No. 35, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MAINE, ET AL.

BEFORE THE SPECIAL MASTER

POST-TRIAL BRIEF FOR THE UNITED STATES

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I N D E X

Page

Page

CITATIONS

Cases:

Statutes:

Page

Miscellaneous:

Page

Miscellaneous, Cont'd:

Page

Miscellaneous, Cont'd:

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INTRODUCTORY STATEMENT

This case involves the respective rights of the United States and the defendant States in the natural resources of the seabed and subsoil of the Atlantic Ocean more than 3 geographical miles seaward of the coastline.

In the early 1940's, the State of California made claims to the natural resources of the seabed and subsoil adjacent to its coast within the 3-mile territorial sea. In 1945, in response to these claims, the United States instituted an action against the State to determine the respective rights of the parties to those resources. None of the defendant States in the present case was a party to those proceedings, in which California sought to establish its title to the natural resources adjacent to the coast by showing that the original States had title to the resources of the seabed and subsoil of the Atlantic Ocean on the basis of their colonial grants and charters and that California was admitted to the Union on an equal footing with those States.

In 1947, the Supreme Court rejected California's claims and held that the United States rather than the States was entitled to the submerged lands and resources of the seabed seaward of the low-water mark and limit of inland waters.

United States v. California, 332 U.S. 19. That holding was reaffirmed in United States v. Louisiana, 339 U.S. 699, and United States v. Texas, 339 U.S. 707.

Subsequently, in 1953, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301, et seq., granting to the coastal States the rights then held by the federal government to the natural resources of certain submerged lands seaward of the low-water line. Congress restricted the grant to 3 geographic miles from the coastline on the Atlantic and Pacific Coasts (43 U.S.C. 1301(b)).

In April 1969, the United States instituted the present proceedings to determine the respective rights of the United States and the defendant States to the natural resources of the submerged lands adjacent to those States beyond 3 geographical miles in the Atlantic Ocean.

In January 1970, the United States filed a motion in the Supreme Court for judgment on the pleadings. Thereafter, the defendant States moved for the appointment of a Special Master to take evidence, make findings of fact and conclusions of law, and submit a recommended decree. The Supreme Court granted the defendants' motion on June 8, 1970, and appointed

a Special Master in this case, without entering any order on our motion for judgment on the pleadings. 398 U.S. 947. At the first prehearing conference in this case on July 28, 1970, the United States requested that the Special Master rule on that motion. The Special Master deferred ruling on the motion pending a full hearing where all parties would have an opportunity to present their evidence. At that time, the United States asserted that any claims by the Atlantic Coast States to the natural resources of the adjacent seabed and subsoil beyond 3 miles from the coast are foreclosed by prior decisions of the Supreme Court. The United States added that it would initially rely on those decisions and would not present any evidence until the conclusion of the evidence to be introduced by the defendant States.

Five hearings were held between April 1971 and February 1973. During these hearings each side offered five witnesses and each side introduced numerous exhibits. As plaintiff in this litigation, the United States submits this opening brief.

SUMMARY OF ARGUMENT

This suit was brought to establish as against the defendant States, the rights of the United States in the lands and natural resources of the bed of the Atlantic Ocean more than

3 geographical miles seaward from the coastline. The defendant States deny all rights of the United States in those lands or resources and assert that they are entitled to those lands and resources as successors to grantees of the British Crown.

It is our understanding that the defendant States are claiming that they have continuously held rights in the continental shelf, both within and beyond the territorial sea, since before the formation of the Union, or their admission to it, and that these rights exist independently of any subsequent grant from the United States. We will show that that proposition is unsound and has been unequivocally rejected by the Supreme Court in its prior decisions. We will also show that Congress has explicitly reassessed federal and state interests in the adjacent seabed and confirmed the decisions of the Supreme Court, so far as they related to the lands beyond the 3-mile belt.

The prior decisions of the Court and of the Congress require that the claims of the defendant States beyond 3 miles from their coastlines be rejected. While the Supreme Court has granted the States an opportunity to justify overruling its prior holdings, there is a substantial burden on the States to introduce new arguments or new evidence not previously considered which might be sufficient to establish the error of those prior adjudications. The United States will show that the defendant States have failed to meet that burden.

As the United States understands the testimony and evidence of the defendant States, they are claiming that ownership of the adjacent seas and seabed was conveyed under English law to the colonies in their original grants and charters; that the original colonies continued to own the adjacent seas until independence, at which time the States succeeded to the rights of the colonies; and that the States have continued to own those seas after formation of the Union. In addition to relying on the previous decisions of the Supreme Court rejecting these contentions, the United States will show that the defendant States have failed in every respect to meet the substantial burden of introducing new arguments and evidence sufficient to establish the error of those previous adjudications.

Specifically, the United States will show that English law during the period of the colonial grants and charters did not recognize the concept of ownership of the English seas and seabed in a property sense. We will also show that even if English law recognized such a concept, with respect to the English seas, there is no evidence that it recognized such a concept with respect to the seas adjacent to America. In this respect, we will show that the Crown did not claim or convey in the colonial grants and charters ownership of the seas and seabed adjacent

to the colonies in North America. We will then show that even if rights to the property of the adjacent seas and seabed had been conveyed in those grants and charters, those rights reverted under English law to the Crown prior to the revolution and passed directly from the Crown to the United States, not to the States. Moreover, we will show that even if the States in 1789 possessed rights to the property of the adjacent seas and seabed, those rights were subsequently lost as a result of the ratification of the constitution in 1789 and the subsequent conduct of the foreign affairs of the United States. Finally, the United States will show that the rights claimed by the defendant States were at all relevant times contrary to international law.

ARGUMENT

I

THE PREVIOUS DETERMINATIONS OF THE SUPREME COURT AND OF CONGRESS REQUIRE THAT THE CLAIMS OF THE DEFENDANT STATES BE REJECTED

A. Prior Decisions Of The Supreme Court Preclude The Claims Of The Defendant States

1. United States v. California, 332 U.S. 19.--In 1945, the United States filed suit against the State of California to determine the respective rights of the State and the federal government in the natural resources of the seabed and subsoil of the territorial sea, the belt of sea adjacent to the coast extending 3 miles seaward from the low-water line and from the lines marking the outer limits of the inland waters of bays and rivers.

In asserting ownership of those submerged lands and resources, California contended that the 3-mile territorial sea was within the original boundaries of the States, that the original 13 States acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a 3-mile belt in adjacent seas, and that California was entitled to stand on an equal footing with the original States. In support of its thesis, California discussed at length the colonial charters and post-revolutionary rights of the original States.

The Court rejected California's contentions. It held that the claim of "equal footing" was unavailing because the original States themselves had no rights in the submerged lands or natural resources of the seabed seaward of the low-water line and the seaward extent of inland waters.

After referring to the multitude of historical references that the parties had cited on the evolution of the concept of the marginal seas, the Court stated (332 U.S. at 32):

> At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three mile water belt along its borders. * * * Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, * * * showed a purpose to set apart a three mile ocean belt for colonial or state ownership.

The Court further explained (332 U.S. at 32-33):

> Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of wealth.

The Court held that the concept of a territorial sea arose and gained international acceptance after the formation of the Union, largely as a result of the efforts

of the federal government. Both because acquisition of the territorial sea had thus been accomplished by the national government rather than by the States and because the territorial sea was primarily affected by national concerns of defense, international relations, and external sovereignty, the Court held that rights in the submerged lands and resources of the territorial sea (unlike inland navigable waters) are attributes of national sovereignty, rather than of State sovereignty. 332 U.S. at 33-36. The Court did not conclude that these waters were indispensable to the federal sovereign; the Court simply determined that between the States and the federal government, the federal government had the exclusive rights to the submerged lands and resources of the territorial sea.

Admittedly, the Supreme Court did not directly adjudicate the rights of the original States in the California case. As we have shown, however, its reasoning required it to decide whether those States had any rights in the seabed or resources beyond the low-water mark. Indeed, because the ruling would predictably affect their own claims,

some of the Atlantic States participated directly or indirectly as amicus curiae in the first California case.

Massachusetts sought and was denied leave to intervene but participated in the amicus brief of the National Association of Attorneys General as one of the drafters of that brief. New Jersey, which specifically joined in the amicus brief of the National Association of Attorneys General, submitted its own amicus brief as well. New York also submitted an amicus brief.

Massachusetts' motion to intervene (U.S. Ex. 1) sought to plead and prove that, before the formation of the Union, Massachusetts owned and always had owned within its borders a 3-mile belt on the open seas.

The Association's brief, in which Massachusetts joined when its motion was denied, relied upon many of the documents and authorities submitted by the defendants in the present case, including most of the colonial charters and

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1/ "U.S. Ex." refers to the exhibits of the United States in this case; "Maine et al. Ex." refers to the exhibits of the defendant States represented by common counsel. "Tr." refers to the transcript of the hearings.

and grants, early colonial and state legislation, the Articles of Confederation, early treaties and other documents following independence, and a great many of the English legal authorities on which the defendants now rely. The Association's brief presented in a detailed and systematic manner the same arguments that New Jersey, New York and Massachusetts made individually concerning Crown rights in the seabed and long and continued recognition of those rights in the States by the federal government and by the courts. (U.S. Ex. 11.)

New Jersey, in its amicus brief (U.S. Ex. 13) asserted that it had title to the lands beneath the Atlantic Ocean out to 3 miles, as successor to the rights of the Crown of England in those areas. In seeking to establish its claim, the State referred not only to the original grants and charters relating to New Jersey but also to such post-colonial documents as the Declaration of Independence, the Articles of Confederation, and the 1783 peace treaty with Great Britain. Again, they argued and relied upon many of the English authorities relied upon by the defendants here.

New York, in its amicus brief (U.S. Ex. 12), asserted that it was, and had been since the Revolutionary War, the owner of the waters and submerged lands in the Atlantic Ocean out to the 3-mile limit as successor to the English Crown. The State attempted in that brief primarily to establish the long recognition by the federal government and the courts of state rights in the seabed.

In short, the Court had before it the same arguments and much of the evidence relating to English, American and international law upon which the defendant States have sought to rely in this litigation. A comparison of the materials the Court considered in the California case with the documents that the defendants have introduced in this case shows that the defendants are relying upon evidence substantially similar to the documentary materials upon which the Court based its previous conclusions. For example, the defendant States have introduced into evidence few, if any, of the major charters and grants which the Court did not have before it in the California case, either in connection with California's original answer (U.S. Ex. 4, particularly pp. 25-54) or the briefs submitted on the

motion of the United States for judgment on the pleadings (U.S. Ex. 7, 8 and 9, particularly pp. 103-109, 20-42, and 79-115, respectively).

Moreover, many of the colonial and early state statutes introduced by the defendants here were before the Court in the California case. Maine et al. Ex. 44-65, for example, consist almost entirely of the original Massachusetts charters and grants, and of colonial and early state statutes. With the possible exception of Exhibit 46, every one of these documents was before the Court in the California case. The charters and statutes were discussed by California in its brief in opposition to our motion for judgment on the pleadings at pages 38 and 40. They were exhaustively set out in Appendix E to that brief at pages 86 to 91. Some of these documents were also discussed in California's original answer at page 36 and pages 707-715 and the United States discussed such documents at pages 93-94 and 103-104 of its brief for judgment on the pleadings. While the defendant States have, of course, introduced evidence in this case which was not previously before the Court, most of this evidence is either similar to the materials previously considered by the Court or, as we shall show later, irrelevant.

2. The Texas and Louisiana cases.--The submerged lands in issue in the California case were the lands that were within 3 miles of the coast of the State. Three years after the California decision, the Court considered submerged lands claims of Louisiana and Texas. United States v. Louisiana, 339 U.S. 699; United States v. Texas, 339 U.S. 707. Louisiana sought to distinguish the California case on the ground that Louisiana Act 55 of 1938, La.Rev.Stat.(1950) 1-3, had extended the State's boundary to a distance of 27 miles from the coastline. The Court rejected the contention, holding (339 U.S. at 705), "The matter of state boundaries has no bearing on the present problem." The Court pointed out that the predominance of national interests over state interests increased rather than diminished as one moved farther seaward, so that the State's purported extension of its boundaries merely emphasized the strength of the federal claim over the state claim where the seabed was concerned. In these proceedings the defendant States claim title to the seabed up to 100 miles and more from the coast.

Texas similarly sought to avoid the impact of the California decision; it claimed that until its admission to

the Union as a State, Texas had been an independent republic which, by its Act of December 19, 1836, 1 Laws Rep. Tex. 133, had claimed a 3-league territorial sea where it exercised all the elements of external as well as domestic sovereignty. The Court refused to accord Texas special treatment, holding that when Texas became a State of the Union, it necessarily did so on an equal footing with the original States; its relinquishment of national sovereignty to the federal government carried with it all the attendant attributes, including exclusive rights in the submerged lands and resources of the territorial sea. United States v. Texas, supra, 339 U.S. at 716-720.

B. Congress Has Explicitly Confirmed The Prior Decisions Of The Court And Has Reassessed Federal And State Interests In The Seabed

Justice Frankfurter, in his dissenting opinion in the California case, suggested that the question of federal-state rights in the seabed with "so many far-reaching, complicated, historic interests" might more appropriately be resolved by Congress rather than the Supreme Court. 332 U.S. 19, 45-46.

Congress did, indeed, subsequently assess the balance of federal and state interests in the seabed and has drawn what it believed to be the proper line between the predominance of state and the predominance of national interests. In 1953, after the decisions in the California, Texas and Louisiana cases, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301, et seq., which granted to each coastal state the submerged lands adjacent to its shores, but only to a limited degree.

The grant of ownership of the submerged lands was specifically limited by Congress to a maximum distance of 3 geographical miles, subject to an exception for historic boundaries not over 3 leagues from the coast within the Gulf of Mexico--an exception that the Court has since held is available only to Texas and Florida. United States v. Louisiana et al., 363 U.S. 1, United States v. Florida, 363 U.S. 121. Although Congress specifically provided that the Submerged Lands Act should not be construed to prejudice the existence of any state's seaward boundary beyond 3 geographic miles from the coastline (43 U.S.C. 1312), the underlying premise is that the defendant States in these proceedings

theretofore held no rights in the bed of the territorial sea and thereafter would hold none farther seaward, where federal administration was provided for under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331, et seq., enacted in the same year. 2/

Moreover, Congress' judgment on this question was made in a context which permitted every State to put foward whatever claims it had to the submerged lands. In the extensive hearings conducted by Congress and in the lively debates that preceded passage of the two Acts, the Atlantic Coast States, unlike the Gulf Coast States, made no claim or suggestion of right to submerged lands beyond 3 miles from their coastlines. The Gulf States were rewarded by Congress for their efforts through the provision for a possible 3 league boundary in the Gulf if they could establish such claims on an historical

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2/ Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the continental shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States and the jurisdiction and control of which by the United States is hereby confirmed. 43 U.S.C. 1302.

basis. In our view, passage of the Submerged Lands and the Outer Continental Lands Acts reflects a congressional determination that the federal government is entitled to the natural resources of the seabed seaward of the areas expressly given to the States under the Submerged Lands Act.

Congress has recently reaffirmed in another context its judgment with respect to the respective rights of the state and federal governments beyond the low-water mark. In 1964, Congress enacted the Contiguous Fishery Zone Act, 80 Stat. 908, 16 U.S.C. 1091-1094, which extended United States jurisdiction over fishing from the 3-mile limit out to 12 miles. Congress carefully reserved to the federal government the authority to exclude foreign fishing vessels from this expanded 9-mile zone adjacent to the territorial sea, 16 U.S.C. 1094; H.Rept. No. 2086, 89th Cong. 2d Sess., pp. 9-10. If Congress had believed that state rights in this area predominated over national rights, it presumably would have given the States the authority to regulate fishing within the newly established zone.

The refusal of Congress to accede to recent attempts by the coastal States to obtain a share of the income derived from the outer continental shelf also affirms the earlier determinations by Congress that this area and those resources

more naturally appertain to the national government. H.R. 17369, 90th Cong. 2d Sess. (introduced May 20, 1968); H.R. 17405, 90th Cong. 2d Sess. (introduced May 21, 1968). Moreover, as far as the United States can determine, in none of these attempts has any of the defendant States asserted that it was entitled to the resources beyond the territorial sea as successor to rights of the English Crown.

In short, beginning with enactment of the Submerged Lands Act in 1953, Congress has consistently affirmed the principle of federal ownership of submerged lands beyond the territorial sea enunciated by the Supreme Court in the Louisiana and Texas cases. Despite the fact that there has been a continuing controversy over such rights in both the Supreme Court and in Congress for more than 30 years, this litigation represents the first time that such a claim has been advanced by the defendant States.

C. The Previous Decisions Of The Supreme Court Are Supported By Recent Decisions Of The High Courts Of Canada and Australia

The previous decisions of the Supreme Court with respect to the rights of the States to the natural resources of the adjacent seabed are supported by two recent decisions by the high courts of Canada and Australia. Bonser v. LaMacchia, 43 Aust. L. J. Rep. 411 (U.S. Ex. 18) and Re Offshore Mineral Rights of British Columbia [1967] Can. L. Rep, (S.Ct.) 796, 65 D.L.R. (2d) 353 (U.S. Ex. 34).

These decisions, by the Supreme Court of Canada and the High Court of Australia, deserve particular respect in these proceedings for a number of reasons. First, these opinions are by the highest courts in two countries which are prominent members of the British Commonwealth. Second, the decisions deal not only with English law as it relates historically to the adjacent seas, but with colonial law as it relates to rights in those seas which may have been conveyed in various colonial charters and grants. Finally, these opinions are particularly relevant here because they relate to the special problems inherent in a federal system of government in which the national government and its political

subdivisions are asserting competing claims to the adjacent seas and seabed, based upon English and colonial law and history.

The reasoning of the courts in both cases is in agreement with the rationale of the Supreme Court in the California case that English law during the 17th and 18th centuries did not recognize any concept of general property in the adjacent seas beyond the low-water mark. Although the national unions of Canada and Australia were formed and assumed external sovereignty after the formation of the United States and after the concept of the territorial sea had obtained a stronger foothold in the law, both courts found that the right to the resources of the seabed beyond the low-water mark belonged to the nation and not to its political subdivisions.

1. Re Offshore Mineral Rights.--In 1967 the Supreme Court of Canada adjudicated a dispute between the federal government of Canada and the Province of British Columbia similar to the dispute between the United States and the defendant States. In that dispute the Province of British Columbia, like the defendant States in these proceedings, asserted rights to the natural resources of the adjacent seabed on the basis of its colonial grants and charters from the English Crown. As in the California case, British Columbia limited its claim to the

territorial sea. All of the maritime provinces of Canada joined in this dispute in support of British Columbia's claim. The Supreme Court of Canada, after an exhaustive review of the British authorities, concluded that British colonial charters did not include any territorial sea and that the "realm of England" stopped at the low-water line until some time subsequent to the Territorial Waters Jurisdiction Act of 1878, c. 73.

Moreover, as did the Supreme Court in the California case, the Supreme Court of Canada held that such jurisdiction as was asserted over the territorial sea pertained to Canada's external sovereignty and remained in the Crown, with only limited authority delegated to the Canadian colonies, until Canada became a sovereign state. In presenting its case, British Columbia had relied on many of the English authorities upon which the defendants seek to rely in these proceedings, particularly those which relate to England's precolonial claims to the adjoining seas (U.S. Ex. 34-48).

2. Bonser v. La Macchia.--In 1969, the High Court of Australia decided a case involving the construction of an

Australian commonwealth statute regulating fishing in "Australian waters beyond territorial limits." The State of New South Wales apparently sought to establish that the statute did not apply to the waters adjacent to its coast on the ground that those waters were granted to the State under its colonial grants and charters. The historical concepts of the realm of England and the territorial sea under English law are analyzed at length in the opinions of Chief Justice Barwick and Justice Windeyer. They, like the courts in the California and Canadian cases, concluded that the realm of England and the territory of the colonies historically ended at the low-water line. Chief Justice Barwick, echoing the decision of the Supreme Court in the California case, specifically held with respect to the colonial grants and charters (43 Aust. L. J. Rep. 411, 414; U.S. Ex. 18):

> I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters. * * *

While there are admittedly, various historical differences between the creation and development of the Canadian and Australian colonies and the American colonies, the Canadian and Australian decisions nevertheless have strong precedential value with respect to some of the key issues in this case.

D. The Previous Determinations Of The Supreme Court And Congress And The Apparent Acquiescence Of The States In These Determinations Create A Heavy Burden On The States In These Proceedings

It is a well established legal principle, reflected in the Supreme Court's reasoning in interstate boundary disputes, that property rights will not be lightly overturned. That principle is equally applicable here.

In Handly's Lessee v. Anthony, 5 Wheat. 374, the Supreme Court first had occasion to settle a dispute involving the precise location of Kentucky's northern border. An action in ejectment was brought by a party claiming under a grant of Kentucky against a defendant claiming under a grant from the United States. The Court held the low-water mark of the north

bank of the Ohio River to be the northern boundary of Kentucky. Thereafter, in Indiana v. Kentucky, 136 U.S. 479, the issue of the Kentucky border on the Ohio River was again litigated, this time in an original action in the Supreme Court. The area in dispute was a small island, in the Ohio River, over which Kentucky had always claimed and exercised sovereignty. The Court reaffirmed its holding in Handly but gave controlling effect to the long acquiescence in the exercise of dominion by Kentucky over the disputed islands stating:

> * * * It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. · In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this Court speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718 * * * For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary. [136 U.S. 479, 510-511.]

The Court concluded:

> * * * The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it. [136 U.S. at 518]

See also Maryland v. West Virginia, 217 U.S. 1, 41-45; Ohio v. Kentucky, No. 27 , Original, decided March 5, 1973.

Here, those of the defendant States that came forward as amici in the California case (see supra, pp. 10-13) asserted no more than a 3-mile claim, and the others had asserted no claim of any kind either during that litigation or prior thereto. Moreover, it was in the interests of the defendant States, if they believed they possessed rights in the seabed beyond the territorial sea, to claim those rights when Congress reassessed federal-state interests after the Supreme Court's decision in the California case. As we have shown, some States did assert such rights and were successful in obtaining legislative recognition of those rights. Yet, all of the defendant States permitted Congress to delimit their rights in the Submerged Lands Act

and the Outer Continental Shelf Lands Act without asserting any claim to greater rights. Their belated claims should not now be heard to upset long established rights and expectations.

This is the practice with respect to boundaries between the States, and, we believe, it should apply to the boundary delimiting the rights of the States and the federal government in the adjacent seabed.

It is therefore the position of the United States that the established limits to state rights in the seabed under the Submerged Lands Act, based upon the prior decisions of the Supreme Court and the independent assessment of Congress, and consistently affirmed by the courts and Congress, should not be set aside in the absence of clear and convincing proof that the previous decisions of the Court and the premises on which Congress acted were incorrect.

In conclusion, it is our view that the Supreme Court and the Congress have already resolved the contentions of the defendant States regarding the natural resources of the seabed of the Atlantic Ocean beyond the territorial waters. Both bodies have consistently concluded that in this area neither the colonies

nor the successor States had rights to those resources. Moreover, the conclusions of both the Court and Congress are supported by the decisions of the highest courts of two nations which share a similar legal heritage. While the Supreme Court has granted the States an opportunity to justify overruling its prior holdings, there is a heavy burden on them to introduce new evidence and new arguments not previously considered which might be sufficient for that purpose. We will now show that the defendant States have failed to come forward with new arguments or evidence that would meet this burden and justify the unsettling of established property rights.

