the degree to which existing rules may govern this new situation, and of more concern, (2) the issue of the absence of juridical means to regulate and control an accident involving an offshore well spill that is damaging vast areas of international waters and the coastlines of at least two nations. To approach these objectives, we will examine the viewpoints of Latin American legal scholars on the direction of the development of the law of the sea during the post-World War II era, especially with regard to Latin American governments' responses to the 1945 Truman Proclamation on the continental shelf.³ Central to the discussion is the concept of the "patrimonial sea" attributed to Chilean writer Edmundo Vargas Carreno and formalized in the Declaration of Santo Domingo of 1972.⁴ Often the phrases "regional particularism" or "American international law" refer to the tendency on the part of many Latin American jurists to cling to Hispanic and natural law traditions in their studies in the international law field.⁵ The "patrimonial sea" or "mar patrimonial" is an outgrowth of this school of thought.

Another way to deal with disputes about the presence or ab-

1. LATIN AM. ECON. REP., June 29, 1979, at 197; WORLD OIL, Aug. 1, 1979, at 21.

2. The Mexican newspaper *Excelsior* and news magazine *Siempre!* accused Pemex Director Jorge Diaz Serrano of withholding information about the extent of pollution. An editorial in *Siempre!* stated that Diaz Serrano should appear before the Chamber of Deputies to answer questions concerning Ixtoc I. See *SIEMPRE!* (Mexico City), July 28, 1979, at 38, 40.

3. Pres. Proc. No. 2,667, 3 C.F.R. 67 (1943-1948 Compilation).

4. See E. VARGAS CARRENO, *AMERICA LATINA Y LOS PROBLEMAS CONTEMPORANEOS DEL DERECHO DEL MAR* (1973).

5. See Leonhard, *Regional Particularism: The Views of the Latin American Judges on the International Court of Justice*, 22 U. MIAMI L. REV. 674 (1968).

sence of legal precedents to cover the Ixtoc I case, is to offer suggestions for solutions based upon a model such as the system set up for oil pollution liability resulting from offshore drilling in the North Sea. As we shall see later, a convention on this problem has been signed by four states that are presently engaged in exploration and exploitation of mineral resources on the seabed in that part of Europe. Thus, the purposes of this article are: to address the topic of the Mexican oil spill by setting forth the viewpoints of prominent Latin American jurists on the development of the emerging concept of the "patrimonial sea" in a critical fashion, and to consider new proposals in the sphere of international law which could provide answers to the perplexities arising out of accidents involving the offshore petroleum industry.

REGIONAL PARTICULARISM AND THE 200-MILE ZONE

William E. Butler, Dean of the Faculty of Laws at the University of London, has initiated a course for post-graduate law students called "Comparative Approaches to International Legal Systems" in which part of the time is devoted to analysis of Latin American contributions to international law.⁶ There are definite patterns to be found in the legal philosophy of Latin American publicists, and Professor Butler has been joined by a few other scholars from outside the Hispanic international legal tradition who have examined the evolution of regional particularism. H. B. Jacobini states that "virtually all of the writers agree that there exists an element of continental solidarity which includes a few peculiarly American rules, practices, and problems, and that America has contributed much to international law in general."⁷ Most recently, the law of the sea has been at the forefront of regional particularism in the Western Hemisphere. A triumph for the States that have been pressing since the 1940's for the establishment of a 200-mile exclusive economic zone was the inclusion of a provision defining such a zone in the Informal Composite Negotiating Text (ICNT) of the Third United Nations Conference on the Law of the Sea.⁸ However, this victory, for which the Latin Americans have

6. See generally W. BUTLER, *INTERNATIONAL LAW AND THE COMPARATIVE METHOD* (1978).

7. H. JACOBINI, *A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN THE WORKS OF LATIN AMERICAN WRITERS* 154 (1954).

8. U.N. Doc. A/Conf.62/WP.10 (1977) [hereinafter cited as ICNT], reprinted in 16 INT'L LEGAL MATERIALS 1108 (1977).

been working so intensely over the span of nearly four decades, is at the very heart of the dilemma faced by Mexico and her apologists in connection with the Ixtoc I incident. While Mexican governmental officials are euphoric about the extensive offshore oil discoveries, the event calls into question the government's liability for pollution originating in the EEZ which damages the environment of a second State.

