Reflections on the Waters
Changing Conceptions of Property Rights in the Law of the Sea

A.V. Lowe
Faculty of Law, University of Manchester, UK

Introduction

In the first issue of a new journal it is not inappropriate to take the wide view, considering the broad perspective of a subject which will be discussed in detail in succeeding issues. This paper offers such a discussion of the “new” Law of the Sea, exemplified by the 1982 Law of the Sea Convention. The “material” changes wrought by the new law which developed during the decade of the Third United Nations Conference on the Law of the Sea (UNCLOS III) from 1973–82— including the biggest reallocation of jurisdiction over areas of the globe ever to have taken place — have been widely discussed. They will only be summarized briefly here (in Part 1) as the background to the central argument of this paper, which is that there has occurred during this period the culmination of a major, almost revolutionary, change in some of the fundamental legal conceptions which are the components of which the Law of the Sea is made. Specifically, it will be argued, first (in Part 2), that the conception of property rights has changed from one in which the exercise of rights in the exclusive interest of the proprietor is almost unrestricted to one in which their exercise is constrained by obligations to have regard to the interests of other states; and secondly (in Part 3), that the allocation of property rights by means of the delimitation of maritime boundaries has shifted from an essentially historical basis, where title to resources is dependent upon the validity of the claims to their acquisition based upon past conduct, to an “end-result” basis where rights are allocated in an attempt to achieve an “equitable” distribution according to the circumstances of the states concerned. Both of these conceptual shifts point towards an approach to the use of marine resources based more upon notions akin to stewardship than upon the untrammelled proprietorship which has, broadly


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speaking, characterized the previous legal order. Since the very conception of coastal and estuarine law implies a degree of responsibility on the part of the coastal state to have regard to the interests of other states in its use of those maritime zones, these shifts will constitute an encouraging feature of the current legal regime as far as most readers of this journal are concerned.

1. The changing framework of the Law of the Sea

At the outbreak of the Second World War the Law of the Sea was a very simple system. States were recognized (if only after the discussions on the subject at the 1930 League of Nations Codification Conference) as having sovereignty over a narrow belt—three miles was the most commonly accepted width—of seas adjacent to their coasts, subject only to a right of innocent passage for foreign ships. In some cases the territorial sea was accepted as being wider than the three-mile norm because the state concerned had built up an historic title to a greater width by the consistent and continuous display of effective state control over a greater breadth in the past: the four-mile Norwegian claim was the classic example. Within the territorial sea the coastal state had full control over all living and non-living resources and jurisdiction to prescribe rules for all foreign ships. Beyond the territorial sea lay the high seas, on which ships were subject only to the jurisdiction of their flag state, and on which ships of all states enjoyed “the freedom of the high seas”—navigation, fishing, laying of pipes and cables, etc.—subject only to an obligation to have “reasonable regard” to the interests of other states in the exercise of their freedoms of the high seas. The main exception to this laissez-faire regime for the high seas was the existence of certain areas of the sea-bed beyond the territorial sea in which certain states had, by effective occupation of the sea-bed, established title to the resources of that area: the historic pearl and chank fisheries off the Ceylonese coast were examples. Some states also claimed jurisdiction over a belt of high seas adjacent to the territorial sea, for limited purposes such as customs control: but the status of this contiguous zone was for long unclear, and its existence does not materially affect the broad generalization that the pre-war Law of the Sea was based on the twin pillars of a qualified sovereignty over the territorial sea and the freedom of the high seas beyond.

The claim to national maritime zones, including both the territorial sea and the exceptional claims to the bed of the high seas, were grounded in the exercise of power and control over the areas in question. True, that control was frequently rather stylized: it was generally recognized that state sovereignty should extend to the whole belt of coastal territorial waters, whether or not the coastal state was actually in a position to bring its power to bear upon any particular stretch of those waters. But the link with the power of the coastal state was clear and is exemplified by the references, which persisted well into the present century, to the “cannon-shot” rule as the original determinant of the breadth of the territorial sea.