II

THE DEFENDANT STATES HAVE FAILED TO INTRODUCE NEW ARGUMENTS AND NEW EVIDENCE SUFFICIENT TO SHOW THAT THE SUPREME COURT'S PRIOR DECISIONS SHOULD BE OVERRULED

A. The States Have Not Shown That English Law Recognized A General Property In The Seas And Seabed Adjacent To The Coasts Of The American Colonies During The 17th And 18th Centuries

The United States argues in point D below that international law in the 17th and 18th centuries did not recognize broad claims to sovereignty of the seas in a general property sense. It is also the position of the United States that regardless of the impact of international law, the defendant States have a very heavy burden in this case. They must first establish that English law recognized a general property in the seas and seabed which the Crown might have conveyed under the colonial grants and charters to the individual colonies before the American Revolution or which might have passed to the individual States as a result of independence. The United States contends that the States have failed to meet that burden because they have failed to show:

(1) That English claims of sovereignty over the English seas during the 17th and 18th centuries constituted recognition in English law of a general property right in the English seas and seabed; and

(2) That, if such claims constituted recognition of a general property right in the English seas and seabed, a similar right was recognized in waters adjacent to colonial coasts.

Our consideration of these points may conveniently be divided into two time periods which present different problems of historical evidence and analysis. The first is the period of the so-called "older legal tradition", 1200 to 1600, relied upon by the States to support their construction of English law during the 17th and 18th centuries. Assertions of sovereignty during this period were based entirely upon a protective concept; the common law specifically denied that the Crown had a general property in the seas or seabed. The second period to be considered is the 17th and 18th centuries. During this period treatise writers and legal commentators developed new legal theories in support of the expansive political claims

of the Stuarts to vast foreign domains and to every unoccupied piece of domestic land, but the law was slow to recognize these theories. Sovereignty of the seas came to be viewed as a combination of protective jurisdiction and a limited appropriation of specific rights, which did not include a general property right in the seas or seabed.

1. English claims of sovereignty of the seas during the 17th and 18th Centuries did not constitute recognition of a general property in the seas and seabed, because such claims were based on a theory of sovereignty as protective jurisdiction over activity on the surface of the sea or an appropriation of specific rights in the sea.--The defendant States have offered a mass of evidence purporting to show that assertions by the Crown of sovereignty over the seas in the 13th through the 18th centuries are evidence that English law during that period recognized a general property in the seas and seabed where such sovereignty was asserted. The United States contends that this evidence does not meet the States' burden of proof on this issue, because the States' arguments are based upon a misconception of the English law concept of sovereignty of the seas as understood in the 13th through 18th centuries.

The modern international law concept of territorial waters accords to a nation the same measure of sovereignty (including full property rights) over its adjacent waters that that nation enjoys over its land territory. As we argue in point D below, this concept did not begin to evolve until well into the 19th century. Moreover, it appears that it was not accepted in English law even as late as 1876. Prior to the development of the concept of territoriality, sovereignty over the seas was understood in English law, first as a power shared by all sovereigns to protect lawful activity upon the seas, and later as specific rights acquired separately by appropriation through occupation and use. Sovereignty in the protective sense carried with it no general property right. Sovereignty acquired by appropriation carried only those property rights specifically appropriated (Tr. 2505). The United States contends that the protective and appropriation concepts of sovereignty underlie all theories and assertions of sovereignty relied upon by the States, and that the States have not established that these concepts constitute a recognition in English law of a general property right in the seas or seabed. In our view, the evidence of particular claims of sovereignty

adduced by the States is either based upon a protective concept of sovereignty or, if based upon an appropriation concept, does not indicate the appropriation of a general property in the seas or the seabed.

Admiralty jurisdiction in both its civil and criminal aspects is based upon the protective concept, as is the related assertion of power to command respect to the English flag upon the seas. The power asserted over fisheries originates in the protective concept. To the extent that it is later based upon the appropriation concept, this power is an appropriation of the right to conduct the fishery, or at most of the specific resources itself. The evidence offered by the States to the effect that the common law recognized the Crown's title to derelict lands or lands which have emerged from the sea does not establish the appropriation of property rights in the seabed while still covered by water. The Crown title to such emerged lands is based not upon ownership of the adjacent seas but upon the Crown's prerogative, which gives emerged lands to the Crown as ownerless property.

2. The States have not shown that there is an "older legal tradition" in English law recognizing the sovereignty of England over the English seas in a property sense. -- In seeking to meet their burden of showing that English law recognized a property in the seas and seabed in the 17th and 18th centuries, the defendant States have asserted that there is an "older legal tradition of sovereignty over the English seas" back to 1300 and possibly Anglo-Saxon times (Tr. 120, 293). Defendants apparently further assert that English law during the period of this so-called "older legal tradition of sovereignty over the English seas" recognized a right of the Crown to a general property in those seas and their seabed (Tr. 123-127, 415). The United States contends that the argument of the States misconceives the "older legal tradition of sovereignty over the English seas." That tradition does not support the conclusion that English law prior to the 17th century recognized Crown ownership of the adjacent seas and seabed. Evidence offered by the United States shows that English law and practice during this period viewed sovereignty of the seas in a protective sense, connoting no general property right.

The defendant States rely generally upon certain documents of the period, such as De Superioritate Maris (Maine et al., Ex. 176, 177), which speaks of England's "Dominion of the Sea of England" and the exercise of "sovereign domain" in the British Seas, or the "sovereignty of the Kings of England over the British Seas." (Tr. 121-122, 293, 296-302.) As Professor Wroth testified, however, "sovereignty" and "dominion" as used during the period of the "older legal tradition," did not entail a claim to the property of the adjacent seas. On the contrary, those statements constituted and were consistent with an exercise of a protective jurisdiction shared with other coastal nations to protect fishing and navigation by all in those seas. Thus, the document De Superioritate Maris and others like it use language such as "safeguard" and "the maintaining of peace, right and equity among all manner of people," which refer to protection, not property (Tr. 2471-2486, 2505). The testimony of Professor Henkin also supports this interpretation of English policy regarding the adjacent seas (Tr. 1903, 1931-1934, 2617-2620). The States have produced no evidence to show that "the older legal tradition" embodied a concept of a general property in the seas and seabed adjacent to the English coasts.

The States further rely upon the specific practices and policies of England with regard to foreign fishing, the flag salute, and the admiralty jurisdiction to support their contention that the "older legal tradition" of sovereignty recognized Crown ownership of the English seas. In addition, the States have sought to show that English law in this period specifically recognized the right of the Crown to the seabed and subsoil in this sea by its prerogative. It is the position of the United States that the evidence pertaining to fishing, the flag, and admiralty is consistent with an understanding of sovereignty as involving protection rather than property. The United States further contends that English law prior to the 17th century expressly rejected the claim of the Crown to ownership of the seabed by its prerogative.

a. Fishing - The States have not shown that English policy and practice during the period of the "older legal tradition" recognized a general property in the seas. -- The States are apparently content to rely for their conclusion with regard to fishing upon Fenn, Elder and Potter (Tr. 297, 330). In our view, the history of English claims to power over fishing, at least during the period of the so-called "older legal tradition of sovereignty," is primarily a manifestation of the concept of sovereignty as protective jurisdiction.

Prior to the accession of the Stuarts to the English throne in 1604, English law and policy favored freedom of fishing. As both Professor Henkin and Professor Wroth testified, English law prior to 1600 generally treated the regulation of fishing as an aspect of sovereignty in a protective sense. Fishing originally was viewed as a common right not subject to appropriation. Tr. 1903, 1931-1934, 2515-2517, 2617-2621. Toward the end of the 16th century, a prescriptive right in the Crown was asserted by Crown apologists, but that was a specific claim to a right to fish, not a general claim of property (Tr. 2515-2517).

Thomas W. Fulton in his Sovereignty of the Seas (1911), p. 57 (hereafter cited as "Fulton"), states that the policy of the Stuarts with regard to fishing was in direct opposition to that which had long prevailed in England; that freedom of fishing on the English coast had been guaranteed to foreign fishermen for centuries before, and that foreign fishermen of various nations had immemorially frequented the British seas in large numbers. Despite the fact that Professor Horwitz has referred to Fulton as a "revisionist" (Tr. 335-336), Fulton is recognized

as the leading authority on the history of English claims to sovereignty over the sea.[3/] As Dr. Jessup commented in his book, The Law of Territorial Waters and Maritime Jurisdiction, p. 10 (1927), "The history of the early British pretensions from Anglo-Saxon days through the eighteenth century is set forth in admirable detail by Fulton." Professor Horwitz contends (Tr. 335-336) that John Rawson Elder in The Royal Fishery Companies of the 17th Century (1912) (hereafter cited as "Elder"), Pitman B. Potter in The Freedom of the Seas in History, Law and Politics (1924) (hereafter cited as "Potter"), and Percy Thomas Fenn in The Origin of the Right of Fishery in Territorial Waters (1926) (hereafter cited as "Fenn"), who wrote after Fulton, go back to a so-called pre-Fulton opinion that England asserted sovereignty over the English seas before James I ascended to the Crown.

Admittedly, Fulton does not deny that there were assertions of "sovereignty" over the English seas prior to James I.

3/ See, e.g.: Fenn, The Origin of the Right of Fishery in Territorial Waters (1926), p. 2; Georg Scharzenberger, I International Law (1957), p. 338; Smith, The Law and Custom of the Sea (3rd ed., 1959), p. 57, note 1; McDougle and Burke, Public Order and the Oceans (1962), p. 1007, note 177; Ian Brownlie, Principles of the Public International Law (1966), p. 208; Colombos, The International Law of the Sea (6th ed., 1967), p. 48, note 2.

Fulton, however, distinguishes the meanings to be attributed to that term at various times in history. He recognizes that the term was generally used in a protective sense during the period of the "older legal tradition." Fulton, supra, pp. 2-3, 30-31. Finally, Fulton points out: "Until the accession of the Stuarts indeed, any pretension of England to a sovereignty of the sea had but little international importance." Fulton, id. at 9. An examination of the authorities relied upon by Professor Horwitz reveals that they in fact support Fulton's conclusions. Elder, for example, indicates that foreigners paid little attention to English claims in this period and that the English tolerated Dutch fishing until the Dutch began to threaten English supremacy in the late 16th century with the wealth and influence they obtained from that fishing. Elder, supra, pp. 5-6.

Fenn's book discusses the origins of the legal theories of sovereignty and maritime jurisdiction which were disputed in the 17th and 18th centuries. Fenn traces the development in English law of theories of maritime sovereignty during the period of the older legal tradition of sovereignty about which Professor Horwitz testified. Far from supporting the claim of the defendant States, Professor Fenn concludes that English law during this

period, as evidenced by writings of Bracton, Britton and Fleta, recognized the doctrine of freedom of the seas as well as a form of jurisdiction over the adjacent seas, which was not, however, asserted as a property right. Fenn, supra, pp. 92-93. Fenn also cites passages from Fortescue as evidence that English law through the 16th century viewed sovereignty in terms of jurisdiction not property. Fenn, id. at pp. 120-123.

There is thus no support for the States' position that regulation of fishing in the 13th through 16th centuries is evidence of a recognition in English law of a general property right to the seas and seabed.

b. The States have not shown that the flag salute during the period of the "older legal tradition" is evidence of a claim to the general property of the seas. -- The defendant States rest their conclusion with regard to an "older legal tradition of sovereignty" in part upon cases of insistence that other vessels lower their sails to British vessels in the English seas, cited in the testimony of Professor Horwitz (Tr. 164-165, 331). The United States contends that the enforcement of the flag salute, particularly in its origin during the period of the older legal tradition,

is not recognition of sovereignty over the seas in a property sense. Fulton says that this custom probably arose under the early Angevin kings in connection with the exercise of jurisdiction over pirates and for securing peaceful commerce. He states that the purpose of requiring the salute was to allow the King's ships to satisfy themselves as to the peaceful character of the vessels. He explains that this custom of lowering the sail had grown into a ceremony, adding that it is evident that this was done more as a matter of honor and respect than as an acknowledgment of maritime sovereignty. Fulton, supra, p. 9. It was only later, under the Stuarts, that England began to enforce this ceremony as an acknowledgment of its sovereignty over the adjacent seas. Fulton, id. at p. 209. Thus, in the period of the "older legal tradition," the flag salute, if it was an assertion of sovereignty at all, manifested only a protective concept of sovereignty.

Whatever significance is to be attached to the flag salute during the period of the "older legal tradition" England did not attempt to assert or exercise sovereignty over the English seas in this manner. Fulton states: "Until the 16th century there is scarcely any evidence to show that the right to the flag was enforced even in the channel." Fulton, id. at p. 43.

c. The States have not shown that admiralty jurisdiction during the period of the "older legal tradition" recognized a general property right in the seas. --

(1) The origins of the admiralty court during the period of the "older legal tradition" reflect protective jurisdiction. -- The United States contends that the development and exercise of the admiralty jurisdiction in the 14th through 16th centuries is an assertion of sovereignty only in a protective sense. The document De Superioritate Maris, which we have previously shown to have been an assertion of sovereignty of the seas in a protective sense, reflects an early stage in the development of the admiralty jurisdiction. As the testimony of Professor Wroth illustrates, the admiralty court developed as a forum for the assertion of the Crown's protective power over the seas (Tr. 2480-2483). There is no evidence linking the admiralty jurisdiction to an assertion of general property rights in the seas or seabed. Admiralty jurisdiction over wreck, royal fish, and similar matters was a manifestation of the royal prerogative in ownerless objects - an assertion of a property right in the specific object only (Tr. 2479-2480). The one piece of evidence cited

by Professor Horwitz (Tr. 125) to the contrary, Officium Dominium v. Dulinge (1590) (Maine et al. Ex. 201), was as pointed out by Professor Wroth (Tr. 2484), an usurpation of jurisdiction by the admiralty court and the assertion of a claim of right not recognized by the common law. Moreover, the document cited is merely a pleading in proceedings of which there is apparently no record of any judicial determination (Tr. 2484).

(2) The exercise of criminal jurisdiction in admiralty was not territorial. -- Apart from references to the terms "sovereignty" and "dominion" in the early admiralty documents we have just discussed, the defendants States apparently rely on the exercise of criminal jurisdiction in the admiralty in the English seas during the period of this "older legal tradition." The States apparently contend that admiralty criminal jurisdiction of offenses other than piracy was exercised over foreigners in the English seas during this period and later, in contrast to the limitation of that jurisdiction in the seas beyond to English nationals, and that the basis for this distinction was the territorial nature of the British seas. (Tr. 154-167, 374, 387). It is the position of the United States that the evidence offered by the States does not support their claim that the admiralty criminal jurisdiction was territorial in the seas adjacent to England. That jurisdiction, in our view, is a manifestation of sovereignty only in a protective sense.

As authority for their position, the States rely on Professor Horwitz' citation of a statement in 2 Hale, Pleas of the Crown, and a few early criminal proceedings in admiralty (Tr. 157-167). Although Professor Horwitz disputed the conclusion of the Lord Chief Justice and the majority of the High Court of England in Reg. v. Keyn (Maine et al. Ex. 160), as to the significance of Hale's statement, he apparently agreed with the Lord Chief Justice's conclusion that four of the eight cases cited by Hale do not support Hale's statement (Tr. 386). As Professor Wroth testified, the four remaining cases cited by Hale, upon which Professor Horwitz relied, were dealt with more effectively by the Lord Chief Justice in the Keyn case than by Professor Horwitz. The Lord Chief Justice stated in Keyn that "four were cases of piracy, which may have been dealt with on the principle that piracy is triable anywhere and everywhere. Moreover, as to two of the latter (piracy) cases, it is doubtful whether the offenses were committed within the body of a county and therefore, triable at common law." Id. at 163-167. As Professor Wroth testified, Cockburn then went on to support his conclusion with a lengthy analysis of each of the cases (Tr. [illegible]. See Maine et al. Ex. 160, pp. 162-168. These cases thus are not examples of the exercise of criminal jurisdiction over foreigners in the narrow seas.

The other early authorities relied upon by the defendant States to establish the territorial nature of the admiralty criminal jurisdiction in the English seas were distinguished by Professor Wroth on grounds similar to the grounds on which the Lord Chief Justice in the Keyn case distinguished the four cases relied upon by Hale. Thus, the case of Hugo de Peyntour (Tr. 161-162, Maine et al. Ex. 198), the Commission of 1361 (Tr. 162), and the case of the Dutch Captain (Tr. 165-166, Maine et al. Ex. 173), all arguably involved piracy. Other cases involved English nationals or English ships (Tr. 2512).

On the basis of this evidence, Professor Horwitz testified that "it seems fairly clear that admiralty jurisdiction was not limited to English nationals before 1536." Yet, as Professor Wroth has shown, and as the Lord Chief Justice in the Keyn case concluded, there are no cases which support the contention that the criminal jurisdiction of the Admiral in the English seas was conceived to be territorial in nature, or differed in nature in any way from the criminal jurisdiction which the Admiral exercised in the seas beyond. This view is supported in part by Sir William Holdsworth, a leading English legal historian, who concludes that after 1363 the Admiralty's criminal

jurisdiction could be exercised "over British subjects, over the crew of a British ship whether subjects or not, and over any one in cases of piracy at common law. It could be exercised over no other persons" Holdsworth, I History of English Law (7th ed. 1956), p. 550.

This view of the historic jurisdiction of admiralty was supported not only by Lord Chief Justice Coke in the Keyn case, but also more recently by decisions of the highest courts of Canada and Australia. As we have noted, the decisions of these courts are particularly pertinent here.

Further, the United States contends that even if foreigners had been tried in admiralty for criminal offenses on the English seas, this would reflect the exercise of admiralty jurisdiction only as a manifestation of sovereignty in a protective sense. As Professor Wroth testified, such jurisdiction was not an assertion of territorial sovereignty, because no distinction was drawn between its exercise upon the English seas and the high seas (Tr. 2513-2515). The admiralty criminal jurisdiction over foreigners is a reflection of the shared power of coastal nations to protect lawful activity upon the seas which was the basis of sovereignty of the seas in the period of the "Older legal tradition."

d. The States have not shown that English law relating to derelict or emerged lands during the period of the "older legal tradition" recognized a general property right in the seas and seabed. -- Finally, the States have sought to establish not only that English law during the older period recognized sovereignty over the English seas in a property sense but, more specifically, that English law recognized the right of the Crown to the seabed and subsoil of those seas by its prerogative. The only contemporary evidence for this proposition produced by the States is the 1569 treatise by Sir Thomas Digges (Maine Ex. 128, 129), cited and discussed by Professor Horwitz (Tr. 123-125). In our view, this evidence does not support the States' position, and, in fact, during the period of the older legal tradition English law expressly rejected the doctrine that the Crown owned the seas or the seabed.

Before the publication of Digges' treatise in 1569, there had been no reference in English legal literature to a prerogative right of the Crown in the seabed or subsoil of the adjacent seas (Tr. 2444). And in his treatise, Digges was concerned not with the seabed and subsoil, but with the foreshore and derelict or newly emerged lands and with establishing the Crown's claim to such lands. While he did advance the argument that the Crown's sovereignty gave it a kind of governmental property interest in the seas, Digges did not base the Crown's claim to lands once covered by the sea upon any theory of seabed ownership. Rather, according to Digges, the Crown owned such lands when they became dry as a profit or product of the sea by virtue of the Crown's prerogative right to ownerless property (Tr. 2443-2446).

The defendant States apparently assert that English law prior to the end of the 16th century recognized a right of the Crown by its prerogative to the seabed and subsoil of the British seas while still covered by the sea. According to Professor Thorne, however, who has published a treatise on the prerogative as it was understood during the period of the older legal tradition, English law during that period did not recognize a prerogative right even in the foreshore or derelict lands, much less to the seabed and subsoil while still covered by the sea. Although, as Professor Thorne testified, the prerogative of the Crown had been much discussed and had, at one point, even been codified during this period, there is absolutely no reference in that statute or in those discussions to a prerogative right of the Crown in the seabed and subsoil (Tr. 2444). As Professor Thorne testified, "English law in that period reflected the Roman law view which, while recognizing some kind of jurisdiction in the adjacent seas, denied a property in them. There is no trace of any English claim to ownership of the sea or seabed" (Tr. 2445). It thus appears that Digges fabricated his theory in 1569 to provide a legal rationale for his personal efforts to obtain title to foreshore and derelict lands

in the right of the Crown. Moore, A History of the Foreshore (3rd.ed. 1888) (hereafter "Moore") pp. 169-172, 212-214.

Moreover, as we shall later show, the Crown's right to these derelict or emerged lands did not even receive limited recognition under English law until the latter part of the 17th century. Thus, Plowden in 1575, successfully arguing against a claim by the Crown to wreck of the seas in Sir John Constable's case, could say with confidence (Moore, supra, p. 229):

> But although the Queen has jurisdiction in the sea adjoining her realm, still she has not property in it, nor in the land under the sea, for it is common to all men, and she cannot prohibit any one from fishing there, and the water and the land under it are things of no value, and the fish are always removable from one place to another. And also Bracton says, lib. 2, cap. 2: If an island is born in the sea, which rarely happens, it belongs to the occupant; and with this Britton agrees; which proves that the Queen has not property in the sea nor in the land under it. And that which Digges in his book and also Robert Carey urged to the contrary is not to be regarded, for they rely on the saying of Bracton in another place, that the Queen shall have the island born propter superintendentiam, and this seems to be understood of a common river or of an arm of the sea within her realm; but I marvel much that the Admiral uses in his Court to hold pleas of robberies and other things done upon the coast of Spain, which is altogether out of his jurisdiction and the authority of this kingdom.

As we have previously noted, the language of the pleading in Officium Dominium v. Dulinge (1590), suggesting that the exercise of admiralty jurisdiction did constitute an assertion of a property right in the seas, is wholly inconsistent with them prevailing common law principles (see Tr. 2484).

In short, English law during the period of the so-called "older legal tradition" did not recognize a property right in the Crown to the seabed and subsoil of the adjacent seas.

3. The States have not shown that English law in the 17th and 18th centuries recognized a general Crown property right in the seas and seabed. -- The United States contends that the defendant States have failed to meet their burden of showing that English claims to sovereignty of the seas during the 17th and 18th centuries constituted recognition in English law of a general property right to the seas and seabed. As the preceding argument has shown, the evidence offered by the States of an "older legal tradition" of sovereignty does not support the conclusion that English law recognized a general property to the seas or seabed prior to 1600. Accordingly, if such recognition occurred in the 17th century, it must have been the result of a newly developed legal theory.

We will now show that no such new theory developed. English law did not recognize a general Crown property right to the English seas during the 17th and 18th centuries. Whatever Crown rights were recognized in the English seas existed as incidents of the Crown's control over those seas. We will further show that even such limited rights as may have existed in the English seas were not recognized until late in the 17th century.

In attempting to establish their claim that English law in the 17th century recognized the right of the Crown to the property of the adjacent seabed and subsoil, the defendant States have relied to a very large extent upon the acts and assertions of the Crown in regard to its dispute with the Dutch over English claims to sovereignty over the English seas. This dispute centered on the lucrative herring fisheries developed by the Dutch off the coasts of Scotland. The actions and assertions of the Crown on which the States rely should be viewed in the context of this dispute.