The Revised Informal Composite Negotiating Text (ICNT/R) vaguely defines the rights and extent of jurisdiction of the coastal State in the 200-mile exclusive economic zone.⁹ But some type of responsibility of a State for pollution in its exclusive economic zone appears in many of the draft articles presented to the United Nations Seabed Committee.¹⁰ Documents drafted in Latin American circles tend to avoid the issue of liability and to expound generalities about the preservation of the marine environment, pollution control, and conservation. Alberto Szekely's two volumes entitled *Latin America and the Development of the Law of the Sea* are an excellent compilation of national laws and regional documents that bear out the point that regional particularism refrains from facing the liability controversy.¹¹

THE DEMISE OF TWO MYTHS

The oceans cover nearly three fourths of the surface of the globe. A common belief before the *Torrey Canyon* catastrophe in 1967 was that the boundless space of the oceans precludes the possibility of measurable pollution. Basic to this belief was Grotius' definition of the high seas as *mare liberum*, not subject to occupation by anyone.¹² Under the precept *res nullius*, the high seas belonged to no one but was subject to equal use by all.¹³ Several decades before Grotius wrote the classic, *De jure belli ac pacis*,¹⁴ Victoria and Suarez revived the Roman law concepts *jus gentium* and *jus naturale* to meet the exigencies of colonization of the New World.¹⁵ However, with the world-wide increase of

9. U.N. Doc. A/Conf.62/WP.10/Rev.1 (1979) [hereinafter cited as ICNT/R], reprinted in 18 INT'L LEGAL MATERIALS 686 (1979).

10. Eighteen separate draft articles concerning the prevention of marine pollution in the EEZ are reprinted in 2 S. ODA, THE INTERNATIONAL LAW OF THE OCEAN DEVELOPMENT 373-415 (1975).

11. A. SZEKELY, LATIN AMERICA AND THE DEVELOPMENT OF THE LAW OF THE SEA, REGIONAL DOCUMENTS AND NATIONAL LEGISLATION (1976).

12. H. GROTIUS, DE JURE BELLII AC PACIS (1625), cited in J. BRIERLY, THE LAW OF NATIONS 28 (6th ed. 1963).

13. *Id.*

14. *Id.*

15. The two Spanish theologians Francisco de Victoria (1480-1546) and Francisco Suarez (1548-1617) are venerated by Latin American lawyers who frequently view themselves as contributors to the revival of Spanish Scholasticism. In dis-

drilling on the continental shelf, the prospect of an uncontrolled offshore well blowout created fears among environmentalists that such an occurrence would be even more calamitous than the worst petroleum supertanker accident. In 1977 Evan Luard warned: "A single blow-out from an off-shore oil well could pollute vast expanses of ocean, destroy the ecological balance within a large area and affect several countries."¹⁶ Ixtoc I seems to fulfill this dismal prophecy and, along with the *Torrey Canyon* and other immense spills resulting from tanker accidents, spells the end to the myth that the seas are too vast to be susceptible to man-made pollution.

A utopian theory recently forwarded is the source of a second myth: the oceans along with their resources constitute "a common heritage of mankind." Ambassador Arvid Pardo of Malta in a memo to the United Nations Secretary-General on August 17, 1967, proposed that with the assistance of a Seabed Authority the revenues accrued from the exploitation of the ocean resources be used to set up a fund to improve conditions in developing nations.¹⁷ But Dennis Pirages points out: "Between Pardo's speech in 1967 and 1973, however, the 'common heritage' of mankind shrank from 65 percent of all ocean space to only 35 percent by means of unilateral declarations by coastal states."¹⁸

The shortlived dream of a "common heritage of mankind" stemmed in part from the fact that nations in the Western Hemisphere took direct actions to enforce the 200-mile zone. In keeping with the 1952 Declaration of Santiago on the Maritime Zone, Chile, Ecuador, and Peru, in an effort to protect their fishing grounds, seized hundreds of United States tuna boats.¹⁹ Protests from the United States were by no means designed to protect the oceanic commons, but to prevent restrictions on the movement of

cussions of the responsibilities of States, these contemporary theorists make reference to the need to revive or modernize the ideas of their intellectual forebearers, Victoria and Suarez. See, e.g., Mora, *Foundations of Modern International Law*, AMERICAS Nov., 1963, at 1; Alfaro, *The Rights and Duties of States*, 2 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL, 95-202 (1959).