The other evidence apparently relied upon by the defendants in this case consists of a number of 17th century admiralty tracts, as well as some tracts dealing with the question

of derelict lands, and a number of documents relating to proceedings in admiralty in both England and the colonies. In addition to this contemporary evidence, the defendants have introduced a number of 19th century cases and authorities which ostensibly bear on the question of the state of English law during the 17th century. The United States will show that none of this evidence singularly or collectively establishes that English law in the 17th century recognized a general property right of the Crown in the adjacent seas or the seabed thereof.

As we have previously shown, prior to the 17th century England did not claim sovereignty over the English seas other than in a jurisdictional sense. The English claims to power over fishing prior to the 17th century paralleled developments with regard to admiralty jurisdiction. In both instances England claimed and exercised a protective jurisdiction unrelated to a property claim to part of the adjacent seas or seabed (Tr. 2515-2517). However, with the accession of the Stuart monarchs, England began to make broader claims to sovereignty.

Although the sovereignty which the English Crown claimed under the Stuarts clearly comprehended more than mere protective jurisdiction, it is the contention of the United

States that the term as then used did not comprehend a claim to ownership of the entire seas and seabed. Notably, England never claimed or exercised the right to prohibit or even tax peaceful navigation in the English seas despite the fact that this was the practice of other nations claiming maritime sovereignty during this period. As claimed by the English in the 17th century, sovereignty included only the rights to tax the fisheries, to exercise admiralty jurisdiction, and to a lesser extent to demand the flag salute. While there are references in the literature of the time to the property of the English seas, those references are only to specific kinds of property or profits in the sea, i.e., wreck and treasure trove. Arguments based upon the claimed right of the Crown in the foreshore and derelict lands are, as we have shown, based upon the Crown's prerogative in ownerless property, and were not recognized by the courts until the latter part of the 17th century.

Moreover, much of the evidence relied upon by the States to prove sovereignty in a full property sense is political in nature, directed against Dutch fishing. This is true

both of the contemporary writings of legal commentators and of the proclamations of James I and Charles I and various orders, directives, reports and memoranda dealing with this question. None of the evidence related to the fisheries and flag disputes offered by the defendants establishes that English law recognized a general right of the Crown to the property of all the waters and lands of the adjacent seas. The numerous admiralty tracts introduced and apparently relied upon by the States are even less persuasive authority on that question.

a. The States have not shown that English practice under the Stuarts recognized a general property in the seas: the Anglo-Dutch fishery dispute. -- The defendant States have introduced a number of documents relating to England's policy, developed under the Stuarts, of establishing exclusive control of fisheries in the British seas. These documents include proclamations, draft proclamations, directives, orders and communications between officials responsible for enforcing that policy through various licensing and tax schemes, as well as a number of political or economic tracts intended to promote and encourage this policy.

These documents reflect both bases for claims of sovereignty over fishing which we described in connection with fishing in the period of the older legal tradition. Thus, the fishery tax on the Dutch was justified as a contribution by the taxpayers toward the maintenance of the British fleet to protect both English and Dutch fishermen against the Dunkirk privateers who represented a threat to all fishermen throughout the 16th and 17th centuries. Elder, supra, pp. 72, 75. And the fishing licenses issued by England, as Professor Wroth pointed out for the earlier period (Tr. 2516-2517), also are consistent with a protective concept of sovereignty. At the same time, as Professor Wroth testified (Tr. 2517-2518), the proclamations and other statements of the Crown reflect a concept of sovereignty as a specific property right acquired by appropriation. Whichever basis in sovereignty is looked to, the official acts of the Stuarts in connection with the Dutch fishing disputes do not include any express recognition of a property right in the seabed and do not depend on a concept of sovereignty which recognized a general property right in the seas or seabed.

Furthermore, while England's policy under the Stuarts with regard to these fisheries, and its legal basis, is clear, it is equally clear that the Dutch did not acquiesce in that policy. There is also evidence that the citizens of Scotland, off whose coasts these fisheries were located, did not acquiesce in England's attempt to organize these fisheries for the benefit of the Crown. Even the authorities upon which Professor Horwitz relied for his testimony about England's dispute with the Dutch over the herring fisheries show that the English were unsuccessful in enforcing their fishing policy against the Dutch. Elder supra, pp. 7, 12, 26, 74. Throughout his book, Elder emphasizes that the Stuarts, despite an occasional success, were never successful in enforcing their policy against either the Dutch or the Scotsmen.

Indeed, after describing the Dutch victory over the Spaniards in the Downs in 1639 as a "complete vindication of the claim to Mare Liberum," Elder states that "the Dutch were now in very truth masters of the seas, and the British fishers and mariners for many years to come were compelled to submit meekly to acts of outrage at their hands," stating further that "the Dutch fishermen exploited the resources in the North

Sea without further let or hindrance from England." Elder supra, pp. 80-84. Thus, Elder, like Fulton, concluded that "the seventeenth century had witnessed a long series of unsuccessful attempts on the part of Britain to cope with her Dutch rivals in the fishing trade." Id. at 115.

As later 17th century commentators whom we will discuss in the next section brought out, England's failure to enforce her fisheries policy in that century thoroughly undermined her claim to have appropriated the fisheries in many areas off English coasts.

b. The States have not shown that English legal theory on sovereignty of the seas during the 17th and 18th centuries recognized a general property in the seas and seabed: Mare Liberum versus Mare Clausum. -- The States place great reliance upon a group of English legal and political writings of 17th century authors who were responding to the need for legal justification of the Crown's maritime policies, primarily with regard to the Dutch fisheries dispute. These works by Welwood, Boroughs, Selden, and others are viewed by the States as establishing the concept of sovereignty as a general property right

to the seas and seabed that may be acquired by prescription through occupation and use. It is the position of the United States that these works do not unequivocally or collectively espouse this theory; that the theory is not based upon an accurate understanding of the prior English law; and that the theory was not fully or clearly adopted in English law.

The works of Welwood and Boroughs do not assert the broad theory of sovereignty for which the States cite them. Welwood first wrote on sovereignty of the seas, not in the 16th century as Professor Horwitz implied (Tr. 127), but only after he accompanied James IV of Scotland to England upon the latter's assumption of the throne at the beginning of the 17th century. Welwood did write a treatise in 1590, while at St. Andrews College in Scotland, entitled The Sea Laws of Scotland. But, as Fulton describes the book it contains 15 chapters dealing with "freighting of ships, the powers and duties of masters, the relation between the master and merchants, etc." and "contains nothing bearing on the question of the fishery * * *." Fulton, supra, p. 352. It was only in Welwood's enlarged edition of this early work, Abridgment of All Sea Laws, published

in 1613 (Maine et al. Ex. 209), that he first included a chapter on "The Community and Propertie of the Seas." In this treatise, in which he endeavored to refute Grotius' Mare Liberum, Welwood asserted the right of a nation to acquire by prescription the fisheries in the sea adjacent to its coast. Welwood was apparently not concerned with establishing a general property right to the seas. This is brought out in a later tract devoted entirely to the subject of dominion of the seas. Welwood, 2 years after his Abridgment of All Sea Laws, wrote that in the adjacent sea the neighbouring prince had, in particular two primary rights besides jurisdiction--namely the right of navigation and the right of fishing, with the power to impose taxes for either. Fulton, supra, pp. 354-355. Welwood thus appears to equate the terms "sovereignty and dominion" with jurisdiction and a right to specific profits of the sea, not any general property right to the seas and the lands beneath them. Moreover, Welwood, as Professor Wroth pointed out, does not imply an automatic right of a nation to those fisheries. He specifically writes in terms of acquiring those fisheries through custom or prescription (Tr. 2517).

Boroughs, writing more than 20 years after Welwood's Abridgment, takes a similar position. As Professor Wroth pointed out, much of Boroughs' work is consistent with the notion of sovereignty as a blend of protective jurisdiction and a right to incidental and specific profits of the seas over which that jurisdiction is exercised (Tr. 2492-2494). Thus, Boroughs wrote of "the King of England's Prerogative and Supreme Jurisdiction in and over the Seas" and the King's right to "things floating upon the superficies of the water [and] such as lie upon the soil or ground thereof" (Tr. 2492-2493; Maine Ex. 175). As Fulton indicates, "[a] considerable part of the treatise is taken up with the fisheries," which were, of course, the principal profit of the sea in which England was interested. Fulton, supra, pp. 365-366.

Whatever the merits of the works of Welwood, Boroughs and others as support for the Stuart policy regarding the English seas, they were all subsumed in or overshadowed by Selden's Mare Clausum (Maine et al. Ex. 204). Selden's treatise, like the other works, was written to justify England's claims to the herring fisheries. Selden, however, asserts a far more comprehensive claim to sovereignty than the others, both as to the

nature of the rights claimed and the area claimed. Thus, whereas the earlier writers apparently viewed sovereignty and dominion in terms of a blend of protective jurisdiction and a right to incidental and specific profits of the sea, Selden viewed those terms as embracing the sea in the same sense as sovereignty over the land territory of England--"a proprietie and private Dominion over the Sea, as well as the Land" (Tr. 133).

Selden, like Welwood, Boroughs and others who wrote specifically in support of the Crown's claims against the Dutch, relied upon authorities demonstrating the historic exercise of admiralty jurisdiction control of fisheries, and other assertions of power by England in the English seas. As we have shown, however, these authorities, particularly the much discussed document "De Superioritate Maris" asserted a concept of protective jurisdiction over the seas. As Professor Wroth said of the admiralty authorities relied upon by Selden, "This evidence only supports a property concept of sovereignty because Selden * * * defines the exercise of jurisdiction - 'custodie Government or Admiraltie' - as constituting occupation sufficient to make of the English seas 'a Territorie or Province belonging to the King' (Tr. 2492). Professor Wroth asserted that Selden's

reasoning in Mare Clausum is faulty because it assumes what writers took to be the point at issue - that acts of jurisdiction give rise to ownership (Tr. 2492). Professor Wroth's conclusion is supported by Fenn who states that the confusing of jurisdiction with property is characteristic of the British writers in their disputes with their Dutch counterparts. Fenn, supra p. 178.

Similarly, Selden treats English claims to exclusive fisheries as tending to establish plenary sovereignty in the English seas. These claims, as we have previously shown, were historically only assertions of a protective jurisdiction. Even in the 17th century, such claims were based on appropriation of the right to fish, rather than on a property right in the sea. Moreover, as we have seen, Dutch opposition to these claims in the 17th century was a bar to appropriation. Sir Philip Medows, in his Observations Concerning the Dominion and Sovereignty of the Seas (1689), written when the Stuarts and their ambitions were gone, took this view of the 17th century experience (Tr. 2496-2519; Medows, Observations Concerning the Dominion and Sovereignty of the Seas (1689), Maine et al. Ex. 202, 725).

Thus, in 1635, when it was first published, Selden's treatise did not represent an accurate appraisal of the law

prior to that time. As we have seen, not even Welwood in 1613 and Boroughs in 1633 expressly advocated the theory that the English seas were to be equated to the land territory of England.

There are other tracts of this period, similar to those of Welwood and Boroughs, written to support the Crown in its disputes with the Dutch.[4/] There are also a great number of political and economic pamphlets intended to incite the Crown and the English people to assert a right to the fisheries off the coast of England and establish a national company to exploit those fisheries. As Elder pointed out, "This growing animosity was fanned by the works of numerous English pamphleteers who wrote concerning the wealth the Hollanders were deriving from the North Seas." Elder, supra, pp. 6, 14-15, 25. A number of these incendiary pamphlets have been cited or introduced by the defendant States as proof of the state of the law during this period (Maine et al. Ex. 444, 459, 460, 461, 462,463,464). These tracts and pamphlets either merely parrot

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4/ Fulton refers to a number of these, some of which have been introduced by defendants. Fulton supra pp. 338-377.

the arguments of Selden and others or are so blatantly political as to be devoid of any legal authority. They add nothing to the States' position.

c. The States have not shown that admiralty jurisdiction in the 17th and 18th centuries recognized a general property in the seas and seabed. --

(1) The views of admiralty authorities are consistent with concept of protective jurisdiction. -- In support of the proposition that English law recognized Crown ownership of the seas adjacent to England, defendants introduced excerpts from a number of admiralty tracts of the 17th and 18th centuries. In particular, defendants introduced excerpts from the writings of Sir Henry Spelman (Maine et al. Ex. 207), Richard Zouch (Maine et al. Ex. 212), John Exton (Maine et al. Ex. 187, 685), John Godolphin (Maine et al. Ex. 191), Sir Leoline Jenkins (Maine et al. Ex. 210, 211, 762), Sir Charles Hedges (Maine et al. Ex. 199), and Charles Molloy (Maine et al. Ex. 726,727). The United States contends that these works do not establish a concept of sovereignty including a general property right to the sea and seabed. Rather they express a view of the admiralty jurisdiction reflecting a protective concept of sovereignty.

In evaluating the importance of the admiralty tracts, an understanding of the historical context in whicy they were written is important. In the 17th century, the common law courts and lawyers had succeeded in imposing major limitations upon the traditional jurisdiction of the admiral. These tracts were written to defend that jurisdiction. As Professor Wroth testified, Zouch, Exton and Godolphin are all representatives of this school, as probably are Spellman and Molloy (Tr. 2497-2500). Admittedly, these apologists for the admiralty jurisdiction all speak of the ancient dominion of the Crown over the British seas. Nonetheless, they almost invariably link those expressions with other expressions characteristic of the concept of sovereignty or dominion in a protective jurisdictional sense. e.g., Zouch (Maine Ex. 207; Tr. 150). None of these authors was concerned with establishing Crown ownership of the adjacent sea and seabed, although they did not hesitate to draw upon the writings of Selden and others in support of their cause. Their primary purpose is to advance the admiralty's claims, so their primary focus is on the protective concept of sovereignty. None of these works offers independent support for the States' position.

In addition to the tracts of the admiralty apologists of the 17th century, the defendants also introduced some documents from the writings of Jenkins (Maine et al. Ex. 210, 211, 762) and Hedges (Maine et al. Ex. 199). These documents, like the previously described tracts, merely acknowledge the Crown's sovereignty or dominion over the British seas without indicating the nature of that sovereignty or dominion. As in the tracts of the admiralty apologists, there is no indication that the authors of these documents understood such "sovereignty or dominion" to comprehend ownership of the adjacent seas and seabed. As we have seen, admiralty jurisdiction traditionally comprehended a protective jurisdiction as well as specific profits of the sea, such as wreck or royal fishes.

(2) <u>There is no evidence that the admiralty's criminal jurisdiction in the English seas was territorial or differed from admiralty's criminal jurisdiction on the high seas</u>. -- Besides showing that the admiralty during the 17th and 18th centuries generally recognized the sovereignty or dominion of the Crown in the seas of England, the States have attempted to establish through Professor Horwitz' testimony that the exercise of criminal jurisdiction by the admiral in the English seas was

an exercise of territorial jurisdiction (Tr. 155, 157, 160, 161). As with the similar arguments advanced by the States with regard to the period of the "older legal tradition", the United States contends that the evidence that admiralty criminal jurisdiction was territorial is unpersuasive and that, in fact, the jurisdiction was a manifestation of a protective concept of sovereignty.

As we have previously argued, the assertion of criminal admiralty jurisdiction over foreigners historically was not an exercise of territorial jurisdiction. The origins of admiralty in the shared power of all nations to protect lawful activity on the seas suggests that admiralty jurisdiction over foreigners, wherever exercised, is a manifestation of a protective concept of sovereignty. The failure of much of the evidence relied upon by Professor Horwitz to draw any distinction where foreigners are concerned between the English seas and the high seas supports this view. The evidence offered by Professor Horwitz of such jurisdiction in the narrow seas, like that which we have already discussed in connection with the "older legal tradition" does not support his conclusion that admiralty criminal jurisdiction over foreigners was viewed as an expression of territorial sovereignty. Most of his evidence either does not involve foreign nationals, but involves English vessels, or involves the crime of piracy, which any nation may try. Professor Horwitz admitted that this evidence was "not overwhelming" (Tr. 167). Nonetheless, he concluded that his evidence was sufficient to establish that the Lord Chief Justice and the majority of the High Court of England in the Keyn case were incorrect when they arrived at an opposite conclusion with respect to the historical scope of admiralty in England (Tr. 153-154, 167).

Professor Horwitz asserted that there is "considerable evidence" in the 17th century that the admiralty exercised territorial jurisdiction in the English seas (Tr. 163). The "considerable evidence" relied upon by Professor Horwitz consisted of the following: a 1681 statute of Scotland, a charge given to the grand jury in an admiralty session and a discussion of another charge, an opinion relating to punishment of one apprehended for firing a gun from the shore of a British colony into a British ship, and an opinion relating to privateers charged with the murder of some men on an English ship in New York Bay.

The 1681 statute of Scotland (Tr. 163; Maine et al. Ex. 172), predating the Union of Scotland and England, is, of course, a Scottish and not an English statute. Moreover, the language of the statute, consistent with jurisdiction in a protective sense, relates only to maritime and seafaring cases. Finally, there is no indication that this assertion is based upon territorial jurisdiction or that jurisdiction was to be exercised over foreigners for crimes other than piracy as it was then understood. Professor Horwitz did not ascertain in his research whether there were, in fact, any cases under this statute and did not know if jurisdiction over foreigners was exercised under it (Tr. 387).

Professor Horwitz asserted that a charge given at an admiralty session held at Old Bailey by Sir Leoline Jenkins underlined the identity between the land jurisdiction of common-law courts and the sea jurisdiction of admiralty (Tr. 164, Maine et al. Ex. 210). The apparent point of the charge is that the elements of a particular crime are the same whether committed aboard a vessel at sea or on land. This principle, however, does not support the far broader assertion that the power to try a person for that crime is the same with respect to an English national and a foreign national on a foreign vessel in the adjacent seas. Notably, Jenkins makes no distinction here between the English seas and other seas. Since the jurisdiction of the admiral runs everywhere "upon the Sea," the charge, if truly an assertion of territorial jurisdiction, only makes sense if construed to be applicable only to English ships anywhere "upon the Sea" or to foreign ships only when in ports, harbors, or other waters within the body of a county.

Professor Horwitz also refers to "two more instances of foreigners being tried by admiralty commissioners for criminal offenses other than piracy. With respect to the first instance, Professor Horwitz states that a discussion relating to striking the flag is a strong indication that the matter involved a foreigner

(Tr. 164-165). 5/ As Jenkins had indicated in the Old Bailey charge, however, even Englishmen were charged with violations for failure to strike the flag (Maine et al. Ex. 211). Thus, it is not clear that the instance referred to by Professor Horwitz involved a foreign national.

Moreover, part of the charge in that instance states that the admiral has jurisdiction of mayhem if committed on the high seas (Maine et al. Ex. 211). Far from showing that the admiral's criminal jurisdiction in the narrow seas differs from its criminal jurisdiction in the high seas, this statement indicates the exact opposite. Even Professor Horwitz acknowledges that the admiral did not exercise territorial jurisdiction on the high seas (Tr. 168). Consequently, this charge merely indicates either that the admiral exercised criminal jurisdiction, such as over mayhem, only over British vessels, or, if applicable to foreign vessels, that the crime of mayhem comes within the definition of piracy.

5/ We have already shown that the origin of the custom of striking the flag was consistent with the exercise of protective jurisdiction. Admittedly under the Stuarts this custom took on more importance for the English. Yet enforcement of this custom can hardly be viewed as establishing sovereignty over the English seas. Fulton has shown that, although the Dutch at times acquiesced in the custom, they certainly did not view it as a recognition of sovereignty. Moreover, other countries, such as France, also enforced the same custom in the same waters claimed by England. Fulton, supra, pp. 12-15, 118, 206-208, 517-518.

The second instance discussed by Professor Horwitz concerns charges against a Dutch captain who detained and robbed two English ships (Tr. 165-166). Apparently Professor Horwitz concluded that since the term "piracy" was not used in the charge, jurisdiction over the Dutch captain was not based upon admiralty's universal jurisdiction over that crime. But robbery of one vessel by another is an act of piracy. Notably, Professor Horwitz offered no evidence that the individuals involved in the two instances were in fact indicted, tried or convicted.

The next piece of evidence cited was an opinion of the Attorney and Solicitor General of England on the power of the common law court to punish a person who, on the shore of the Colony of Barbados, had fired on a ship about 2 miles from the shore, killing one mate and wounding another (Maine et al. Ex. 180). Professor Horwitz states that the opinion did not consider the question of nationality (Tr. 166). Since the Barbados were an English colony and the common law court would have jurisdiction over anyone apprehended for a crime initiated on the shore of that colony, the failure of the court to consider the question of nationality is no evidence that the admiral's criminal jurisdiction in the seas adjacent to the colony are territorial.

The final piece of evidence which Professor Horwitz offered to support his conclusion as to the territoriality of the admiral's criminal jurisdiction in the narrow seas was an

opinion of the King's Advocate, Attorney and Solicitor General concerning jurisdiction to try the master and crew of a privateer charged with the murder of some men on an English ship within New York Bay (Tr. 166-167). Once again this is a case that falls within the definition of piracy. 6/ Nonetheless, if, as Professor Horwitz implied, this opinion equates the criminal jurisdiction of admiralty over murders with territoriality, the language which he quotes is too broad to support him. The opinion states that the admiralty jurisdiction "does extend to the case of murder committed any where on the high seas" (Tr. 167; emphasis added). If Professor Horwitz is correct, then this statement would stand for the proposition that the admiral exercises territorial jurisdiction over the entire high seas. It is more likely that the statement stands for the uncontested proposition, as Chief Justice Cockburn emphasized in the Keyn case (Maine et al. Ex. 160), that the admiral has criminal jurisdiction over English vessels and pirates wherever they are found on the high seas.

6/ Moreover, since the ship was in New York Bay, it was probably within the body of a county under English common law.

These six bits of fragmentary and, at best, ambiguous evidence constitute the "considerable evidence in the 17th century" that Professor Horwitz relies upon to support his proposition that the admiral's criminal jurisdiction in the adjacent seas was territorial, unlike his jurisdiction on the high seas. It is on the basis of this evidence, together with the equally unpersuasive evidence relating to the period of the "older legal tradition," that Professor Horwitz asserts that Lord Chief Justice Cockburn and the majority in the Keyn case were misled as to the historical scope of the admiralty criminal jurisdiction in England (Tr. 154).

The decision of Lord Chief Justice Cockburn and the majority in the Keyn case with respect to the historical scope of admiralty criminal jurisdiction in England has been recently affirmed by the high courts of Canada and Australia in the cases previously discussed.

The Supreme Court of Canada, in speaking of the Keyn case, stated:

> The English Criminal Courts would have had jurisdiction if the act had occurred within the body of a county of England. The question whether the territorial sea was within the body of a county was, therefore, directly in issue. If it had been within the body of the county, the Court of Oyer and Terminer would have had jurisdiction. The

> majority decision of the Court was that the territory of England ends at low-water mark. There was, therefore, no jurisdiction in the Court of Oyer and Terminer. The Court also held that the case did not fall within the historical jurisdiction of the Lord High Admiral. That Court would have had jurisdiction if the accused had been a British national. The jurisdiction of the Admiral, which begins at low-water mark, did not extend to foreign nationals on foreign ships. [Re Offshore Mineral Rights of British Columbia, supra, p. 363, U.S. Ex. 34.]

The Court then cited with approval the following language from the opinion of Lush in the Keyn Case:

> * * * In the reign of Richard II the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; * * * and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, * * *. [Re Offshore Mineral Rights of British Columbia, supra, pp. 363-364, U.S. Ex. 34.]

d. The English seas were not within the realm of England. -- The defendant States have also attempted to establish the territorial nature of the English seas by establishing the proposition that the realm of England included the English seas. The United States contends that the realm of England stops at the water's edge. The States have relied upon the testimony of Professor Horwitz for their conclusion that the realm included the English seas. Professor Horwitz based his position upon statements in three treatises and his analysis of the 16th century statutes setting out the jurisdiction of the admiralty courts. Professor Horwitz thus disputes the conclusion reached by Chief Justice Cockburn in the Keyn case, relied upon in United States v. California, 332 U.S. 19, 32, that the realm of England stopped at the low-water mark.

In this connection, Professor Horwitz relied upon statements by authorities such as Robert Callis in his Lectures on the Statute of Sewers (Maine et al. Ex. 178; hereafter cited as Callis), Sir Mathew Hale in his De Jure Maris (Maine et al. Ex. 194; hereafter cited as Hale), and Sir Edward Coke in his The First Part of the Institutes of the Laws of England (Maine et al. Ex. 182; hereafter cited as Coke), in asserting that

under English law the English seas were within the realm of England (Tr. 154-57). The statement by Callis, however, dealt not with the sea and the seabed, but with newly arisen islands, and thus does not support the proposition that the intervening seas were part of the realm of England.

As Professor Wroth testified (Tr. 2508-2509), Coke did not equate admiralty jurisdiction with jurisdiction over the realm of England. Coke apparently meant to include within the realm only those portions of the adjacent seas which were considered at common law to be within the bodies of the counties. These were portions of the adjacent seas that were characterized at common law as inter fauces terrae. This term described a roadstead or arm of the sea between promontories or projecting headlands from which the opposite shore was visible. Black's Law Dictionary, 4th Edition (1951) p. 948.

As Professor Wroth's testimony shows, those authorities that do equate "realm" with the admiralty jurisdiction give that term a meaning that does not include all the attributes of territorial sovereignty.. To assert otherwise would be to claim for England territorial sovereignty throughout the high seas, a claim which even Selden did not make (Tr. 2509-2511). When used in this broad sense, the term "realm" connotes the area over which sovereignty in the jurisdictional sense existed.

Finally, in his testimony construing the language of the statutes, 13 Ric. 2, c. 5 (1389), 15 Ric. 2, c. 3 (1391), and 2 Hen. 4, c. 11 (1400), Professor Wroth concluded that they support the proposition that under English law the realm of England stopped at the low-water mark (Tr. 2507). The conclusion reached by Professor Wroth is supported by Sir Henry Finch in his Nomotechnia, or Law, or a Discourse Thereof. In that work, published in 1613, Finch declared that the common law ran through the realm, and asserted that "neither is the main sea, that is to say, beneath the low-water mark, parcel of the realm, for there the Admiral's jurisdiction (which hath nothing to do of things within the realm) doth only meddle and not the common law" Finch, Nomotechnia or A Law, or a Discourse Thereof (Pickering ed. 1759) pp. 77-78. Sir William Holdsworth calls Finch's work "much the most complete and the best institutional book before Blackstone" Holdsworth, 5 History of English Law (3rd ed., 1945) p. 399. John Selden's comments on Fortescue's De Laudibus Angliae (1616) indicate that at that time Selden also believed that the admiralty jurisdiction operated outside the realm. See Response of Professor Wroth, U.S. Ex. 400. As previously noted, Lord Chief Justice Cockburn in the Keyn case reached the same conclusion.

The evidence presented by Professor Horwitz does not substantiate his conclusion that to the 17th century jurist out of the realm was commonly considered to mean out of the body of a county of the realm. Indeed, Professor Horwitz admitted that "there is much talk in the 17th century about admiralty's jurisdiction being limited to outside the realm" (Tr. 155). In short, the English seas were viewed during the 17th century as outside the realm.

Moreover, the high courts of Canada and Australia in the cases previously discussed reaffirmed Lord Chief Justice Cockburn's determination that the realm ended at the low-water mark. Thus, the Supreme Court of Canada in the Re Offshore Mineral Case held that at common law the realm of England and of any British Colony ends at the low-water mark. The waters beyond the low-water mark are not part of the realm. Re Offshore Mineral Rights of British Columbia, supra, p. 354, 363 U.S. Ex. 34.

Similarly, Chief Justice Barwick of the High Court of Australia concluded that the decision of the majority in the Keyn case decided that at common law the realm ended at the edge of the sea and did not extend to the waters which washed the shores or the underlying seabed. Bonser v. La Macchia, supra, p. 278, U.S. Ex. 18.

Chief Justice Barwick of the Australian High Court had the following comment on the historical scope of English admiralty jurisdiction:

> I cannot read the majority decision in Reg. v. Keyn (The Franconia) (1876), 2 Ex. D. 63, in any other sense than that at common law the realm ended at the edge of the sea and that it did not extend to the bed of the sea, i.e., to any portion of the earth's crust adjacent to the realm covered at low tide, nor did it extend to the waters which washed the shores. These constituted the high seas and events taking place upon them fell within the jurisdiction of the Admiral, whose jurisdiction in general was not exercisable in 1788 within the realm except in the main streams of great rivers below the bridges: 13 Ric. 2 Stat. 1 c. 5; 15 Ric. 2 c. 3. See also the Offences at Sea Act, 1536 (28 Hen. 8 c. 15 ss. 1 and 2). [Bonser v. La Macchia, supra, p. 278, U.S. Ex. 18.]

e. The States have not shown that English law relating to emerged or derelict lands during the 17th and 18th centuries recognized a general property right in the seas and seabed. -- The defendant States, in addition to evidence relating to a claim of sovereignty, generally, over the English seas, have offered evidence to establish that English law recognized a prerogative right of the Crown in lands which have emerged

from the English seas. Apparently the defendant States rely upon the theory upon which this right was recognized as establishing a more general recognition under English law of Crown ownership of the English seas and seabed (Tr. 128-131, 226, 311, 325-327). The United States contends that the proper basis of this theory is the Crown's prerogative right to ownerless property, that if the theory connotes any Crown right in the seabed generally it is an inalienable governmental right, and that in any event the theory was not established in English law until late in the 17th century.

The right to derelict lands was first asserted, during the reign of Elizabeth I, by Sir Thomas Digges in his treatise published in 1569. Under Digges' theory, the king was entitled to those lands by right of his prerogative, as with wreck, treasure trove, and similar matters. According to Digges the Crown's right did not attach until those lands emerged from the sea (Tr. 2450).

Later, under the Stuarts, the king's right to derelict lands apparently was based not simply on the prerogative concept of the king's right to ownerless property which attaches to the seabed when it emerges, but on a concept of ownership of those

lands while still submerged. As Professor Thorne testified, "in the subsequent reigns of James I and Charles I, the king's right to derelict lands begins to be based on a much broader less obvious royal right, that of dominion over the English seas and ownership of the ground beneath them" (Tr. 2442).

The United States does not deny that the Crown vigorously asserted its claim to the derelict or emerged lands beginning with Digges. The reasons for this assertion, as described by Professor Thorne, were primarily economic (Tr. 2446-2447). We emphasize, however, that it was not until after the accession of the Stuarts to the Crown in 1604, after the great dispute with the Dutch over the herring fisheries had begun, that the Crown began to claim derelict lands on an ownership theory in addition to the narrower prerogative theory.

English law did not recognize the theory that the king owned the seabed and subsoil while submerged in a true property sense even when Callis wrote his Statute of Sewers in 1622. Admittedly, there are assertions in the works of both Callis and Digges that the seabed belonged to the Crown while still submerged. However, while both Callis and Digges at times referred to the Crown's property in the seas, each of them ultimately

based the Crown's rights to emerged lands upon the prerogative theory (Tr. 2450-2452); Callis quite clearly expressing doubt that the Crown could grant land still covered by the sea (Tr. 2458).

In our view, when Digges, Callis and Hale referred to the dominion or sovereignty or the "property" or "proprietary" of the English seas, they were not referring to a general property right to the seas in the same sense as ownership of land. Instead, like Welwood and Boroughs, they were referring to jurisdiction and control of the seas with an incidental right to the specific profits which normally arise in the seas. Thus, Callis states that "the dominion and empire of the sea, the legal power of administration of justice, the property, profit and possession thereof, doth appertain to the King." Moore, supra, p. 256. Although Callis does not define what he means by "property," it is apparent from his definition of "profits" that it did not include the waters of the seas or the underlying lands. Thus, he distinguished two kinds of profits "1. real and 2. personal." He defined the "personal profits of the sea" to be wreck, flotsam, jetsam, ligan and great fishes." More importantly, he defined "real profits" to include grounds

relinquished by the sea and newly arisen islands, not the sea-bed and subsoil while still submerged (Moore, supra, p. 256). From this it is apparent that Callis must have used the term "property" as well as the phrase "dominion and empire of the sea" in a jurisdictional sense. Before the seabed emerges, the Crown holds it, like the sea itself, only in a jurisdictional or governmental sense. In this connection, we note that Callis argues that the grants to the admiral of maritime jurisdiction and the "droits" of admiralty throughout the realm show "the King's legal power and jurisdiction on the seas" and his right to "profits arising on the seas" (Maine Ex. 178, 680).

The writings of Sir Mathew Hale some 15 years later are consistent with this construction of Callis' work. Like Digges and Callis before him, Hale also claimed derelict lands for the Crown on the prerogative theory rather than the ownership theory. Hale was not prepared even in 1637 to base the Crown's right to those lands on "that doubtful question whether the soil of the sea be the king's when covered by water." Moore, supra, p. 362. As is made clear in his later treatise on this subject (infra, pp. 90-92), Hale, like Callis, apparently also equated "dominion" and "propriety" of the sea with jurisdiction

or control of those seas with an incidental right to the specific profits which arose in those seas. Thus, Hale wrote in 1637: "Because as the king hath right of jurisdiction or dominion of so much at least of the sea as adjoins to the British coast nearer to them to any foreign coast . . . so as soon as any matter of profit happens upon or by reason of the said sea capable of propriety, it doth presently belong to the King . . . ." Moore, supra, p. 362. Hale asserted that this special "dominion" and "propriety" prevents any subject from acquiring an interest in any of those profits such as islands rising in the sea or derelict lands when they arise in those seas. Moore, supra, p. 363. As Professor Thorne noted, if the soil belonged to the Crown in a property sense before it emerged, there was no need to assert ownership upon the prerogative theory. The works of Digges, Callis and Hale thus show that the English law concept relating to derelict lands, as late as 1637, did not recognize Crown ownership in a property sense of seabed or subsoil while still a part of the English seas.

Moreover, English law did not begine to recognize Crown claims to relicted lands upon either theory until late in the 17th century. Despite the fact that numerous actions were brought

apparently the first case in which the Crown received a favorable judgment was the Philpot case in 1628. Moore, supra, p. xxxi, xxxviii, xxxix. In that case, the Crown's title to relicted or emerged lands on the River Thames was upheld, not on the basis of the ownership theory, but apparently in reliance on the prerogative theory that the land belongs to the king when it emerges from the water. Moore, supra, p. xxxi.

The next case in which the Crown received a favorable judgment was the Oldsworth case in 1637. Moore, supra, p. 304. Hale, arguing on behalf of the Crown, relied upon the prerogative theory and did not mention the earlier Philpot case. It is unclear from the decision in this case which theory the judges relied upon in granting the derelict or emerged lands to the Crown.

Philpot and Oldsworth were the only two cases prior to the Great Remonstrance in 1640 in which the rights of the Crown to derelict lands were recognized by English courts, despite the innumerable actions brought on behalf of the Crown during this period. Significantly, as Professor Thorne testified, the decisions in both cases were to a large degree abortive (Tr. 2679). They were the result of trials by judges

who were appointed by the king and who were later impeached for their subservience to the king. In both cases, individuals claiming under the Crown's title were unsuccessful in enforcing the Court's judgment. Suits to take possession of the land at issue in the Philpot case were pending when the Revolution broke out in 1640. Moore, supra, p. 267. Similarly all ejectment actions by the Crown grantees under the Oldsworth case apparently failed until 1671. Moore, supra, p. 416. Indeed, as Moore further explains, the Crown's claim to relicted lands was one of the causes of the Revolution in 1640, and during the Commonwealth scarcely any attempt was made to establish Crown title to such lands. Moore, supra, pp. XL, 281, 310.

It is interesting to note that Hale arguing on behalf of the Crown in a suit in 1646 apparently did not rely either upon the Philpot or the Oldsworth cases to establish the Crown's claim to the foreshore. Moore, supra, pp. 310-311. Thus, English law, at least through the period between the Great Remonstrance in 1640 and the Restoration in 1660, did not recognize a property right in the Crown to the seabed and subsoil of the English seas while still submerged.

With the restoration of the Stuart monarch in 1660, the Crown's claims to derelict lands apparently achieved only limited recognition under English law. Moore, supra, p. xli. At this time, Sir Mathew Hale, asserted that the soil of the sea while still submerged "belonged to the Crown in point of propriety":

> The third sort of maritime increase are islands arising de novo in the king's seas, or the king's arms thereof. These upon the same account and reason prima facie and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands de novo arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land invironed with water; and thus some places have arisen, and their original recorded, as about Ravensend in Yorkshire. [Hale, De Jure Maris (1667) in Moore, supra, p. 383.]

Once again, however, Hale undoubtedly did not intend to equate the "propriety" which the Crown has in the sea with the property which the Crown has in its mainland territory. Hale further elaborated on the concept of the king's "propriety" as follows:

> The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrown and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly

> regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it * * *. [Moore, supra, p. 399.]

On the other hand, at this time, Hale apparently was prepared to go somewhat further than Callis in that he argued that the Crown could grant land still covered by the seas, but only if the grant met certain conditions. As Professor Thorne testified, Hale in De Jure Maris stated that a grant of land cum incrementa maritima could not pass increments because of uncertainty but that a grant that was certain both with respect to the type of land granted, i.e., land under water, and the amount of land granted, 1,000 acres, would pass the soil under water at once (Tr. 2458). In the case of Attorney General v. Farmer, in 1676, Hale argued, on behalf of the Crown, its claim to "100 acres of derelict lands which were claimed in a manor holden under Crown grant of a manor, and all the soil, ground, sand and marshalnd contiguous to the premises which may at some time in the future be recovered by the withdrawal of the sea." Moore, supra, pp. 417-418. Specifically, Hale argued that the Crown

grant gave the grantee nothing because the king had not the acres in him and thus could not grant what he did not have and that the lands which the king has by his prerogative cannot pass by general words, but must be expressly named, and that the extent of land granted was indefinite. (This is the same position which Hale had taken in his De Jure Maris 9 years earlier.) The land was not expressly granted as "land under water" and was not described in certain terms or even as 100 acres. Therefore, according to Hale's theory, it remained a part of that whole tract of the sea which only the Crown could possess by its navies. The defendants argued that the Crown owned the seabed while it was still submerged and could, therefore, pass title to the soil before it emerged. 7/ Moore, supra, pp. 417-418.

Thus, after the restoration of the Stuarts in 1660, the Crown achieved some success in its efforts to claim derelict or emerged lands. But neither the cases nor Hale's De Jure Maris support the proposition that English law recognized Crown

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7/ It is difficult to determine the decision of the Court from the three reports of this case. One report indicates that the Court held that nothing passed by the general words and the patent as to the 100 acres of derelict lands was void. Another report indicates that no judgment was given and that the case was agreed upon by counsel. Moore, supra, pp. 417-418.

ownership, in a property sense, of a whole tract of the sea or the underlying lands. In the final analysis, the writing of Digges, Callis and Hale and the cases discussed above stand for the limited proposition that the Crown rather than the subject is entitled to lands which emerge from English seas. The basis in English law for this doctrine, as articulated by Digges, Callis and Hale, is that the Crown is entitled to those emerged lands not because it owned those lands as property before the sea receded but by virtue of its prerogative right to ownerless property. Even the limited right of the Crown to grant specific portions of the seabed while still submerged which Hale described in 1676 had not achieved full recognition when Blackstone wrote in 1765. Blackstone, II Commentaries on the Laws of England (1765), p. 262, Maine et al. Ex. 174.

f. The States have not shown how general legal authorities in the 17th and 18th centuries recognized a general property in the seas and seabed. -- Apart from the evidence relating to the fishing dispute with the Dutch, admiralty and derelict lands, the defendant States also rely on a number of general authorities on English law in the 17th and 18th centuries. Some of these works have already been discussed. Other works

cited by Professor Horwitz, such as works by Rolle, Bacon, Viner and Comyns, are compilations of abstracts of cases and other materials arranged topically like a modern law digest or encyclopedia. There is little or no commentary or analysis of the cases and materials cited in these compilations. These works contain, for the most part, abstracts of the authorities which we have already discussed, including the usual references to the "sovereignty" or "dominion" of the king in the English seas. More specifically there are references to the right of the Crown by its prerogative to derelict or emerged lands. The numerous references in these materials to the specific prerogative rights of the Crown in the adjacent seas including its right to emerged lands merely incorporate the authorities which we have already discussed which take the view that sovereignty or dominion of those seas was not viewed as comprehending a general property right to those seas, but a right to jurisdiction over those seas and to appropriate specific profits which arise in them. As we have previously shown, if the Crown had owned the seabed while it was a part of the sea, there would have been no need for it to claim derelict or emerged lands on the basis of the prerogative concept.

Finally, Professor Horwitz cites a portion of Blackstone's Commentaries dealing only with derelict and emerged lands in which Blackstone repeats the position which Hale took in his De Jure Maris in 1667. But, as Professor Thorne noted, Blackstone included an alternative statement of the prerogative theory, indicating that Blackstone was not convinced of the Crown's title to lands still covered by water (Tr. 2459; Maine et al. Ex. 174).

None of these works expressly supports the general proposition that English law recognized a right of the Crown to the property of the waters or underlying seabed and subsoil of the English seas.

g. The States have not shown that the Crown was aware of either the existence or the importance of mining beneath the open seas in the 17th and 18th centuries. -- In support of the proposition that English law recognized a right in the Crown to the seabed and subsoil of the adjacent seas, Professor Horwitz testified concerning what he described as "two clear examples, perhaps a third, of undersea mining in the 17th and 18th centuries" (Tr. 221). The United States contends that these examples are all instances of activities in inland waters over which the Crown had plenary jurisdiction.

The first "clear example" cited by Professor Horwitz was a mine in Culross, Perthshire in Scotland, which he says was operated as early as 1588 (Tr. 221). There is no indication whether this early attempt at undersea mining succeeded. By 1600, however, the colliery had apparently been abandoned for some time (Maine et al. Ex. 190, p. 55). Regardless of the success or failure of these early attempts, it is significant that the mine shafts did not extend into the open sea off of England but into the Firth of Forth or an inlet of the sea into the mainland of Scotland. Culross is situated at a location where the waters of the Firth are only 10 or 12 miles wide, and thus within the body of the county under the common law.
The other "clear example" of undersea mining which Professor Horwitz described was a coal mine in Whitehaven in Cumberland, England (Tr. 222). It appears that the mining of coal near the shore was begun in 1729 (Maine et al. Ex. 198, p. 99). Moreover, these mines did not extend below the sea in 1733 (Maine et al. Ex. 195, p. 49). By 1765, they had, as Professor Horwitz testified, extended a mere three-quarters of a mile under the sea (Tr. 223). Hay, A Short History of Whitehaven (1966) p. 52. The shafts extended under the Solway Firth. Solway Firth like the Firth of Forth is an inlet of the sea into the mainland. The undersea mines were dug under Salton Bay within the Solway and thus were wholly under inland waters.

The undersea coal mines at Whitehaven were worked freely until the year 1860, when the Crown put forward a claim to the minerals lying below low-water mark. Hay, supra, p. 52. Apparently, the fact that these mines were worked under the sea was not known to the Crown until the middle of the 19th century. Moreover, the same authority which describes this mine says that "there is every reason to believe that the coal worked under the Solway at Saltom was the first ever worked beneath the sea in any part of the world." Hay, supra, p. 52. Yet, this instance and the other "clear example" of mining beneath the sea are relied on by Professor Horwitz to support the conclusion that the Crown was aware of the importance of the resources of the seabed and subsoil when it made the original colonial grants and charters near the beginning of the 17th century.

The "inconclusive evidence that there was undersea mining of a saltpeter in Virginia and England during the 17th century," which Professor Horwitz cites, is indeed inconclusive. The evidence from which Professor Horwitz concludes that there was undersea mining of saltpeter in America is a general grant to the Duke of Albemarle to mine anything and everything,

including saltpeter, in the parts of the colonies in America (Tr. 223; Maine et al. Ex. 232). There is in this grant no hint of mining beneath the sea. Professor Horwitz ties this grant to a reference by the Governor of Virginia that he hopes to discover saltpeter in the Bay. 8/ It is more likely that the expression "in the Bay" meant, geographically, along the shores of the bay rather than in or under the waters of the bay. Nevertheless, since under English law, a bay would have been within the body of a county, there is no evidence of mining under the open seas. The salt mining in England and America referred to by Professor Horwitz (Tr. 224, 225) was not undersea mining, since salt is obtained as a residue upon the dry ground after the sea waters have receded or evaporated.

4. The States have not shown that if English law recognized special rights of the Crown in the English seas, such rights were recognized in the seas adjacent to the colonies. -- The defendant States apparently seek to establish their claims to

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8/ The Colony of Virginia, however, had been one of the colonies excepted from the grant to the Duke of Albemarle.

the seabed and subsoil of the Atlantic Ocean out to 100 miles by establishing that English law recognized Crown ownership of the English seas, and by then showing that similar ownership rights were recognized in the Atlantic Ocean off the coasts of the colonies and were subsequently transferred to the colonies.

All of the sources and authorities that defendants introduced to prove a right of the Crown to the seabed and subsoil dealt entirely with the English seas. Even if it is assumed that this authority establishes that English law recognized a property right of the Crown to the English seas, it does not support such a property claim in the colonial seas unless (1) the English seas can be deemed to extend to the colonial coasts, or (2) the Crown's claim in the colonial seas rests on a similar legal theory as its claim to the English seas. During the hearings in this case, the United States has shown that the English seas did not extend to the coasts of America, that the Crown did not claim sovereignty or dominion in the seas off the colonies; and that it is doubtful, even had they asserted such a claim, that they exercised sufficient authority, according to then prevailing English legal theory, to obtain dominion and sovereignty over those seas (Tr. 2522-2526). Although there was considerable

doubt as to the extent of the English seas, [9/] no one claimed that those seas extended across the Atlantic Ocean to include the seas adjacent to the coast of the American colonies. Thus, if the Crown had any claim to those seas, it must have rested on an independent basis. While Welwood's The Abridgement of All Sea Laws, published in 1613, was the first treatise articulating the theory on which England claimed sovereignty over the English seas, Selden's Mare Clausum, published in 1635, probably represents the fullest expression of English legal theory on sovereignty over the seas under the Stuarts. The works of Welwood, Boroughs and Selden were written after many of the important grants and charters at issue in this case and do not reflect the protective nature of the sovereignty which was claimed and exercised by England in the English seas prior to the 17th century, supra, pp. 30-35. However, it is to their works that we must look for the English legal theory regarding claims to sovereignty over maritime areas as that theory later developed under the Stuarts in the 17th and 18th centuries.

9/ The most detailed account of the various attempts to define these seas can be found in Fulton, supra, pp. 15-20.