16. E. LUARD, *THE CONTROL OF THE SEA-BED: A NEW INTERNATIONAL ISSUE* 114 (1977).

17. U.N. Doc. A/6695 at 1-2 (1971).

18. D. PIRAGES, *THE NEW CONTEXT FOR INTERNATIONAL RELATIONS, GLOBAL ECOPOLITICS* 201 (1978).

19. The label "Tuna War" was first widely used in Ecuadorian newspapers in January, 1971. See *El Universo* (Guayaquil), Jan. 19, 1971, at 6.

naval fleets, merchant ships, and fishing vessels.²⁰ By the 1970's the fish in the super-adjacent waters and the mineral resources of the seabed were, in the view of Latin American statesmen and jurists, undisputably within the realm of the exclusive economic zone, and for them 200 miles became "a universal norm" of international law.²¹

THE EMERGENCE OF THE "PATRIMONIAL SEA"

Andres Aguilar, Ambassador of Venezuela to the United States, explains the origins of the phrase "patrimonial sea" in the following way:

The term "patrimonial" in the case, is a natural choice for jurists who have been trained in the concepts and terminology of European continental law, based on Roman law. For this school the term "patrimonial" immediately brings to mind the idea of a plurality of economic rights vested in a single person, whether natural or juridical.²²

The derivation of the word "patrimonial" from Roman law is indeed an appropriate choice to describe the zone because, as with so many Latin words and phrases found in international law, it conveys clarity of meaning through its very simplicity and logic.

"Patrimony" is defined in Webster's Dictionary as "an estate inherited from one's father or ancestor."²³ Analogies made from Roman domestic law became a basis for establishing rules of international law. Professor Brierly writes that "the founders of international law turned unhesitatingly to Roman law for the rules of their system wherever the relations between ruling princes seemed to them to be analogous to those of private persons."²⁴ Equivalentents like person-state, contract-treaty, and property-sovereignty were essential to the formation of a body of rules governing nations. In this context the "patrimonial sea" is an oceanic estate that is the property of a State over which it may exercise sovereignty lawfully handed down to it by the ancestors or fathers of the State. Furthermore, the development of the technology necessary to exploit ocean resources influenced Latin American political leaders, diplomats, and international lawyers

20. Hollick, *United States Oceans Politics*, 10 SAN DIEGO L. REV. 467 (1973); see also Loring, *The United States Peruvian "Fisheries" Dispute*, 23 STAN. L. REV. 391 (1971).

21. Menchaca, *El Derecho del mar en el porvenir*, 154 REVISTA DE POLITICA INTERNACIONAL 53 (1977) (A basis for 200 miles is the extent of the fishing grounds of the Humboldt Current).

22. Aguilar, *The Patrimonial Sea*, in *THE LAW OF THE SEA, NEEDS AND INTERESTS OF DEVELOPING COUNTRIES: PROCEEDINGS OF THE SEVENTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE*, 161-62 (L. Alexander ed. 1973).

23. WEBSTER'S NEW COLLEGIATE DICTIONARY 840 (G&C Merriam Co., ed. 1975).

24. J. BRIERLY, *THE LAW OF NATIONS* 20 (6th ed. 1963).

to press for the creation of an area to be termed the patrimonial sea, epicontinental sea, or exclusive economic zone.

Throughout the history of Latin America since the period of independence from Spain, most States in the region have been subjected to domination and intervention from Europe and the United States. Thus, legal documents and proclamations became the major tool for weak nations to counter the pressures of power politics. The legalistic mentality prevalent among Hispanic-American governmental officials is misunderstood and criticized by lawyers trained in the "common law" tradition. Latin American foreign policies reflect intense feelings of anti-imperialism, self-determination, xenophobia, and patriotism.²⁵ The permeation of legalism into Latin American culture is typified in the reference to Argentina as "the land of *abogados* (lawyers)."²⁶

Several terms were presented to describe the region's push for the 200-mile zone; but as mentioned earlier the phrase "patrimonial sea" was first used by Professor Edmundo Vargas Carreño in 1971 in the following manner:

The patrimonial sea includes both the territorial sea as well as a zone beyond it the extension of which is determined unilaterally—but not arbitrarily—by the coastal State. The jurisdiction of the coastal State to regulate the exploration, conservation, and exploitation of the marine resources contained within the patrimonial sea is extended over the adjacent waters, the seabed and subsoil thereof.²⁷