These treatises generally agree that England's claim to the English seas was based upon long use or prescription. In replying to Grotius' Mare Liberum in 1613, Wellwood took the position that a prince may occupy a part of the sea adjacent to the coast of his kingdom. Wellwood addressed his treatise not to the property of the sea or seabed, but to the property of the fisheries found in those seas. Wellwood drew an analogy between the prince and a private man who may obtain exclusive rights to a fishery by "prescription" and concluded "have not Princes a like right and power" (Maine et al. Ex. 290, pp. 70-71). Boroughs stated: "[A]nd for his sacred Majesty, our great Sovereagne Lord the King, such is his cleare and undubitable right to the Superiority of the Seas of England, derived and confirmed upon him by immemorable prescription, and continued in possession even untill this very yeare 1633" (Maine et al. Ex. 175, p. 54). As we have previously stated, Wellwood and Boroughs apparently equated sovereignty and dominion of the seas to jurisdiction and a right to specific profits of the sea, such as the fisheries.

As Professor Wroth testified (Tr. 2523), Selden's Mare Clausum, like Welwood and Boroughs before him, sets out a

long chain of historical events which establish "the perpetual occupation" of the British seas. It is Selden's Mare Clausum which is the embodiment of English policy regarding maritime sovereignty during the Stuart period. In this work, Selden set out the requirements for achieving maritime dominion. He asserts that dominion is based on "just possession and occupation, and its continuance" with an intent to claim such possession, and must "receive a signal confirmation by a long continued assent, a free and public confession or acknowledgment of such neighbors, whom it most concerns" Selden, Of the Dominion of the Seas (Needham Transl. 1652) p. 284. As Professor Horwitz acknowledged (Tr. 408), Selden asserts that dominion is based on "a private or peculiar use or enjoyment of the sea, as consists in a setting forth ships to sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it, in receiving such profits and commodities as are peculiar to every kind of sea Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure" (Selden, supra, p. 188, Maine et al. Ex. 204).

The above writings thus show that English legal theory justified sovereignty over the seas on the basis of prescription or long-continued occupation, obviously not applicable to the seas off the American colonies. Thus, applying the criteria of maritime dominion which evolved in English law under the Stuart regime, neither the Crown nor the colonies ever claimed or acquired sovereignty over the colonial seas, particularly during the early period when most of the important grants and charters were issued.

B. The States Have Not Shown That The English Crown Claimed Or Conveyed In The Colonial Grants And Charters The Sea And Seabed Adjacent To The Colonies

1. The adjacent seas and seabed were neither claimed by the Crown nor conveyed by it to the colonies under the original grants and charters. -- As we understand the testimony and evidence of the defendant States, they are contending that the Crown claimed and conveyed to the colonies in their grants and charters ownership of the seas and seabed adjacent to America.

It is the position of the United States that what the colonists received under their grants and charters was, at most, a grant of lands on the mainland upon which to establish settlements and sufficient power to make laws for the peace, order and good government of those settlements. As was apparently the view of at least two of this Nation's founders, the grants and charters were more in the nature of exclusive licenses to obtain and use lands within the boundaries than absolute grants of such areas.

The views of Alexander Hamilton on this subject were expressed in the arguments he made on behalf of the State of New York in its boundary dispute with the State of Massachusetts.

Hamilton denied that the Massachusetts charter of 1629 conferred absolute grants of soil or jurisdiction and denominated them "as mere licenses to settle and acquire property and jurisdiction." As quoted by Professor Morris (Tr. 1769), Hamilton summarized this view as follows:

> "[In] the general sense of Mankind the colonies of the different nations in America were measured not by their parchment but by the extent of their actual or reputed possession and settlements."

The view that the colonies' titles to the lands they claimed were based not upon the Crown's grants and charters but upon actual possession and occupation is also supported by the writings of Thomas Jefferson (see Tr. 1713).

Moreover, this view of the nature and scope of the charters is consistent with the circumstances under which the colonization of America occurred. As the United States pointed out during the hearings in this case, the English Crown issued grants and charters covering areas which it did not actually possess and about which very little was known. The Crown even issued charters covering areas which it had previously granted to someone else or which were claimed by other nations (Tr. 1460-1463). Finally, the Crown recognized the rights of the colonies

to lands within the boundaries of the grants only to the extent those lands had been effectively occupied by the colonies. Thus, the Crown felt free to carve up and dismember the colonies (infra, p. 163), and even to restrict their property rights within the lands which the colonies had occupied (E.g., Tr. 1698-1700, 2300-2303).

Whether the colonial grants and charters conveyed the lands described within their boundaries in a strict property sense or whether they merely conveyed an exclusive license to obtain lands within those boundaries, the areas described did not include as territory the adjacent seas and seabed. Thus, although the jurisdiction and powers of the colonies necessarily extended into the adjacent seas for purposes of regulating trade and navigation as well as the defense of the colonies, the grants were not intended to and did not convey ownership to vast areas of those seas (E.g., Tr. 1652).

The Supreme Court accordingly concluded in the California case (332 U.S. at 31-32):

> * * * Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, * * * showed a purpose to set apart a three mile ocean belt for colonial or state ownership.

> Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of wealth.

The Court's conclusion as to the nature and scope of English colonial grants and charters was recently concurred in by the highest courts of Canada and Australia. As previously discussed, the Supreme Court of Canada was asked to adjudicate a dispute over the natural resources of the adjacent seabed between the national government and the maritime provinces which claimed those resources on the basis of colonial grants and charters. The Canadian court rejected the arguments of the provinces and concluded that the charters and grants did not convey any part of the adjacent seas (supra, pp. 22-23).

The High Court of Australia had to determine whether the grants and charters of the British colonies in that country included portions of the adjacent seas in connection with the construction of an Australian commonwealth fishing statute (supra, pp. 23-24). In upholding the constitutionality of the statute, the court rejected the argument that the Australian

states had obtained any portion of the adjacent seas under their colonial grants and charters. In arriving at that conclusion, Chief Justice Barwick commented (Bonser v. La Macchia, supra, p. 278, U.S. Ex. 18):

> I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters. * * *

The opinion of the Supreme Court in the California case was cited with approval by both the Canadian and Australian courts.

2. The assumptions underlying the defendants' conclusions with respect to the colonial grants and charters are inconsistent with English law in the 17th and 18th centuries. -- The defendant States apparently assert that the seabed and subsoil, including the adjacent seas, were claimed and conveyed by the Crown to the colonies under their respective grants and charters. During the hearings in this case, Professor Smith testified at length on behalf of the defendant States concerning the language of the numerous charters, grants and letters patent

issued with respect to the colonies (Tr. 673-792). We do not understand the defendant States to contend that these grants and charters expressly and specifically conveyed ownership of the adjacent seas, but rather that those seas, including the subsoil and seabed, were claimed and conveyed by the Crown to the colonies by necessary implication. The States appear to rely primarily on language granting "jura regalia," "royalties" or "rights," usually in conjunction with language granting "lands," "soils," "grounds," "mines," "minerals" and the like. They also appear to rely on language conveying some governmental interest in the adjacent seas, such as grants of admiralty jurisdiction. Finally, as we understand the testimony, the States rely also on the inclusion of islands within the grants and charters to define the distances into the sea which were granted by the Crown.

The United States will show by an analysis of the language of the numerous charters and grants issued by the Crown to the American colonies in light of the underlying English law that these assumptions relied on by the defendant States to establish their claims to the adjacent seas are inconsistent with English law in the 17th and 18th centuries.

a. Arguments upon which the States rely. -- Professor Smith, in his testimony, attached great significance to the grant to the colonies of "royalties." In his discussion of the Sir Humphrey Gilbert patents of 1578 (Maine et al. Ex. 139), for example, Professor Smith concluded: "I believe it is clear that regality or royalty in dominio included all Crown rights in the marginal sea and seabed, and that when the term 'royalties' was used in colonial charters it was intended and understood to include those rights" (Tr. 680). After referring to language granting Sir Humphrey Gilbert the right to hold and occupy "all the soyle of all such lands, countries and territories so discovered or possessed," "with the rites [rights], royalties and jurisdictions, as well marine as other, within sayd lands or countreys of [or] the seas thereto adjoining," Professor Smith concluded (Tr. 680-681):

> In my opinion; the above recited clauses from the letters patent were designed to grant, and did grant, to the patentee maritime or admiralty jurisdiction and also the soil of the adjoining seas. The Queen in effect obviously assumed that when Sir Humphrey Gilbert discovered and took possession of any 'remote, heathen and barbarous lands, countreys and territories * * * the

> royal rights or prerogative with respect to such lands areas and the adjoining seas were identical to those possessed by the Queen within the realm.

Professor Smith also sought to show how the numerous grants and charters, subsequently issued by the Crown, conveyed the adjacent seas by the same or similar terms (see, e.g., Tr. 705, 726, 733, 739, 845, 846). Throughout this analysis, Professor Smith stressed that the grant of "royalties," or the like, conveyed to the grantee as large a right to the property of the seas adjacent to the colonies as the Crown possessed in the English seas (see, e.g., Tr. 725, 733, 734, 767, 771, 783, 785, 787, 791, 792, 803). Thus, in commenting upon a 1663 charter of Charles II establishing the colony of Rhode Island (Maine et al. Ex. 156), Professor Smith concluded: "It is my opinion that by virtue of this charter with its grants of royalties the patentee had a right to the soil beneath the seas adjoining to the same extent as did the Crown in England" (Tr. 733-734).

While acknowledging that the distance into the English seas to which England could exercise this right was indefinite (Tr. 671-672; cf. Tr. 770), Professor Smith testified (Tr. 791-792):

> When the various colonial charters are read cumulatively they indicate that the Crown claimed and granted to, or made effective for, the American dominions of the Crown the same sort of rights in the adjoining Atlantic as it claimed in the English seas. Since the precise extent of the claim in English waters was undetermined the opportunity was taken to particularize the limits in certain of the colonial charters, though their limits vary from one charter to another.

Professor Smith apparently concluded that this "particularization" of boundaries was achieved through language granting islands within a specified distance of the coast of a colony (Tr. 696, 698, 699, 708, 719, 728, 761, 762, 763, 765, 779).

After referring to the works of Bartolus (Tractatus de Insula) regarding jurisdiction by coastal States over islands, Professor Smith testified (Tr. 699-700):

> Some of the early writers were fascinated by the problem of new islands arising from the sea. Unless the patentees had a right to the soil of the adjoining seas, such new arisen island, regarded as nullius, might be lawfully occupied by a foreign power, such as Spain, or might be granted by the Crown to other patentees. It made sense from both the standpoint of the patentees and of the Crown, particularly under the uncertain conditions of early colonization efforts, for the Crown to grant and the Virginia Company to hold rights to the soil of the adjoining seas to a distance of over one hundred miles from the shore.

Professor Smith apparently assumed that the colonies could not claim ownership of the islands without claiming ownership of the bed of the seas from which they came. Thus, in concluding that an indenture between the Council of New England and John Mason (Maine et al. Ex. 13) conveyed the seabed and subsoil out to at least five leagues, Professor Smith testified: "My conclusion rests upon the language, 'together with all islands and inlets within five leagues distance of the premises and abutting upon the same or any part or parcel thereof,' plus the grant of all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, pre-eminences and marine power in the 'said Seas and River'" (Tr. 762-763).

b. Sovereignty over the adjacent seas and seabed could be obtained only by effective occupation. -- The first assumption Professor Smith made during the hearings in this case was that sovereignty over the seas is an automatic incident of sovereignty over the mainland situated in or near those seas. When asked: "On what basis did the Crown claim the ownership of the seas, seabed and subsoil adjacent to the colonies?," Professor Smith responded: "[My] position is that

having taken, occupied a land mass, that the sovereignty of the adjoining sea would adhere to it" (Tr. 1219). He also testified that: " . . . in light of the charter provisions I have surveyed, it is clear beyond dispute that in the 17th and 18th centuries English law, sovereignty or dominion over territory with a sea coast was regarded as carrying with its rights over the adjacent sea, seabed and subsoil * * *" (Tr. 792). It is the position of the United States that the Professor Smith's answer is inconsistent with English legal theory during the period in which the grants and charters were issued.

As the United States has previously shown, English law prior to the 17th century did not recognize any concept of sovereignty over the adjacent seas in a property sense. Only upon the accession of the Stuarts to the throne of England in 1604 did England begin to claim sovereignty in the English seas giving England exclusive rights against all countries. Moreover, such rights could only be established, under English legal theory of the 17th and 18th centuries, through the effective occupation of the seas in question and international recognition of a claim to the area (see supra, pp. 59-66). Nonetheless, Professor Smith, apparently on the basis of an assumption

that sovereignty over the seas followed from sovereignty over the mainland, further assumed that the colonies in America had rights in the adjacent seas to the same extent that the Crown claimed and exercised rights in the English seas. Even Selden in 1635 did not claim this for the colonies. Selden, in Mare Clausum, asserted that although the British seas did not extend to the American coast, there was "another right belonging to the King of Great Britain and that of a verie large extent upon the Shore of America" (Selden, supra, p. 441). Selden apparently argued that Cabot's discovery vayage in 1497 and Sir Humphrey Gilbert's ill-fated colony at Newfoundland in 1583 supported such a claim. As Professor Wroth pointed out, this conclusion seems inconsistent with Selden's own theory (Tr. 2524). Nonetheless, after describing the Newfoundland claim, Selden added: "How far our English colonies laterly transported into America have possessed themselves of the sea there I have as yet made but little inquiries." Selden, supra, p. 442. Thus, Selden, consistent with prevailing English legal theory on this issue, viewed the question of the extent of the rights of the Crown in the seas adjacent to the colonies as a question as to how far the colonies had effectively possessed themselves of those seas.

c. English law did not recognize a right of the Crown by its prerogative to the property of the adjacent seas. -- The next assumption which Professor Smith made during his testimony was that English law in the 17th and 18th centuries, and earlier, recognized the right of the Crown by its prerogative to the ownership of the adjacent seas and seabed (Tr. 671-673). The United States has shown that English law in the 17th and 18th centuries did not recognize the concept of ownership of the adjacent seas in a property sense (see, supra, pp. 52-95).

The United States has specifically shown that even a limited property right to the seabed and subsoil while still submerged did not begin to achieve recognition under English law before the end of the 17th century (supra, pp. 82-93). Even then, the Crown's right to grant such lands did not extend to "whole tracts" of open sea that would be embraced in Professor Smith's construction of the charter grants. At that time, rights to the seabed and subsoil in a purely proprietary sense could pass only under certain conditions, i.e., if it were granted by certain bounds and described with spedificity as land under the seas. As two charters show, the draftsmen of these grants knew how to convey submerged lands when they wished to

do so. Thus, the Gorges Patent for the Province of Maine, 1639, contains a grant of soil and grounds "as well dry as covered with waters"(Maine et al Ex. 3). The Duke of York's grant of New Castle to William Penn, 1682 Ma. 266, contains a grant of "all islands in the said river Delaware and the soils thereof" (Maine et al. Ex. 266). As Professor Kavenagh testified, these particular grants do not convey the bed of the open sea but rather lands under internal waters, creeks, havens, rivers and the like (Tr. 1525, 1584). The two grants referred to above also conveyed "royalties" and "rights" in terms similar to the other grants and charters. If those other general terms of conveyance did, in fact, pass a right to the soil of lands under water, as Professor Smith has testified, it would not have been necessary to describe particular submerged lands specifically in the grants.

d. A grant of islands does not convey by implication the intervening sea or define the distance into the sea otherwise granted. --

(1) Ownership of the seas and seabed is not necessary to a grant of islands. -- Contrary to Professor Smith's conclusion, ownership of the seabed was not necessary to a claim to islands off the coast of a colony. In contending

that the inclusion of language granting all islands within a specified distance was intended to particularize charter boundaries in the sea, Professor Smith (Tr. 699) cited Bartolus and relied on the following quotation from Julius Goebel's work The Struggle for the Falkland Islands (1927), at pp. 74-75:

> "One having jurisdiction over the territory adjacent to the sea, says Bartolus, has jurisdiction over the sea for one hundred miles notwithstanding the fact that the sea is common to all, and it follows from this that jurisdiction over the islands within such waters is properly vested in the nearest state. For two days journey, says Bartolus, is what the law regards as sufficiently near on land, and one hundred miles at sea is less than two day's journey."

But as Goebel's quotation shows, all Bartolus recognized was jurisdiction over the adjoining seas not ownership of them. Those seas continued to be "common to all."

Indeed, Bartolus and other 14th and 15th century publicists took the position that the only power which the sovereign could assert over the sea was a protective power. As Professor Wroth testified (Tr. 2478-2479):

> As these publicists indicate, this protective concept was manifested in the exercise of jurisdiction by the sovereign in cooperation with other sovereigns to police the sea and keep it free from the depredations of pirates and others who would infringe upon the rights

> of navigation and fishing. These publicists like Bracton and the civil law tradition upon which he and they equally relied, denied any power in the sovereign to appropriate the sea as property. See Fenn, The Origin of the Right of Fishery in the Territorial Waters (1926) 81-122.

On this point, Professor Thorne testified:

> Indeed, the one clear precedent, the island arising in the sea was dead against Digges, for Bracton, Fleta and Britton all stated that it belonged to the first occupier (Bracton, ii 42, 44); (Thorne ed., 1968); (Fleta, iii, ca. 2 (1290), (Selden, ed. 1685); Britton, i, 216 (1290); (Nichols ed., 1875). English law in this period reflected the Roman law view which, while recognizing some kind of jurisdiction in the adjacent seas, denied a property right in them. [Tr. 2444-2445, cf. Tr. 2450-2452.]

Even Professor Horwitz recognized that Digges was wrong when he argued that civil law gave islands rising in the sea to the king (Tr. 327). As we have previously shown, the prerogative theory that gave the Crown rights to derelict or emerged lands, including islands, as ownerless property was current throughout most of the 17th century (supra, p.49). Contrary to Professor Smith's apparent assumptions, ownership of the seabed and subsoil was not a necessary prerequisite to the granting of islands. Even Professor Flaherty readily admitted that a grant of intervening seas, seabed and subsoil was not necessary to a grant of such islands (Tr. 1335).

Moreover, there is evidence that the drafters of the charters and grants did not believe that a grant of islands conveyed by implication the intervening seas or seabed. If a grant of "royalties" in conjunction with a grant of islands did pass, by implication, the intervening seas and seabed, it would be unnecessary to assert ownership of future islands arising within the intervening seas. Yet the Maryland charter of 1632, which contains the usual language relied upon by Professor Smith to convey the seabed and subsoil of the adjacent seas also contains a grant of "all and singular the islands and inlets * * * which had been or shall be formed in the sea, situate within ten marine leagues from the said shore" (emphasis added; Maine et al. Ex. 141).

As Professor Wroth testified:

> Clearly if this . . . general language had conveyed the seabed, it would have been unnecessary to make a special grant of new risen islands, because ownership of them would have gone with ownership of the seabed. The draftsmen of this charter must have concluded either that the Crown did not own the seabed and so, as Professor Thorne points out, did not have title in its soil until it became dry, or that the general language used in this and prior grants did not convey seabed rights. [Tr. 2530.]

(2) The Supreme Court has already ruled that a grant of islands does not by necessary implication convey the intervening seas. --

(a) Generally. -- In United States v. Louisiana, 363 U.S. 1, the Court considered claims by Louisiana under the Submerged Lands Act to a boundary in the Gulf of Mexico out to three leagues based upon a grant of all islands within that distance in its 1812 Act of Admission. The United States contended that the grant included only the islands and not the intervening seas and seabed. The Court held (363 U.S. at 67):

> The language of the Act [of Admission] itself appears clearly to support the Government's position. The boundary line is drawn down the middle of the river Iberville "to the gulf of Mexico," not into it for any distance. The State is thence to be bounded "by the said gulf," not by a line located three leagues out in the Gulf, "to the place of beginning," which is described as "at the mouth of the river Sabine," not somewhere beyond the mouth in the Gulf. [Emphasis added.] And while "all islands" within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever.

As the United States has shown during the hearing in this case, most of the grants and charters here, like the 1812 Louisiana Act of Admission, granted an area of mainland bounded by the sea, with an additional grant of islands in the adjacent seas out to various distances.

For example, the 1629 charter of the colony of New Plymouth granted an area of the mainland with an eastern boundary of "the great western ocean" (Tr. 1521; Maine et al. Ex. 84), and the New England 1620 charter granted an area of the mainland "from sea to sea" (Tr. 1512-1513; U.S. Ex. 70). Both of these charters and grants were superseded by the 1691 charter of Massachusetts which described the bounds of the colony as being "from the said Atlantic Ocean and western sea and ocean in the east part, towards the south sea" (Maine et al. Ex. 44). The 1662 charter of Connecticut provided that the colony was bounded "on the south by the sea" (Tr. 1565; Maine et al. Ex. 272). The 1643 patent of Rhode Island does not even mention the sea and 1663 charter for Rhode Island defined the boundary of the colony towards the "south by the ocean" (Tr. 1560-1561; Maine et al. Ex. 155, 156). The Duke of York's confirmation to the proprietors described New Jersey as "bounded on the east part

by the Main sea" (Tr. 1577; Maine et al. Ex. 75).

Moreover, the "Recognition by Charles II of the Proprietary rights of the soil and government of East New Jersey, Novenber 23, 1683" (Maine et al. Ex. 77), and the "Grant of the government of West Jersey, from Daniel Coke to the West Jersey Society, April 4, 1691" (U.S.Ex. 102) state that the eastern boundary is the Atlantic Ocean (Tr. 1577-1578). The 1632 charter of Maryland described a grant of mainland "between the main ocean on the east and the bay of Chesapeake on the west" (Tr. 1494; Maine et al. Ex. 141).

In short, the description of the boundaries found in these grants and charters, like the similar language in the 1812 Louisiana Act of Admission, merely granted rights to the mainland (including inland waters such as bays, gulfs and inlets) and, in many cases, islands off shore.

(b) Treaty of 1783. -- Professor Smith also maintained that a grant of islands to a specified distance in the Treaty of Peace of 1783 necessarily implied a grant of the intervening seas, seabed and subsoil. Although Professor Smith testified that a provision in the Treaty of Utrecht describing exclusive fishery limits relates only to fishery limits

(Tr. 1275), he maintained that a provision in the 1783 treaty relating to ownership of islands relates not only to such islands but also to ownership of the intervening seas and seabed. On this point, Professor Smith testified:

> Article II provides that the boundaries of the United States are to include "all islands within twenty leagues of any part of the shores of the United States." While there is no language, such as we have found in most of the colonial charters, referring to such regalities within these limits as waters, seas, mines, fishings, etc., it is my opinion that in the light of the long history of such charter provisions it was well understood at the time that language granting islands within a certain distance of the coast also granted the intervening sea and seabed, out to at least that distance. [Tr. 845-846.]

Professor Smith was unclear about the effect this 20-league line had upon areas beyond that limit. Apparently, he concluded that the line represented the limits of ownership claimed by the United States into the sea (Tr. 1275-1276, 1286-1287). One of the only two authorities to which Professor Smith referred for this aspect of his testimony was Professor Morris' book on the subject. The Peacemakers: The Great Powers and American Independence (Tr. 1276). However, Professor Morris concluded that Article II of the Treaty of 1783 clearly related

only to islands, and not to the intervening seas and seabed (Tr. 1807-1816).