The Declaration of Santo Domingo 1972 reaffirmed the concept, thereby laying the ground for a firm regional consensus to submit the idea of the zone for recognition at the Third United Nations Conference on the Law of the Sea Sessions in Caracas 1974 and in New York 1977. Indeed, it took an aggressive small group of delegates to argue in behalf of poor nations and developing nations to win support for the 200-mile zone as a natural heritage to be utilized for the economic development of the Third World.²⁸ In reality, Mexico is one of the few more developed nations in this group which will reap the benefits allowed by the new draft provisions on the exclusive economic zone in the ICNT/R.²⁹ Mexican For-

25. These policies have in turn been translated into declarations such as the Drago and Calvo doctrines. *See id.* at 228, 324.

26. A. WHITAKER, ARGENTINA 59-60 (1964).

27. Cited in Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AM. J. INT'L L. 33, 43 (1974).

28. Stewart, *Mexico's Oil: Myth, Fact and Future*, WORLD OIL July, 1979, at 21.

29. *See* Franck, *An International Regime for the Seabed Beyond National Jurisdiction*, 6 GA. J. INT'L & COMP. L. 151, 155 (1976).

eign Minister Jorge Castaneda announced in June 1979 that the oil policy of his country would continue to be geared to the utilization of petroleum revenues for national economic development.³⁰

Lex Ferenda or Lex Lata

Perhaps the most important cause of confusion about the status of the patrimonial sea is the matter of whether the concept is *lex ferenda* (law which it is desired to establish) or *lex lata* (law in force). It appears that from statements and declarations issued, as well as from actions taken to police the 200-mile zone, Latin American States consider the new international law of the sea to have assimilated the patrimonial sea as *lex lata*. Again, we find ourselves caught up in the debate over regional particularism. Professor W. E. Butler explains:

For all its undoubted virtues and weaknesses, international law operates as a system in which the subjects of the system have profoundly diverse histories, languages, cultures, ideologies, values, levels of socio-economic and political development, and legal traditions. Some international legal rules are universal, or nearly so, in their acceptance, whereas others are applied within geographic regions or clusters of ideological or political affinities.³¹

The "patrimonialists" should be greatly encouraged by the inclusion of the "exclusive economic zone" in the ICNT/R and the recent Canadian seizures of United States tuna boats. Are these happenings evidence of international acceptance of the new zone? The fact that acceptance of the EEZ is growing so rapidly leads Professor Szekely to conclude that while "much controversy remains as to the detailed jurisdiction that it embraces . . . , the zone is now viable and will become a proposition *de lege lata*."³² Other publicists concur with the conclusion that the EEZ or patrimonial sea is well on its way to the status of *lex lata*.

In summary, it would be useful to cite Georg Schwarzenberger's lucid and concise description of the concept:

In the exclusive economic zone, the coastal State is to be granted "sovereign rights" regarding the conservation and exploitation of the actual resources of the sea-bed and subsoil and superadjacent waters, and exclusive jurisdiction regarding the establishment and use of artificial islands, installations and structures, other activities for the economic exploitation of the zone, and pollution control Other States are limited in the exclusive zone to rights of navigation, overflight and communication, but subject to control by the coastal State in safety zones around artificial islands, installations and structures. Like land-locked States in the region, other States may participate in the exploitation of the living re-

30. *Excelsior* (Mexico City), June 6, 1979, at 1.

31. W. BUTLER, *supra* note 6, at 115.

32. A. SZEKELY, *supra* note 11, at 171-72.

sources of the zone only under agreements with the coastal State.³³

THE QUESTION OF LIABILITY FOR OIL SPILLS FROM OFFSHORE DRILLING OPERATIONS

With the possible exception of the Santa Barbara "Oil Disaster of 1969" during which 1,000 gallons of crude per hour poured into the Pacific over a period of 11 days,³⁴ spills from offshore drilling in the Western Hemisphere have not received much publicity.³⁵ However, the Ixtoc I blowout is causing great alarm among observers inside and outside the petroleum industry. Technicians working to bring the spill under control and authorities connected with the cleanup operations have expressed dismay over the magnitude of the accident.³⁶ The massive spill is a crucial dividing point in the history of the evolution of laws governing the offshore oil industry as it enters a new era.³⁷

The time has arrived when the international community cannot afford to allow coastal States to set standards unilaterally for pollution resulting from drilling operations in the EEZ which damage the marine environment of large expanses of the ocean as well as the ecological balance in the waters under the jurisdiction of several States. Enforcement of international laws aimed at protecting the marine environment will not be an easy task for the United Nations or regional agencies, but one might offer some suggestions about the creation of models for dealing with this problem.