Professor Henkin testified on this matter as follows (Tr. 1907-1908):

> There is nothing in the circumstances surrounding the treaty or the maps which were used during the negotiations to suggest that Great Britain or the United States recognized what we would call sovereignty or exclusive rights in the seas and the seabed out to 20 leagues. * * * [A]t that time it was already recognized by Great Britain and other coastal nations that sovereign rights could not be had in the seas beyond the reach of coastal cannon. And, as I said there was no need to make such claims since they would bring no practical consequences and protect no practical interests. The practical interests of the United States were only in the islands near its shores which were important to the United States for both economic and security reasons. The treaty provision also protected remaining British interests in the area by removing any ambiguity as to which of the many known and yet undiscovered islands off its coasts the United States would obtain as a result of its severance from Great Britain and which might continue to belong to Great Britain.

Professor Henkin's position is fully supported by the Supreme Court's decision in United States v. Louisiana, 363 U.S. 1. The Court there referred to Article II of the Treaty of 1783 and stated (363 U.S. at 68):

> After describing the boundary of the United States from the mouth of the St. Croix River in the Bay of Fundy to the mouth of the St. Mary's River between Georgia and Florida, the parties [to the 1783 treaty] added: "comprehending all islands within twenty leagues of any part of the shores of the United States. . . ." In the light of Jefferson's observation, only 10 years later, that national claims to control of the sea beyond approximately 20 miles from the coast had not theretofore been generally recognized among maritime powers; his accompanying proposal that a three-mile limit should be placed upon the extent of territorial waters; and subsequent American and British policy in this regard, * * * it is hardly conceivable that this provision of the Treaty was intended to establish United States territorial jurisdiction over all waters lying within 20 leagues (60 miles) of the shore. [Footnote omitted.]

c. The grants and charters are not sufficient to grant ownership of the adjacent seas even if such a grant were possible under prevailing English law. -- As we have previously noted, Professor Smith's assumptions, regarding a grant of "jura regalia" or "royalties," and "islands," are not well founded. Even if the term "royalties," in some abstract sense, might have comprehended a right to the ownership of the adjacent seas and seabed, however, we do not believe a grant in such general terms could have been valid. As Professor Wroth pointed out (Tr. 2532): "It was a general principle that 'general words in the king's grant never extend to a grant of things

which belong to the king by virtue of his prerogative, for such ought to be expressly mentioned.'" Professor Wroth referred to the example given by Viner of a grant of lands "and the mines therein contained," as not sufficient to convey title to royal mines located on the lands (Tr. 2532; U.S. Ex. 389). This rule was applicable to the colonial charters as well as to grants to individuals.

Thus, Professor Wroth (Tr. 2532-2533) discussed a 1723 opinion by the Attorney General and Solicitor General of England to the Board of Trade in connection with the charters of New Jersey (Maine et al. Ex. 69, 72, 74, 75, 265). The opinion concerned a dispute between the grantees and the Crown as to ownership under those charters of royal mines within the colony. Professor Smith analyzed these charters and relied upon the language granting "royalties" in conjunction with rivers, mines, fishery and the like to establish, by implication, the grant of the adjacent seas and seabed (Tr. 740-747). Despite that general language, including "royalties," the Attorney and Solicitor General of England ruled that only the base mines within that province passed to the grantees and that the words of the grant are not sufficient to carry royal mines, title to

which remained in the Crown. Chalmers, Opinions of Eminent Lawyers (1st. Am. ed. 1858) pp. 141-142. If the words "mines" and "minerals" and "royalties" were insufficient to convey the prerogative in royal mines, it follows a fortiorari that "royalties" and the other general terms relied upon by Professor Smith were inadequate to convey, by implication, Crown ownership to the adjacent seas and seabed.

f. The conclusions of the defendant States are inconsistent and impractical. -- Apart from the fact that Professor Smith based his conclusions that the colonial charters and grants conveyed the adjacent seas and seabed upon invalid assumptions regarding English law in the 17th and 18th centuries, there are other reasons for rejecting his construction of those charters.

(1) The defendant States have been inconsistent in construing the language of the charters and grants. -- Professor Smith has been inconsistent in his application of the principle that a grant of islands necessarily implied a grant of the intervening seas and seabed. As Professor Smith commented with respect to Virginia's third charter (1612) (Maine et al. Ex. 43):

> The primary purpose of the third charter was to extend the "first colony's" eastern or seaward boundaries to include the Bermudas, lying almost six hundred miles off Cape Henry. (Tr. 1704).

This charter clearly granted "jura regalia" in as full language as any of the other charters and grants as well as "all and singular those islands whatsoever situate and being in any part of the Ocean and Seas bordering upon the Coast of our said first colony in Virginia, and being within three hundred leagues of any of the parts heretofore granted." [Tr. 702.] There is nothing in this charter which limits the effect of the language granting islands to a specific distance. Professor Smith nevertheless concluded that the "third charter was not intended to, and did not, grant the seas and subsoil stretching from the Virginia mainland to the Bermuda's" (Tr. 705).

Similarly, when asked if the patent to Sir Robert Heath from Charles I of 1629 should be considered a grant of the seas, seabed and subsoil between the Carolina coast and the Bahama Islands, Professor Smith responded, "I haven't seen anything to lead me to believe that it is" (Tr. 1256-1257). Yet, that charter, like the third Virginia charter, did not differ in form from any of the other charters and grants conveying all

islands within a specified distance from the coast. If a grant of islands to a specified distance is sufficient to "particularize boundaries" into the sea in all of the other charters, it should be sufficient to do so in the Virginia charter of 1612 and the Heath Patent of 1629. It is clear, however, that in no case was that language intended to establish such limits.

(2) Application of the rule of construction advocated by the States is impractical. -- As Professor Kavenagh testified, considerable confusion would inevitably result if the charters and grants were construed as Professor Smith proposes (Tr. 1637-1651, U.S. Ex. 330-333. See also testimony of Professor Morris, Tr. 1769-1770). This confusion would arise not only from the complete failure of any of the charters to indicate the manner in which the purported offshore boundaries between adjacent colonies are to be determined but also from the absence, in several instances, of any indication as to the seaward limits of those boundaries in the sea. Thus, some of the grants of offshore islands were not defined or limited in any way. As Professor Kavenagh pointed out, such grants, like the grant to the Carolinas, could be construed under Professor Smith's theory as a grant of seas and seabed clear across the Ocean (Tr. 1499).

Other grants and charters like those in 1643 to Rhode Island (Tr. 1559-1560; Maine et al. Ex. 155) and in 1664 to New Jersey (Tr. 1575; Maine et al. Ex. 69) did not contain a grant of adjacent islands. Professor Smith, as we have previously noted, testified that the Crown took the opportunity to use the grant of islands in the charters and grants to "particularize" its claims in the sea off North America. It seems strange, if indeed this was the intention of the Crown, that the Crown would not have taken the same opportunity with respect to these colonies.

(3) The construction of the charters and grants by the colonies themselves does not support the construction advanced by the States. -- As Professor Kavenagh testified innumerable disputes with respect to offshore boundaries would have arisen if grants of seabed and subsoil had been made in the charters and grants (Tr. 1637-1651, U.S. Exs. 330-333). But in fact, as Professors Kavenagh and Morris testified, despite the innumerable controversies that arose concerning boundaries, there were none relating to areas of the adjacent seas or seabed (Tr. 1637-1651, 1683-1684).

In our view, the fact that disputes over seaward boundaries never occurred is evidence that the colonies, and later the States, never viewed sea areas as part of their territory. Moreover, the controversies over colonial boundaries which did occur affirm that the Atlantic Ocean was viewed by the colonies as their seaward boundary.

One of the earliest colonial boundary disputes resulting in an official determination was between Maine and Massachusetts. In 1650, the colony of Massachusetts Bay, on the basis of its 1629 charter, laid claim to much of Maine and attempted to take it over. The dispute between the proprietors of the colonies continued until 1677 when the Council for Trade and Plantation issued a judgment in favor of Ferdinando Gorges as proprietor of the Province of Maine. After reviewing the terms of the charters of Massachusetts and Maine and their respective contentions, the Council on Trade and Plantation specifically described the boundaries of Maine as:

> All lands and hereditaments whatsoever lying within the limits aforesaid north and south in the lattitude and breadth and in length and longitude of and within all the breadth aforesaid throughout the mainlands there from the Atlantic and western sea and ocean on the east part to the south sea on the west. [Emphasis added; Tr. 1533, U.S. Exs. 88, 338.]

Moreover, as Professor Kavenagh pointed out, the Council on Trade and Plantation went on to discountenance the use of imaginary lines in construing the boundaries of the respective colonies (Tr. 1534, cf. 1639-1640).

In the Connecticut-Rhode Island boundary dispute, which began in 1663, reference was made to the Treaty of Hartford of 1650 between the English and the Dutch. As Professor Kavenagh pointed out, that treaty specifically indicates that the boundary on the east was the "sea shore" (Tr. 1642; U.S. Ex. 253). The final settlement between these two colonies in 1683 did not describe a boundary into the sea (Tr. 1642-1643; U.S. Ex. 254).

In the New York-Massachusetts eastern boundary dispute which was contested in the 1750's and 1760's, Massachusetts, interpreting her 1691 charter, described the colony as extending from the Atlantic Ocean on the east toward the "South Sea" (Tr. 1768).

In the New York-New Hampshire boundary dispute, the parties invariably used the sea as the eastern boundary (Tr. 1639; U.S. Ex. 214).

In the vigorously contested, pre-revolutionary war dispute between the States of New Jersey and New York, both States construed their eastern boundaries as the Atlantic coast. Thus, in its brief of July 18, 1769, New Jersey described its boundary on the east under its grants and charters as

> all that tract of land adjacent to New England and lying and being westward of Long Island, and Manhatas Island, and bound on the East part by the Main Sea, and part by Hudson's River [and] . . . extending eastward and northward along the sea coast, and the said river called Hudson's River. [Tr. 1766; U.S. Ex. 380.]

New York, in its brief, described its boundary under its grants and charter as

> from the Southwest Cape of Delaware Bay commonly called Cape Henlopen as far as and including the Connecticut River and the lands extending back from the said coast into the Country [and] . . . all that tract of land adjacent to New England and being to the westward of Long Island and Manhattan Island, and bounded on the East part by the Main Sea, and part by Hudson's River, and North upon the West Delaware Bay or River, and extending southward to the main Ocean as far as Cape May * * *. [Tr. 1767; U.S. Ex. 373, 380.]

In short, these various boundary disputes support our contention that the colonial grants and charters did not convey any rights to the seabed and subsoil. As Professor Morris concluded:

> In sum, the state boundary controversies even though they concerned interior areas in dispute, reveal that the parties claimed that their eastern boundaries went to the Atlantic Ocean, asserting no pretensions to offshore rights, seabed or subsoil. [Tr. 1769-1770.]

Moreover, the view that the colonies were bounded on the east by the Atlantic Ocean is supported by official responses of the various colonial governors to specific questions put to them by the Crown or the proprietors. Significantly, there is no evidence that any Crown or colonial official ever expressly described the boundaries of any of the colonies as encompassing vast areas of the adjacent seas. On the other hand, there is evidence that they viewed the sea coast as the boundary to their colonies. Thus, in 1737, Cadwallader Colden, in response to an inquiry from Governor Clark of New York, said that the colony was bounded on the south by the Atlantic Ocean running from Sandy Hook and including Long Island and Staten Island up to the Hudson River (Tr. 1604; U.S. Ex. 130). And it appears that some years earlier Governor Dongan described the boundaries of New York in a similar manner (Tr. 1604; U.S. Ex. 131). Sir Edmund Andros, as Governor of New York in 1678, described the boundary as "south to the sea" (Tr. 1604; U.S. Ex. 132). In 1755, Governor Dinwiddie of Virginia described the boundaries of his colony in the following terms:

> [T]he boundaries of Virginia, as it is now circumscribed, are to the east and southeast, the main Atlantic Ocean. [Tr. 1607-1608; U.S. Ex. 139.]

In 1763, Governor Fauquier described the boundaries of Virginia in similar terms stating that "Virginia is bounded on the east by the great Atlantic Ocean * * *" (Tr. 936).

In short, the construction of the defendant States of the boundaries described in the colonial grants and charters is impractical, confusing and contrary to the construction adopted by the colonies themselves.

3. The States have not shown that colonial law and practice support a claim that ownership of the adjacent seas was conveyed to the colonies. -- The defendant States have introduced extensive evidence of colonial law and practice in an apparent attempt to establish that the colonies believed that, under their grants and charters, they owned the adjacent seas and seabed. As Professor Kavenagh testified, "the charters themselves cannot be considered in a vacuum, [and] one must take into account the action of the Crown, the proprietors and the settlers in the colonies" (Tr. 1652). In our view colonial law and practice show that neither the Crown nor the colonies claimed ownership of the adjacent seas and seabed.

We note at the outset that none of the evidence submitted on behalf of the defendant States or by the United States contains a specific assertion to the ownership of the seabed and subsoil

of the Atlantic Ocean; instead, the evidence concerns mainland and inland water activities, jurisdiction over English and colonial vessels and their crews at sea, and, in a few instances, jurisdiction over foreign vessels entering or leaving the colonies. In addition, there are a few instances covered by the evidence which arguably involved exclusive claims to fish. But, as we will show, these claims do not support the claims of the defendant States to ownership of the adjacent seas and seabed.

In the following analysis, we do not attempt to anticipate every argument that the defendant States will make on the basis of this evidence, but seek to meet the general arguments suggested by the evidence and the context in which it was offered.

a. The States have not shown that colonial law regulating fishing in the adjacent seas constitutes evidence that the Crown claimed or conveyed ownership of the adjacent seas and seabed in the grants and charters. -- The fishing industry in colonial America was of three major kinds: The whale fisheries; sedentary fisheries; and the traditional free swimming fisheries resources. It is these activities that provide the closest relationship of colonial Americans to the sea. The defendant States apparently place great reliance upon these activities to establish the proposition that colonial practice recognized exclusive ownership of the adjacent seas and seabed (see Tr. 794, 1038, et seq.).

(1) Whale Fisheries. -- The colonial whale fishery initially consisted primarily of the capture of drift whales; that is, whales that had been washed up on shore or nearby sand bars or stranded in nearby shallow waters (Tr. 1633-1636). The colonists also occasionally made forays out from the coasts in small boats to chase whales that were visible from the shores (Tr. 1637). During the latter part of the 17th century, the focus of the colonial whaling industry, particularly in New England, changed. During this period, distant whaling became predominant (Tr. 2231-2247) and New England whaling vessels began foraging throughout the world in search of whales. Colonial laws governing whaling were based either upon activities within the mainland boundaries of the respective colonies, or upon the jurisdiction which the colony exercised over its vessels and residents.

A number of laws dealt with whales which are washed up on shore or caught within a short distance of shore and brought into the colony. For example, a New York statute of 1667 encouraging whale fishing provided:

Encouraging Whale Fishing

> WHEREAS the force of the Law concerning Whales and such like great ffish, cast on Shoare within this Governm't is apparently

> evaded by the practise of some men, seeking their owne Ends without regard either to the Townes and Proprietors of the Beach, or to ye just Dutyes reserv'd, to his Royall Highnesse. This Court doth order and declare, That no particular man or men shall pretend to be sole disposers and Proprietors of any whale, or such like great ffish which at any time hereafter, shall or may bee found dead in the sea, without visible markes of a deadly wound, formerly given by some unknowne and ownd by particular adventurers: However, That due encouragem't may not bee wanting, to such as shall adventure to bring to Land, any such like dead ffish, They shall from the proprietors of any Beach, bee amply rewarded for their Paines: Which satisfaccon shall be adjudged by any two Justices of the Peace, or at the first Court of Sessions in the same Riding, In case the Adventurers or Proprietors cannot Agree. [Emphasis added. U.S. Ex. 208, pp. 161-162.]

Similarly, three 17th century New Jersey statutes grant permission to bring whales on shore or prohibit others from appropriating whales driven on shore (Maine et al. Exs. 483, 484, 485; see also U.S. Exs. 199, 200). These laws are based upon the colony's control over captured whales brought into the colony.

On the other hand, distant whaling is not evidence of a claim to ownership of the seas where those whales are captured. As Professor Kavenagh testified, the colonists sought these whales throughout the world in such places as the Azores, off Brazil, the Davis Strait, the Leeward Islands, the Bahamas and Cape Verde Islands (Tr. 2231-2240).

The colonies regulated distant whale fishing in a number of ways. For instance, they passed laws to govern the construction or operation of the vessels which participated in these activities (see e.g., Maine et al. Exs. 471, 478, 500, 502, 535 and 541). These laws, however, were based upon control either over activities within the mainland boundaries of the colony or over the vessels and the citizens of these colonies.

(2) Sedentary fishing. -- The harvesting of shellfish by the colonists is the only activity conducted by the colonists directly related to the resources of the seabed. The defendant States have apparently introduced evidence relating to this activity as evidence of claims to the seabed and subsoil out as far as 100 miles from the coastline.

The United States has shown that the colonial shellfish industry took place in very shallow areas of such inland water bodies as rivers, river mouths, bays, creeks, marshes, either from shore or by utilizing small boats with long-handled rakes (Tr. 1633). For example, the records of the towns on Long Island relating to shellfishing indicate that only inland water areas were involved (U.S. Ex. 205; Maine et al. Ex. 471). Moreover, as Professor Morris noted, apparently the only disputes that arose in connection with the harvesting of these shellfish

involved areas within the boundaries of towns, such as Huntington, New York (Tr. 1719-1721; cf. Tr. 1633).

As far as we can determine, no shellfish were harvested beyond the inland or close in shore waters of any colony during the colonial period. This activity thus can hardly be construed as an open, continuous and clearly asserted claim to the ownership of the Atlantic Ocean for distances out to 100 miles.

(3) Other colonial fishing activities. -- In addition to the whaling and shellfish industries, the colonists harvested the free swimming fish in the sea. The extent of these fisheries varied from time to time and from colony to colony. In the northern colonies, the fishing industry was a very important integral part of colonial life throughout the entire colonial period. Although fishing in the adjacent seas was important to these colonies, the Newfoundland Banks, which lie hundreds of miles east and north became the most important fishing area.

In the middle and southern colonies, the fishing industry was economically insignificant during the entire colonial period. There fishing was a major concern only during the early years of the colonies, primarily for purposes of subsistence. It was during this period that the only recorded inter-colonial legal dispute over fishing rights arose (Tr. 1514-1515). That dispute--involving only Englishmen--concerned the

right of colonists of the London Company to fish in the New England colony. The Privy Council Order of 1621, which settled the dispute, specifically permitted the colonists of each of the companies to fish in the respective colonies (U.S. Ex. 71). There is nothing in the order construing the charter provisions from which one can infer that England claimed or conveyed exclusive fishing rights in the adjacent seas, either against other Englishmen or against foreign fishermen. The absence of any such implication stems in part from the nature of the colonial fishing industry.

During the colonial period, the fishing industry was dependent upon the utilization of shore-based activities to preserve the catch and prevent its destruction prior to the vessel's return to its final destination in England, France or elsewhere (Tr. 1632). For all practical purposes control of the land meant control of the fisheries. The importance of land to fishing is reflected in the following passage from the 1621 Privy Council Order referred to above:

> [W]hereby it was thought fitt that the said Colonies should fish att and within the limitts and bounds of each other reciprocully, with this limitation, that it bee only for the sustentation of the people of the Colonies there, and for the transportation of people into either colony (as by the said order more att large appeareth). And further it was ordered att this present by their Lopps. that they should have freedome of the shore for drying of their netts, and taking and saving of their fish, and to have wood for

> their necessary uses, by the assignment of the Governers att reasonable rates. [U.S. Ex. 71.]

The royal charters issued subsequent to the 1621 Privy Council Order further illustrate dependence of the colonial fishing on shore-based activities. In those charters, the Crown specifically excepted from the grant the power to prohibit English fishermen from drying their catches on the shores of the colony. For example, the Maryland Charter of 1632 provides:

> Savings always to us, our heirs and successors, and to all the subjects of our kingdoms of England and Ireland, of us, our heirs and successors, the liberty of fishing for sea fish, as well in the sea, bays, straits, and navigable rivers, as in harbors, bays, and creeks of the province aforesaid; and the privilege of salting and drying fish on the shores of the same province; and, for that cause, to cut down and take hedging wood and twigs there growing, and to build huts and cabins, necessary in the behalf, in the same manner, as heretofore they reasonably might, or have used to do. [Maine et al. Ex. 141; emphasis added.]

Similarly, the Rhode Island Charter of 1663 granted by Charles II after the restoration provides:

> Provided alsoe, and oure expresse will and pleasure is, and wee doe, by these presents, ffor us, our heirs and successours, ordeyne and appoynt, that these presents shall not, in any manner, hinder any of oure loving subjects, whatsoever, ffrom useing and exercising the trade of ffishing upon the coast of New-England, in America; butt that they, and every or any of them, shall have ffull and ffree power and liberty to continue

> and use the trade of ffishing upon the sayd coast, in any of the seas thereunto adjoyninge, or any armes of the seas, or salt water, rivers and creeks, where they have been accustomed to ffish; and to build and to set upon the waste land, belonging to the sayd Coleony and Plantations, such wharfes, stages and worke-houses as shall be necessary for the salting, drying and keepeing of theire ffish, to be taken or gotten upon that coast. [Emphasis added; Maine et al. Ex. 156, p. 3219.]

Most of the evidence presented by both the defendant States and the United States concerning colonial legislation regulating fishing activities relates to inland waters such as bays, creeks, river mouths and harbors or waters close to the shoreline (Tr. 1629-1630). For example, certain laws of the Massachusetts Bay Colony enacted in 1646, 1652 and 1668, dealing with fish and fishermen, apparently apply only to fishermen that utilize the shoreline to dry their catch (Maine et al. Ex. 499). A 1692 Act of the Massachusetts Bay Colony similarly speaks of fish pickled, saved and salted within the province and mackeral taken, killed or hauled on shore with nets or seines within the province (Maine et al. Ex. 503). A 1641 Massachusetts law declares "free fishing in creeks, coves and other places where the sea ebbs and flows," thus permitting free fishing even in inland waters (Maine et al. Ex. 533).

Similarly, a 1668 statute of the Colony of New Plymouth relating to fishing applies to "strangers who come ashore to improve the land to make [preserve] fish," not to foreigners fishing in the open sea (U.S. Ex. 200). And the "Liberties of the Massachusetts Collonie in New England" speaks only of liberty of fishing in the "great ponds, bayes, coves and rivers so farre as the seaebbs and flows" (U.S. Ex. 158).

As these examples illustrate, colonial legislation relating to fisheries was based upon the control which the colonies exercised over their own colonists or control of activities on shore or in inland waters. Thus, the colonial interest and participation in harvesting the fisheries resources of the adjacent seas does not establish that the colonial governments or the Crown officials believed that the colonies had been granted the ownership of the adjacent seas or seabed.

b. <u>The States have not shown that the exercise under colonial legislation of prerogative rights to valuables in or near the sea constitutes evidence that the Crown claimed ownership of the adjacent seas and seabed in the grants and charters</u>. -- The defendant States apparently seek to rely upon assertions of the Crown's prerogative rights to certain valuables found in or near the sea as evidence of a claim by the colonies or the Crown to the general property of the adjacent seas, seabed and subsoil.

(1) Wreck and treasure trove. -- Treasure trove is defined as money or other valuables buried in the ground by some unknown person which is later discovered by a different individual (Tr. 1223-1224). Wreck is defined as that remaining portion of a ruined vessel or its cargo which has been cast ashore. Treasure trove and wreck belonged to the Crown as ownerless property, and not because the Crown claimed ownership--which it did not--of the lands on which those valuables were discovered.

As Professor Thorne testified: "Traditionally under English law when valuables were found, either cast on the shore or buried in the ground, and their owner could not be ascertained, English law gave them to the king rather than to the finder. Wreck and treasure trove were among his prerogatives" (Tr. 2443-2444). Professor Flaherty's testimony on behalf of the States also shows that the claim to such valuables was not based upon a claim to the ownership of the lands upon which it is discovered. Professor Flaherty apparently relied upon a claim in 1687 by Virginia to its prerogative share in treasure trove found near the Island of Hispaniola to establish that Virginia claimed ownership of the seas and seabed of the Atlantic Ocean within 100 miles of the coastline of Virginia (Tr. 1012). Neither Professor Smith nor Professor Flaherty seemed to know whether

the Crown claimed prerogative rights in areas over which the Crown did not claim sovereignty (Tr. 1223-1226, 1374). Moreover, Professor Flaherty admitted that he did not know whether the Crown of England claimed sovereignty over the Island of Hispaniola or the area of the sea surrounding it (Tr. 1354). In fact, until 1697, Spain was the recognized sovereign of the island of Hispaniola. Fagg, Latin America A General History (1963) pp. 94-107, 277, 413.

(2) Flotsam, jetsam and lagan. -- Like wreck, flotsam, jetsam and lagan are not natural resources of the sea or seabed. As Professor Smith testified, flotsam consists of the floating material left after a shipwreck; jetsam is the material thrown overboard by a ship in distress; and lagan is the material which remains on the seabed after a shipwreck (Tr. 1225). Of these items, only lagan has a direct relationship to the seabed. The right of the Crown by the prerogative to flotsam, jetsam and lagan, like its claim to wreck and treasure trove, was recognized long before English law recognized any concept of ownership of the adjacent seas and seabed. Thus, a claim to these valuables like the Crown's claim to wreck and treasure trove is based not upon a claim to ownership of the seas and seabed in which they are found, but upon a claim by the Crown against its subject to ownerless property (Tr. 2443-2444).

(3) Royal fish. -- Generally, royal fish are certain large fish, such as whales and sturgeons. Blackstone, I Commentaries on the Laws of England (Chitty ed. 1866), p. 217. As with wreck and treasure trove, the Crown's right to these fish was based not upon a claim to the ownership of the places in which they are found, but upon the Crown's right to ownerless property. Thus, theprerogative right to such fish was generally claimed without regard to where these fish were captured. A New Jersey statute of 1678, for example, asserted authority over

> * * * the killing and taking of whales, or any other the like Great Fish as well at Sea as in any harbour Creek or Cove * * * [Maine et al. Ex. 485, pp. 152-153].

Other colonial legislation contains similar language (see, e.g., Maine et al. Exs. 483, 484; U.S. Exs. 198, 199, 200, 208, 209, 210). As we have noted, the colonists pursued the whale fisheries throughout the world. Thus, the exercise of the royal prerogative in great fish such as whales in colonial legislation could not have been intended as a claim of ownership over those seas (Tr. 1636-1637).

(4) The exercise of the prerogative under colonial legislation was limited to valuables found or brought into the colony. -- Finally, exercises of the prerogative rights to valuables under colonial legislation was usually limited to

such valuables actually located within the mainland limits of the colony. For example, Professor Flaherty referred to an order from James II to his Governor, Lord Howard of Effingham, in which James II ordered the Governor to search out the one-half share due the Crown from a wreck found near the coast of Hispaniola "or from any other wreck whatsoever which hath been brought or shall bee brought into the Plantation under your Government" (Tr. 1012-1013; emphasis added.). He also referred to a Proclamation of May 1700, dealing with flotsam and wreck only on the shore of the colony or in Chesapeake Bay or other havens, rivers and creeks within the colony. The specific language relied upon by Professor Flaherty is as follows (Tr. 1013-1014):

> * * * Whereas Especially at this time severall goods and merchandizes may be found floating upon the water in the Bay of Chisapeake or upon some other haven River or Creek in this his Majesties Colony and Dominion or may be drove on Shore and there privately taken up and carryed away * * *.
>
> * * * require all his Majesties Coroners and Sheriffs in their respective Counties and Stations to use their utmost Endeavour to take and secure all Wrecks, Buoys, Cables, Anchors, Boates or other goods and merchandizes which they shall find in or floating upon the water or Drove upon the Shore and all such goods and things as may be accounted for Floatsam Jetsam or Lagan * * * and Give me an account thereof from time to time * * *.

This language clearly applies only to those items found within inland waters or driven on to the shores of the Colony of Virginia.

c. The States have not shown that the exercise of admiralty or maritime jurisdiction under colonial legislation constitutes evidence that the Crown claimed or conveyed in the grants and charters ownership of the adjacent seas and seabed. -- The defendant States apparently rely on the exercise of admiralty or maritime jurisdiction under colonial legislation to establish their claim to ownership of the adjacent seas and seabed. In our view, the exercise of admiralty or maritime jurisdiction, unless otherwise shown, is not based upon a claim to sovereignty or ownership of the seas in which it is exercised. In the instances upon which defendants apparently rely, such jurisdiction is based either upon the English or colonial nationality of the vessels or crews, the presence of a vessel or its crew within the mainland boundaries of the colony, including the internal waters, or the tacit or implied consent of the vessel to such jurisdiction.

None of the various colonial laws relating to admiralty or maritime jurisdiction was dependent upon a concept of ownership of the sea. As we have shown, English admiralty jurisdiction is historically based upon a concept of protective jurisdiction

over, not ownership of, the adjacent seas and has its origins in international law. The statute enacted by the Assembly of the State of Virginia in May of 1779 reflects the basically international origins of admiralty jurisdiction. That statute provides that state admiralty courts were to be governed in part by the Laws of Oleron (Tr. 1002-1003). As Professor Wroth testified:

> The laws of Oleron was one of four or five continental European codes of maritime law which had developed in the principal port cities of Europe in the Mediterranean, Atlantic and North Sea and Baltic coasts. These codes were generally similar in the subject matter with which they dealt and the principles of law which they articulated. Thus, the maritime law as it came into the English court system was essentially a body of international common law of the sea, applied in a uniform fashion in the maritime or admiralty courts of all European countries. [Tr. 2474-2475.]

Moreover, as Professor Morris indicated, Virginia was not the only colony in which the Laws of Oleron were in force (Tr. 2342, 2345).

Apparently, the defendant States are relying upon evidence of jurisdiction over piracy to establish the proposition that Virginia claimed ownership of the adjacent seas and seabed. Thus, Professor Flaherty testified at length about the exercise of jurisdiction over pirates and their goods by both the vice admiralty court and the General Court of Virginia

(Tr. 988-1001). However, as we have previously shown, the exercise of jurisdiction over piracy and other depredations at sea is not dependent upon a claim to ownership of the seas in which that jurisdiction is exercised, but is a further manifestation of the protective concept of sovereignty.

The defendant States apparently also rely on colonial jurisdiction over British and colonial vessels and their crews while traversing the sea between the colonies and Great Britain (Tr. 1019, 1926-1927). Professor Flaherty referred to four statutes dealing with that activity. Three of these statutes provided for the punishment of "mutinious and disobedient seamen" and the regulation of the behavior of seamen on Virginia ships or on ships trading with Virginia. 4 Hen. Stat. 107-110; 6 Hen. Stat. 24-28 (1748), amended in 8 Hen. Stat. 523-524 (1772); 12 Hen. Stat. 131-137. One of the statutes required ships leaving England for Virginia to provide "four months provisions for passengers on the ocean voyage * * *" (1 Hen. Stat. 435, renewed 2 Hen. Stat. 129 (1662); Tr. 1019). The operative factor in all of these statutes is that the ships were either Virginia vessels or were English vessels bound for or departing from the royal colony of Virginia. There is no indication of any claim to ownership or sovereignty over the seas over which those vessels travelled. Indeed, to claim otherwise would be to claim the entire Atlantic Ocean.

A 1668 Massachusetts Bay statute regulating maritime affairs has apparently been offered as a further example of colonial control over actions taking place in the adjacent sea (Maine et al. Ex. 541). But the statute is not limited in application to any particular part of the sea. For example, Section 6 of the statute requires all ship masters to provide sufficient food and drink for their seamen and passengers for the voyage. Section 10 requires ship masters to pay their officers and seamen at the conclusion of the voyage. Sections 18, 21, 24 and 25 provide control over the conduct of officers and seamen on board ship. As with the previously discussed statute, to claim ownership over the seas on the basis of this statute would be to claim all the seas over which the vessels governed by this statute sailed.

Finally, the defendant States also appear to rely upon laws regulating pilots and pilotage, as well as the dumping of ballast, garbage or the like into rivers and creeks, to support their contention that the Crown or the colonies owned the adjacent seas and seabed (Tr. 1028-1029; Maine et al. Exs. 417, 479, 507, 517, 518, 523-525, 531, 537, 542, 543, 546). As Professor Kavenagh testified, these and similar actions related only to inland waters or waters close to shore (Tr. 1623-1628).

C. The States Have Not Shown That The Colonies And Then The States Continued To Possess Ownership Rights To The Adjacent Seas and Seabed Until The Present Proceeding

1. The States have not shown that the colonists continued to possess ownership rights to the adjacent seas after they became royal colonies. -- The United States has shown that English law during the relevant colonial period did not recognize ownership of the adjacent seas and seabed in a property sense. The United States has also shown that no grants of the adjacent seas and seabed were made to the colonies under their grants and charters. We will now show that, even if it were assumed that English law recognized, and the Crown had conveyed, ownership of the adjacent seas to the colonies through the grants and charters, any rights so acquired reverted to the Crown before the Revolution either as property rights or as incidents of governmental rights.

a. If ownership rights to the adjacent seas and seabed existed, those rights reverted to the Crown before independence. -- Assuming arguendo that the colonies had been granted proprietary rights in the seabed and subsoil, similar to the proprietary rights they were permitted to obtain on the mainland,

these rights, to the extent that they had not been exercised by the colonies or granted by them to private individuals, would have reverted to the Crown when the colonies came under direct Crown control.

(1) By 1754, with few exceptions, the vacant unappropriated lands of the colonies reverted to the Crown. -- As the United States has shown during the hearings in this case, all but two of the colonies which are relevant to this litigation came under direct Crown control long before 1776.

Professor Wroth testified that there were two primary methods by which the American colonies became royal colonies. Those two methods were (1) by surrender of the charters and (2) by revocation of the charter either by scire facias proceedings or quo warranto proceedings (Tr. 2538-2545).

The method of royalization, termed "surrender," involved a voluntary relinquishment of some or all charter rights by the colonial proprietors or corporation. Examples of this type of royalization are found in the "Act for Establishing an Agreement With * * * the Lords Proprietors of Carolina" (U.S. Ex. 66), and the Surrender of the Great patent of New England (U.S. Ex. 82). Most of the surrender agreements called for

surrender of all rights and claims but, in the case of New Jersey, the proprietors retained title to the vacant lands of East and West New Jersey (Maine et al. Ex. 78; Tr. 1578-1581).

Quo warranto and scire facias proceedings both involved legal action against the proprietary or corporate charters based upon breaches of the express conditions of the charters (Tr. 2541-2542). The difference between these proceedings was described by Professor Wroth as follows (Tr. 2541):

> In scire facias, process by publication was available and the judgment resulted in the repeal of the charter. Quo warranto proceedings required personal service and resulted in a judgment that the corporation was seized into the King's hands leaving him the choice of dissolving it or letting it continue under a restored or revised charter. The latter course permitted the corporation to submit the crown's demands rather than suffer dissolution. See, generally, 9 Holdsworth, History of English Law, 65-67 (3rd edn. 1944).

Quo warranto proceedings were utilized to rescind the charter of the Virginia Company in 1623 (Tr. 1485-1486). Scire facias proceedings were utilized to vacate the Massachusetts Bay Colony charter of 1629 in 1683 (Tr. 1545-1546). See also U.S. Exs. 89 and 90.

The following brief description of the royalization of the colonies shows that only Massachusetts Bay, Rhode Island and Maryland possessed viable charters which could serve as a basis for a claim to proprietary rights to the adjacent seabed and subsoil. In addition, New Jersey's surrender agreement could serve as a basis for a claim by that State to proprietary rights to the adjacent seabed. Except with respect to those

few colonies, any ownership rights in the seabed and subsoil which existed prior to 1754 were by that time vested in the Crown.

Sir Fernando Gorges' abortive colony in Maine ceased to exist in 1678 when Gorges deeded the Province of Maine to John Usher (Maine et al. Ex. 5), who in turn deeded it to Massachusetts Bay (Maine et al. Ex. 6; Tr. 1532-1538). Maine was later formally incorporated into the Massachusetts Bay Colony by the Massachusetts Bay Charter of 1691. Nowhere in any of these documents is there specific mention of a claim to the seabed or subsoil adjacent to the coast.

In New Hampshire, John T. Mason relinquished all claims to the colony in 1679 and the colony became Crown property (Tr. 1557).

The Colony of New York presents a different situation than the other royal colonies. This colony was owned by James Duke of York, prior to his ascension to the throne of England (Tr. 1572). Upon his ascending the throne of England in 1685, the Colony of New York was merged with and became Crown property (Tr. 1574). Whatever personal rights James II may have had to the colony of New York were lost when he fled the throne in 1689 (Tr. 1574).

Virginia did not possess a valid charter after 1623. Thus, all vacant and unappropriated lands within that colony reverted to the Crown. The defendant States have alleged that Virginia was issued another charter in 1676. Even if the purported

1676 Virginia charter did become effective, [10] by the terms of that charter Virginia remained a royal colony directly controlled by the Crown.

North Carolina and South Carolina became royal colonies in 1729 when seven of the Lords Proprietors of the Carolinas surrendered all of their title and interest to the Crown. This surrender agreement included all governmental powers and all vacant or unappropriated lands in the colony (Tr. 1507; U.S. Ex. 66).

The Colony of Georgia became a royal colony in 1754 when the trustees surrendered the Georgia charter in toto, retaining none of the vacant lands in Georgia nor any governmental powers (Tr. 1511; U.S. Ex. 69).

If the original grants and charters of these colonies did convey rights to the adjacent seas and seabed in a strict property sense, by 1754 those rights had reverted to the Crown as with the rights to all other vacant lands or unoccupied lands.

10/ As pointed out by Professor Kavenagh, the purported 1676 Virginia charter has not been officially authenticated and its authenticity has been disputed by American colonial historians (Tr. 1490-1493). The evidence relied upon by Professor Flaherty is, we submit, insubstantial and does not warrant rejecting the traditional position of American colonial historians that the Virginia Charter of 1676 did not become effective.

As Professor Morris testified in connection with the western lands, vacant lands were those lands which had not been granted by the colonies prior to royalization and which were not within areas already developed by the colonies (Tr. 2304-2305, cf. 2542-2545). The submerged lands claimed by the defendant States in this litigation, if they were ever thought of in a proprietary sense, would have been classed as vacant lands. The States have introduced no evidence that the seabed and subsoil beneath the open sea were either occupied or granted by the colonies prior to royalization, or, for that matter, after royalization, of the colonies.

(2) There is no evidence that the colonies which retained their vacant and unappropriated lands claimed or had been granted the adjacent seabed. -- New Jersey and Massachusetts Bay represent exceptions to the general proposition that after royalization all vacant and unappropriated lands within a royal colony belonged to the Crown. Pursuant to the surrender agreement of April 15, 1702 (Maine et al. Ex. 78), the proprietors of East and West New Jersey surrendered all governmental powers to the Crown but retained ownership of the vacant and unappropriated lands within the colony (Tr. 1578-1581). Subsequently, the proprietors of New Jersey attempted to claim and dispose of lands

beneath internal waters on the basis of their retained proprietary rights, Martin v. Waddell, supra. Had the proprietors thought they also had rights in the lands beneath the adjacent seas, there would presumably be some record of a similar claim to those lands in the records of the proprietors. However, as Professor Kavenagh testified, no record of an attempt to sell or lease the seabed or subsoil adjacent to the New Jersey coast has ever been found (Tr. 1580-1581).

The original 1629 charter of the Massachusetts Bay Colony was revoked in 1683, resulting in the reversion of all vacant and unappropriated lands in that colony to the Crown (Tr. 1544-1547). In 1691, however, the Crown issued a new charter to an expanded Massachusetts Bay Colony which included the old colonies of New Plymouth, Maine, and Nova Scotia as well as the area described in the 1629 charter. This new charter considerably restricted the colony's rights. The governor and council were appointed by the Crown and all laws enacted by the colony were specifically subject to royal disallowance (Tr. 1547). Under the new charter, the colony retained rights to the vacant and unappropriated lands within the original Massachusetts Bay Colony area of 1629, but was prohibited from granting land in the newly acquired area of Maine and Nova Scotia without specific royal approval (Maine et al. Ex. 44).

Significantly, however, both the New Jersey charter and the 1691 Massachusetts charter specify the seacoast as the boundary of the grant, supra, pp. 122-123.

The only colonies with seacoasts which remained outside of direct royal control on the eve of independence were Rhode Island and Maryland (Tr. 1587-1588). The Rhode Island charter, however, specifically states that its boundary on the south is the ocean and includes certain specified islands in the following terms:

> * * * untill itt meete with the aforesayd line of the Massachusetts Collony; and bounded on the south by the ocean: and, in particular, the lands belonging to the townes of Providence, Pawtuxet, Warwicke, Misquammacok, alias Pawcatuck, and the rest upon the Maine land in the tract aforesayd, together with Rhode Island, Blocke-Island, and all the rest of the islands and banks in the Narragansett Bay, and bordering upon the coast of the tract aforesayd (Ffisher's Island only excepted), * * * [Maine et al. Ex. 156, pp. 3220-3221].

Similarly, the Maryland charter (Maine et al. Ex. 141) incorporates an area of land on the mainland and all islands formed or to be formed within 10 leagues of the mainland. As we have previously argued, if Maryland had been granted the seas and seabed within 10 leagues, it would have been unnecessary to grant islands "to be formed."

Thus, none of the four colonies which had not come under direct royal control prior to independence either claimed or had been granted ownership of the adjacent seas and seabed.

(3) The Crown repeatedly disposed of vacant and unappropriated lands of the colonies without regard to the boundaries set out in the original grants and charters. --

(a) Dismemberment of the colonies by the Crown. -- As Professors Kavenagh and Morris testified, the Crown felt free to dispose of vacant and unappropriated lands in royal colonies in any way it chose (Tr. 1489-1493, 1500, 1509, 1538, 1549, 1583, 1637-1651, 1700, et seq.). After Virginia became a royal colony in 1623, for example, the Crown distributed the vacant and unappropriated lands lying within the boundaries set forth in the earlier charters to that colony of 1606, 1609 and 1612. In 1632, for example, the Crown dismembered Virginia to create the Colony of Maryland over the strenuous objections of Virginia (Tr. 1497-1498). And in 1665, the Crown again dismembered Virginia to create the Carolina Colonies (Tr. 1499). In 1732, the Crown dismembered the Carolinas to create Georgia (Tr. 1509).

While the colonies opposed the Crown's policy of disposing of vacant lands, as a matter of English law those lands vested in the Crown and could be disposed of as the Crown saw fit.

(b) The Proclamation of 1763 and the Quebec Act of 1774. -- Additionally, as Professor Morris testified, the Proclamation of 1763 and the Quebec Act of 1774 constituted very substantial dismemberments of the territories claimed by the various colonies. In the Proclamation of 1763, the Crown forbade any land grants of territories beyond the Appalachian Mountains, thus effectively reducing the coastal colonies' rights in the vacant western lands (see Tr. 1707, et seq.). Accordingly, after 1763, colonies such as Virginia and New York could not dispose of whatever rights they retained in the trans-Appalachian territories and were effectively divested of those rights.

The Quebec Act of 1774 removed whatever doubt existed as to the validity of the old charter claims to areas west of the Appalachians. Parliament in that year formally annexed the old Northwest Territory to the Province of Quebec, abrogating the claims of Virginia and colonies northward that had possessed sea-to-sea charters (Tr. 1714-1715). This Act of Parliament, despite colonial objections, was, of course, valid under the English legal system.

b. If rights to the adjacent seas and seabed passed under the grants and charters as an incident of government, these rights reverted to the Crown before the Revolution. -- It is the position of the United States that neither international

law nor English law prior to the 19th century recognized the concept of ownership of the adjacent seas or seabed in a property sense. Assuming arguendo, however, that English law did recognize a right to the property of the adjacent seabed, we contend, that such a right would have been an incident of the governmental power over those seas. All such powers were in the Crown by 1754.

(1) If English law recognized any rights in the adjacent seabed in the 17th and 18th centuries, it did so only as an incident of governmental power. -- As we have previously shown, although English law never recognized the right of the Crown to grant entire seas, it did recognize that the Crown could exercise some governmental power over them. Thus, as Sir Mathew Hale wrote in 1667:

> The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possible possess it. [Moore, supra, p. 399.]

Thus, if any right of property could have been recognized in the seas and seabed adjacent to the colonies, it would only have been as an incident of the governmental power which those

colonies might have been able to exercise in those seas. From very early times English law has recognized that inland navigable waters are subject to public rights of navigation and fishery, that these rights are of great importance, and that because of that overriding public interest the lands underlying inland navigable waters are held by the sovereign in trust for the public, not as property, but as attributes of sovereignty. Martin v. Waddell, 16 Pet. 367, 408-416.

(2) The Supreme Court has recognized in connection with the colonial grants and charters that rights to lands under water passed as an incident of governmental powers. -- The Supreme Court in United States v. California, 332 U.S. 19, applied, in the context of the adjacent seas, the principle that rights to lands beneath navigable waters are not to be viewed merely as property rights, but are an incident of sovereignty. That principle is not novel in our law. It has achieved historic judicial recognition in the common law tradition and in earlier decisions of the Supreme Court. In Martin v. Waddell, 16 Pet. 367, and Massachusetts v. New York, 271 U.S. 65, the Supreme Court associated rights in lands beneath navigable waters with governmental powers.

In Martin v. Waddell, 16 Pet. 367, the Supreme Court was called upon to construe the colonial grants and charters of New Jersey in order to determine whether lands beneath inland

navigable waters were attributes of sovereignty which passed with governmental powers or were property rights which remained with the proprietors after the surrender of governmental powers to the Crown. In an action for ejectment from 100 acres of land covered by the waters of Raritan Bay, suit was brought by those claiming title through the proprietors of the colony of New Jersey against those who claimed through the State of New Jersey. The proprietors had surrendered all governmental powers to the Crown long before the revolution. The Court held that rights to the seabed and subsoil passed with the transfer of the powers of government in the absence of express terms to the contrary:

> * * * Grants of that description are, therefore, construed strictly; and it will not be presumed, that the King intended to part from any portion of the public domain, unless clear and especial words are used to denote it. [16 Pet. at 411.]

Thus, when the proprietors of New Jersey surrendered their governmental powers to the Crown, while retaining their title to the lands within the colony, ownership of the bed of Raritan Bay reverted to the Crown as an attribute of sovereignty and did not remain with the proprietors as a real property interest. Although Martin v. Waddell settled rights of private parties, its holding that the rights to lands under navigable inland waters are clearly associated with governmental powers and appertain directly to them is applicable to the instant dispute.