Plans for abating offshore drilling-source pollution are at an embryonic stage, but do show promise because of the serious commitment by some States and petroleum companies to meet the problem head-on before the advent of widespread and irreversible

33. Georg Schwarzenberger warns:

The area enclosed in exclusive economic zones of Coastal States covers more than one-third of the total area of the high seas, and 10 countries would receive 30 per cent of the area appropriated. Combined with the rules on international straits proposed in the Convention, it is estimated that on a consensual basis, four-fifths of world fishing and nearly all exploitable off-shore oil would come under the control of Coastal States.

Schwarzenberger, *Trends in the Law of the Sea, From Leviathan to Jaws?* in THE YEARBOOK OF WORLD AFFAIRS 1979 at 365, 366 (G. Schwarzenberger ed. 1979).

34. B. BUZAN, SEABED POLITICS 126 (1976).

35. One can only speculate about the long-term damage resulting from unreported spills which accompany the day-to-day production of oil from offshore rigs.

36. LATIN AM. ECON. REP., June 29, 1979, at 197.

37. See generally P. SWAN, THE LEGAL DIMENSIONS OF OCEAN OIL (1979).

damage to the oceans. On the matter of liability the Intergovernmental Maritime Consultative Organization (IMCO) and the Stockholm Declaration have provided a number of principles that were later incorporated into the ICNT/R.

Perhaps, the most promising model convention is the Convention on Compensation for Oil Pollution Damage from Offshore Operations which establishes civil liability for oil pollution in the North Sea. David B. Keto explains:

Thus far, the Netherlands, Norway, Sweden, and the United Kingdom have signed it. In order for the convention to come into force, it must be ratified by four countries, and implementing legislation must be drafted by each of the parties The Convention provides for the strict liability of offshore operators for damage caused by oil released in the course of offshore operations. Parties to the Convention may set maximum levels of liability but the maximum may be no less than \$35 million, rising to \$145 million in May of 1982. Claims for damages may be brought in the courts of the state in which the pollution originated or of the state in which the damages occurred.³⁸

Legislation concerning the creation of a "superfund" at the federal level to cover compensation for damage caused by offshore operations has been under consideration in Congress. The "superfund" would resemble the North Sea liability pool. Keto argues that "unlimited civil liability is precisely the sort of legal uncertainty that the oil companies appear to view as the most threatening to the viability of their operations."³⁹ Thus, we can expect that the pragmatic approach to the issue of liability in the form of model domestic laws, such as the "superfund," will precede any enforceable rules originating from regional arrangements.

CONCLUSION

If the Ixtoc I incident is to give momentum to the creation of new domestic, regional, and international laws aimed at the prevention of offshore oil disasters, advocates of these rules will have to overcome several obstacles: (1) the "energy crunch" is likely to lead to a *laissez faire* policy toward national and multinational petroleum enterprises; (2) leaders in the Third World countries, in keeping with the much heralded "New Economic Order," have hastened the pace for the exploitation of seabed resources; (3) economic development through offshore oil production in the patrimonial sea has become a matter of intense national pride;⁴⁰ (4) a long history of Latin American hostility and distrust toward the

38. See generally D. KETO, LAW AND OFFSHORE OIL DEVELOPMENT: THE NORTH SEA EXPERIENCE (1978).

39. *Id.* at 100.

40. *E.g.*, Mexico's oil policies.

United States will probably rule out legally binding regional arrangements on liability for oil spills; (5) the technology of offshore drilling used in many States may be inferior to those found in areas which have been operating for several decades; and (6) optimism and enthusiasm about the discovery of new seabed reserves has resulted in the willingness of some States to become "pollution havens" at the expense of the ocean environment. Finally, the above conclusions are epitomized by the reaction of Jorge Diaz Serrano (Director General of Pemex) who, during the worst stages of the Ixtoc I disaster, stated that the rate of 30,000 barrels per day of crude flowing into the Gulf of Mexico from the blowout well was proof that his nation might have greater petroleum reserves than earlier estimated.⁴¹

41. See LATIN AM. ECON. REP., June 29, 1979, at 197.