The Supreme Court reaffirmed its holding in Martin v. Waddell in Massachusetts v. New York, 271 U.S. 65. In that suit, Massachusetts asserted title to a narrow strip of land on the waterfront of the City of Rochester and sought to enjoin the City from taking that land by eminent domain or, in the alternative, to obtain monetary compensation for such taking. The dispute arose after the States had resolved conflicting claims to an area of western New York by the Treaty of Hartford entered into between New York and Massachusetts in 1786. Under that agreement, New York retained sovereignty over the disputed area while Massachusetts was given title to the land. The Court held that lands under Lake Ontario, which were covered by the 1786 agreement, belonged to New York as an attribute of sovereignty rather than to Massachusetts as real property. Again the Court concluded that rights to the subsoils of navigable waters directly appertained to sovereignty over those waters rather than private property rights:

> It is a principle derived from the English common law and firmly established in this country that the title to the soil under navigable waters is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription. * * * The rule is applied both to the territory of the United States * * * and to land within the confines of the States * * * whether they are original States * * * or States admitted into the Union since the adoption of the Constitution [citations omitted]. [271 U.S. at 89.]

As the foregoing cases show, rights to lands beneath navigable waters are associated with governmental powers and pass with the transfer of such powers in the absence of express terms to the contrary. We shall now show that any governmental powers in the adjacent seas that the Crown may have conveyed to the colonies in their grants and charters reverted under this principle to the Crown prior to the revolution and therefore became vested in the United States, rather than the defendant States, upon independence.

(3) The governmental powers under which rights to the adjacent seabed would have passed, reverted to the Crown before independence. -- The colonies were originally granted broad power and jurisdiction with respect to admiralty and maritime matters (see, e.g., Tr. 2526-2527). The exercise of this jurisdiction, however, was subject to challenge if repugnant to the laws of the realm of England. Even the earliest exercises of admiralty or maritime jurisdiction by the colonies were subject to ultimate control of the Crown officials and the courts of England. Moreover, the officials who exercised these powers and jurisdiction did so in their capacity as Crown officials, such as Vice Admirals.

Thus, as a practical matter, the actual control of these matters was normally in the Crown which alone maintained

the power necessary to exercise the more important jurisdiction in this area. As Professor Kavenagh testified, the individual colonies did not have either the power or, in some instances, the desire to exercise admiralty or maritime jurisdiction over such matters as piracy, illegal trading, and defense (Tr. 1599-1622; U.S. Exs. 125, 127, 128, 129, 138, 139, 140, 149, 150, 151, 152, 153, 154, 156, 157, 160, 160A, 164, 171 and 172).

The incidents described by Professor Flaherty concerning control of piracy in Virginia are illustrative of the inability of the colonies effectively to protect their coasts without the presence of royal vessels (Tr. 999, 1006, 1341).

After 1696, the Crown by virtue of the establishment of the colonial vice-admiralty courts assumed complete jurisdiction over admiralty matters in all of the colonies, chartered as well as unchartered. The officials of these courts were appointed by the Crown, were officers of the Crown, and were responsible only to the Crown and not to the colonial legislatures or colonists. The vice-admiralty courts enforced the navigation laws and entertained controversies involving salvage, wrecks and mariners' wages, as well as piracy, privateering and other felonious actions that took place on the high seas (Tr. 997-999).

These courts assumed even greater control of the activities of the colonies in the 18th century. During that period, the vice-admiralty courts enforced the White Pine Act, the Stamp Act, the Tea Act, and other statutes (Tr. 2526). The expanded jurisdiction of the vice-admiralty courts and the fact that these royal courts sat without juries and were not responsible to the colonists constituted a major cause of the American Revolution. In short, admiralty jurisdiction exercised in the colonies, at least after 1696, was the jurisdiction of the Crown and not of the colonists or independent colonial governments.

Other governmental powers also reverted to the Crown prior to independence. As we have noted, when the colonies became royal or royal charter colonies, they relinquished to the Crown all their governmental powers, including any incidental governmental power they may have retained in the adjacent seas after 1696. The colonies were thereafter governed by the Crown through royally appointed governors who were responsible to the Crown. In most cases royally appointed councils assisted the governors in their tasks.

With the royalization of Georgia in 1754, for example, Georgia joined the ranks of Massachusetts Bay, New Hampshire, New York, New Jersey, Virginia and the Carolinas as royal

colonies. In each of these colonies, a governor and council were appointed by the Crown. Although colonial legislatures elected by the colonists did exist, laws which they enacted were subject to royal disallowance--a prerogative frequently exercised. For example, ten laws enacted by the Virginia House of Burgesses in 1748 and 1749 were disallowed by the Crown in 1752. Among the laws disallowed were laws regulating the construction of wooden chimneys and to prevent the inhabitants of Walkerston from raising and keeping hogs (Tr. 1488-1489; U.S. Ex. 59). It is difficult to imagine a more pervasive control over colonial self-government than that shown by this exercise of the power of royal disallowance. The records of the colonial period are replete with other examples of royal control over colonial governments (Tr. 1487-1488, 2345-2348).

Even in the colonies of Maryland and Rhode Island, which were still operating under their original charters in 1775, the powers of self-government independent from Crown authority and control were drastically limited. With the establishment of the vice-admiralty court system beginning in 1696, these colonies were subjected to Crown control and disposition of the admiralty matters (Tr. 2546). The acts of trade and navigation,

which were initiated in 1660, increasingly imposed strict regulations and control over shipping, imports, exports and customs duties.

The increasingly active Board of Trade and Privy Council further limited the independence of Maryland and Rhode Island. Much of the activity of those bodies was based upon a 1696 Act of Parliament declaring void all colonial laws that were repugnant to acts of Parliament applicable to the colonies (Tr. 2547; see also Tr. 1590-1591). Thus, by the eve of the American Revolution, the colonies of Maryland and Rhode Island were functioning as independent governments in name only. They still retained ownership of vacant lands within their boundaries, but all disputes concerning ambiguities in charters were resolved in favor of the Crown (Tr. 2547-2548).

As previously stated in colonial practice all aspects of trade, protection of the colonies and other matters closely related to the sea were controlled by or provided by Crown officials and not by independent colonial governments. While colonial legislatures could and did exercise a certain amount of control over their ports, harbors, river

mouths, bays and over the conduct of colonial citizens at sea, even actions taken on these matters were subject to royal disapproval (Tr. 1488-1489, 1590-1591, 2545-2547).

In short, colonial governments on the eve of the American Revolution were not independent, self-governing entities, but were dependent upon Crown officials and subject to the royal will. And this was especially so with respect to maritime matters. In effect, colonial governments existed as an extension of the Crown and Parliament. Accordingly, if, contrary to our previous contentions, property rights in the adjacent seas, seabed and subsoil had indeed passed to the colonial governments as an attribute of governmental power under their original grants and charters, these rights had reverted to the Crown on the eve of the American Revolution (Tr. 1590-1591, 2545-2547).

2. The States have not shown that ownership of the adjacent seabed passed from the Crown to the colonies upon independence. -- The United States has shown that no right to the ownership of the adjacent seas and seabed existed under English law during the colonial period and that no such rights were granted to the colonies under their grants and charters. Furthermore, even if such rights existed and were granted to the colonies, they reverted to the Crown long before the revolution. In order to establish that rights to the property of the adjacent seas, if such rights existed, passed directly from the Crown to the States, the defendant States apparently contend that the existence of the States preceded the formation and existence of the national government. Thus, the defendant States have asserted that the Declaration of Independence created 13 sovereign independent nations (Tr. 508, 644, 849, 950, 954). The States further assert that the original States were recognized as 13 sovereign independent nations under international law and apparently continued to be recognized as such under international law until the Constitution was ratified by them (Tr. 644-655). At that time they parted only with the external aspects of their sovereignty, which apparently did not include rights to the adjacent seabed (Tr. 950-955, 1378-1379).

In our view, upon the signing of the Declaration of Independence, if not before, the United States came into being as a separate sovereign entity with all the attributes of external sovereignty. We further contend that if any rights existed in the adjacent seabed, they existed as an incident of governmental power over those seas--a power which passed directly from the Crown to the United States. Finally, the United States contends that even if ownership rights to the seabed existed in a property sense, those rights passed directly from the Crown to the United States.

a. The United States was created upon independence as a nation and was recognized as such under international law. --

(1) The history of the first Continental Congresses shows that the national government possessing the attributes of sovereignty came into being prior to the States. -- The history of the first Congresses reveals that at least a fledgling national government existed before independence. The delegates to the First and Second Continental Congresses were chosen not by the colonial governments, but directly by the people in a number of ways: revolutionary committees, polling freeholders, illegal assemblies and revolutionary conventions.

The delegates to the First Continental Congress were chosen in the spring and summer of 1774, after adjournment of the regular winter meeting of most colonial assemblies. Thus, unless a governor called a special session in 1774, the assemblies could not legally meet or act, and hence the majority of delegates to this Congress were chosen by popular groups or revolutionary bodies. Only four out of the twelve colonies elected delegates to the First Continental Congress through regular assemblies.

The First Congress issued a call for the Second Congress in the fall of 1774. Delegates to the Second Congress were chosen during the winter and early spring when most provincial assemblies had their regular meetings. Nonetheless, there was the threat that the royally appointed Governors would prorogue the assemblies and thus bring all colonial government to a standstill. Consequently, eight of the colonies chose not to elect their delegates through the regular assemblies but through specially constituted assemblies or conventions.

As Professor Morris testified:

> The congress of delegates (calling themselves in their more formal acts "the delegates appointed by the <u>good people</u> of

> these colonies,") assembled on September 5, 1774, all states being represented except Georgia. Story argues, and I would support him, that the Continental Congress was organized "with the consent of the people acting directly in their primary, sovereign capacity." [Tr. 1728.]

It was the Continental Congress in 1776, not the individual States, that authorized general hostilities against Great Britain and dissolved the allegiance of all colonies to the British Crown (Tr. 1730). As Professor Morris noted: "From the moment of the Declaration of Independence, the United colonies must be considered a nation de facto, and Congress exercised the powers of a general government whose acts were binding on all the states" (Tr. 1731).

Moreover, during most of the period in which the First and Second Continental Congresses operated, the States did not exist. In fact, the States came into being in great part as a result of the activity of the Congresses. As Professor Morris testified, "in all cases in which states formed provisional governments prior to the Declaration of Independence it was done in compliance with the recommendations of Congress * * *" (Tr. 1729). Except for New Hampshire and South Carolina, and possibly Massachusetts, which had formed separate governments

pursuant to earlier instructions of the Continental Congress, no state governments existed during the period preceding the resolution by Congress of May 10, 1776, calling upon the people of the colonies to establish new governments. What existed prior to the resolution were, at first, extralegal committees and, then, revolutionary Congresses or Conventions. The actual governments of the colonies during this period remained in the control of the Crown.

Indeed, the most significant change between 1774 and 1775 was the transfer of electoral power from extralegal committees to revolutionary provincial "Congresses" or "Conventions." Royal authority within the provinces began to disintegrate as the colonists began to organize behind their extralegal, revolutionary bodies. Congress recognized this gradual disintegration of legal government as it occurred in 1775 and 1776. In Congress' instructions to the provinces of New Hampshire and South Carolina of November 3 and 4, 1775, inhabitants of the two colonies were instructed to establish such a form of government as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province. III Journals of the Continental Congress (hereafter

JCC) pp. 319, 326-327; U.S. Ex. 340. At the directions of the Second Continental Congress, these two provinces established new constitutions, even before the resolution of Congress on May 10, 1776 (Tr. 1735-1736), calling upon the other States to establish governments. That resolution, passed by the Second Continental Congress two months before the Declaration of Independence, reads as follows:

> Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general. [IV JCC 342.]

Professor Morris described the role of Congress as follows (Tr. 1737):

> "Congress had, with the consent of the people, taken the initiative in the transformation of the thirteen colonies into one sovereign state. It became thereby per se the national government de facto and by the success of the Revolution gave its acts, both earlier and later, an additional and legally binding force" [Hermann von Holst's Constitutional and Political History of the United States].

In addition to declaring independence and calling on the colonies to erect new governments, the Continental Congress, not the States, assumed the necessary attributes of national sovereignty. As Professor Morris testified (Tr. 1737-1738):

> * * * the Continental Congress assumed such other attributes of national sovereignty as establishing an American army and navy, a continental money system and a continental post office * * * and creating a national debt. Furthermore * * * the [Continental] Congress entered into treaties with foreign powers, sent and received ambassadors, made foreign alliances, negotiated peace, and fixed the boundaries of the United States.

It was also the United States in Congress assembled that asserted sovereignty over naval and maritime matters. As early as 1775, Congress appointed a committee "to hear and determine finally upon all appeals brought to Congress" from the courts of admiralty of the several states (Tr. 1738).

In summary, the United States existed as a separate entity having the attributes of national sovereignty under international law before the creation of the state governments.

As Professor Morris showed in his testimony, the views of the Nation's founders on the question of national sovereignty substantiate the conclusion that one nation, not a loose

federation of 13 separate nations, resulted from the revolution against England (Tr. 1747-1753). For example, Dr. Benjamin Rush, the delegate from Pennsylvania, said on the floor of the Continental Congress in 1776:

> "We are now a new nation * * *. We have been too free with the word independence; we are dependent on each other, not totally independent states * * *. I would not have it understood that I am pleading the cause of Pennsylvania, when I entered that door, I consider myself a citizen of America." [Tr. 1747-1748.]

Professor Morris also cited the following statement by Samuel Chase in 1778:

> "America has now taken her rank among the Nations and has it in her power to secure her Liberty and Independence." [Tr. 1748.]

With respect to other contemporary statements, Professor Morris stated:

> Similar views of the locus of sovereignty in this period can be found in the statements and writings of James Madison, John Jay, Benjamin Franklin, John Adams, Robert Morris, and other leading statesmen of the Revolutionary era. In fact, not a single Revolutionary leader, after the Declaration of Independence was adopted, denied the existence of a common American sovereignty. [Tr. 1749.]

Professor Morris also pointed out that the view that sovereignty went from the Crown to the Continental Congress and not the States was supported by early opinions of the United States Supreme Court (Tr. 1729-1732). Justice Paterson, for example, in Penhallow v. Doane, 3 Dall. 54, recognized the revolutionary Congress as "the general, supreme, and controlling council of the nation, performing acts of high sovereignty approved by the people of America." This view was in accord with the views of eminent writers on constitutional law such as Mr. Justice Story, John Norton Pomeroy and John W. Burgess (e.g. Tr. 1732). John W. Burgess in Political Science and Comparative Constitutional Law stated that the Continental Congress "was the first organization of the American state" and that

> "* * * from the first moment of its existence there was something more upon this side of the Atlantic than thirteen local governments. There was a sovereignty, a state, not in idea simply or upon paper, but in fact an organization. The revolution was an accomplished fact before the Declaration of 1776, and so was independence. The act of the 4th of July was a notification to the world of faits accomplis." [Tr. 1733.]

Thus, the United States as a sovereign national government came into being before any of the state governments and the United States alone possessed the attributes of external sovereignty. The United States continued to exist as the only

internationally sovereign state resulting from the independence from England. As Professor Morris testified, the United States, under both the Articles of Confederation and the Constitution, continued to possess all the attributes of external sovereignty necessary to recognition as an independent nation under international law (Tr. 1762-1765, 1816-1822).

(2) The Supreme Court has already determined that the United States was the only State under international law to emerge from independence. -- As Professor Henkin testified (Tr. 1909):

> Professor Morris in his testimony makes a compelling case that between 1776 and 1789 there was only one international sovereign, which made war, negotiated peace and conducted foreign relations, and that was the United States in Congress assembled. But, however, historians might weigh the competing evidence, as regards legal rights depending on that issue, the final word is in the Supreme Court of the United States.

Professor Henkin then discussed (Tr. 1910) the significance of the Supreme Court's opinion in United States v. Curtiss-Wright Corp., 299 U.S. 304, which was based on the proposition that the States never had international sovereignty and that sovereignty passed directly from the British Crown to the United

States. The case involved a Joint Resolution of Congress authorizing the President to embargo arms to the countries at war in the Chaco, and imposing criminal penalties for violations. President Franklin Roosevelt proclaimed an embargo and the defendant company, indicted for violating it, challenged the Resolution and Proclamation as entailing an improper delegation of legislative power to the President. In sustaining the indictment, the Supreme Court held that principles which limit delegation in domestic affairs are not equally applicable in the area of foreign affairs. In order to define the precise nature of those presidential powers in foreign affairs, the Court traced the evolution of external sovereignty from the American colonial period through the constitutional period. 299 U.S. at 316-317.

The Court's opinion in Curtiss-Wright unequivocally establishes that the kinds of governmental powers associated with external sovereignty resided first in the British Crown and later in the United States, never in the States individually. The opinion stated (299 U.S. at 316):

> "And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the

> colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "The Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

The concept that external sovereignty passed directly from the British Crown to the United States, definitively enunciated in Curtiss-Wright, was also reflected in the Supreme Court's much earlier decision in Chisholm v. Georgia, 2 Dall. 419. The questions in that case were whether the State of Georgia by reason of its sovereignty could be sued by a citizen of another State and whether judgment against Georgia could be entered by default. In his opinion, Chief Justice John Jay reasoned that the real question for determination was in what sense Georgia was a sovereign State. In determining the nature of this sovereignty, the Chief Justice examined the political environment prior to the American Revolution and concluded that national sovereignty passed from the British Crown to the people of the United States, represented in the First Continental Congress. Chief Justice Jay rejected the concept of thirteen separate sovereignties in the following passage:

> The revolution or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; * * * and they continued, without interruption, to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of a general government. [2 Dall. 419, 470.]

In Penhallow v. Doane, 3 Dall. 54, the Supreme Court reaffirmed the transmission of external sovereignty from the British Crown to the United States. The case, discussed by Professor Morris in his testimony (Tr. 1745-1747), involved a prize--the Susanna-- taken by certain New Hampshire privateersmen in 1777. The Susanna was libeled in the Court Maritime of the State of New Hampshire and the ship and cargo were decreed forfeited. The maritime court refused to permit an appeal to Congress on the ground that the applicable New Hampshire statutes provided for appeal only to the State Superior Court. After the Superior Court affirmed the forfeiture, the claimants petitioned Congress for review. The appeal was heard by the newly established Court of Appeals in Cases of Capture whose

jurisdiction was conferred by the Articles of Confederation (Art. IX). That court reversed the judgment of the New Hampshire court and ordered restoration of the property to the claimants. Since the state courts would take no action to enforce the decree, the case lay dormant until the new federal court system was established by the Judiciary Act of 1789.

In 1793, the United States Circuit Court for the District of New Hampshire directed commissioners to assess damages on behalf of the claimants, and a final decree was awarded in 1794. The case then came before the Supreme Court on writ of error. The issue for resolution by the Supreme Court concerned the degree of sovereignty possessed by the State of New Hampshire in 1777. Had New Hampshire possessed both internal and external sovereignty, its exercise of admiralty jurisdiction--an attribute of external sovereignty--would have been valid. The Supreme Court held that New Hampshire did not possess admiralty jurisdiction. Justices Paterson, Iredell, Blair and Cushing in lengthy opinions agreed that the Court of Appeals in Cases of Capture established by the Articles of Confederation was validly constituted and had jurisdiction of the appeal from the New Hampshire Superior Court. Justices

Paterson and Blair were of the view that the inherent war powers of the Continental Congress were sufficient to confer jurisdiction on the Court of Appeals (3 Dall. at 79-120).

In concluding that the national government, rather than the individual States, was sovereign with respect to external matters, Justice Paterson stated (3 Dall. 80-81):

> In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. * * * The truth is, that the states, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now; the states collectively, under congress, as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which, other sovereigns would be more immediately interested; such for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors.

Justice Iredell concurred (3 Dall. at 91):

> But that previously thereto they (the Continental Congress) did exercise, with the acquiescence of the states, high powers of what I may, perhaps with propriety, for distinction, call external sovereignty, is unquestionable.

In short, as Professor Henkin indicated, the Supreme Court has fully accepted the proposition that the attributes of external sovereignty passed directly from the British Crown to the United States; neither the 13 colonies before independence nor the 13 states after independence were ever separate, sovereign states in an international sense.

(3) As a matter of international law, only the United States, and not the individual States, obtained status as an independent sovereign. -- The defendant States apparently contend that the 13 American colonies were treated internationally as separate and independent States prior to the ratification of the Constitution (Tr. 644). The defendant States apparently rely upon the Treaties of Commerce and Alliance with France of 1778 and the Provisional and Definitive Treaties with Great Britain of November 20, 1782, and September 2, 1783, for this contention (Tr. 644-655).

Professor Morris specifically examined the authority underlying the treaties relied upon by the defendants and concluded that the treaties were made with the United States collectively and not with the individual States (Tr. 1779).

As Professor Morris testified the unchallenged authority of Congress to conduct foreign affairs

> * * * was asserted as far back as November 29, 1775, when Congress appointed a five-man Committee of Correspondence to contact the European powers and again on September 26, 1776, when Congress appointed a committee to prepare plans for treaties of commerce with foreign nations. From 1776 onward, without exception, American diplomatic commissions and the treaties negotiated under them contained such unequivocal terms as "the two parties;" "the said two nations," "the two States," "the two republics," "of either nation," 'both nations." [Tr. 1779.]

Moreover, as Professor Morris noted, it was Congress that appointed diplomatic representatives abroad and issued instructions and commissions in the name of the United States. For example, John Adams, in commenting on his commission to the United Provinces, wrote to the President of Congress that he had "lately received [it] from my sovereign, the United States of America in Congress assembled" (Wharton, VI Revolutionary Diplomatic Correspondence 402; Tr. 1780).

The commissioners who negotiated the peace with Great Britain were commissioned by and received their instructions from Congress, not the States (Tr. 1780-1784). As Professor Morris testified:

> Not only were the American Peace Commissioners acting under election and by instructions of the United States in Congress assembled, but their negotiations were carried on in behalf of the United States not of the Thirteen States as separate entities. [Tr. 1784.]

At one time or another Russia, France and Austria sought unsuccessfully to negotiate with the States individually in order to divide them (Tr. 1784-1788). On this point, Professor Morris testified:

> John Adams, minister plenipotentiary, appointed by Congress in the fall of 1779 to negotiate and conclude a peace with Great Britain, along with a treaty of commerce, clarified the legal and constitutional issues * * *. Adams pointed out * * * that the United States could not be represented in a Congress of European powers without recognition of their independence, and served notice that the proposal then mooted of carrying on separate consultations with <u>each</u> of the Thirteen States was entirely unacceptable. * * * For any power to apply to the governors or legislatures of the separate states would be "a public disrespect." * * * It would be an error and a misdemeanor for a state official to receive and transmit such a communication to his respective legislature. In short, "there is no method for the courts of Europe to convey anything to the <u>people of America</u> but through the Congress of the United States, nor any way of negotiating with them but by means of that body." [Emphasis added; Tr. 1787-1788; U.S. 336.]

Professor Morris concluded:

> Henceforth, it was clear to all the negotiating powers that negotiations were being conducted with a single nation, the United States of America. [Tr. 1788.]

Professor Henkin also confirmed that internationally none of the 13 states were treated as sovereign nations; they were always treated as a collectivity (Tr. 2650-2660).

There is, therefore, no reason to doubt the historical accuracy of the Supreme Court's Curtiss-Wright doctrine, which is controlling here.

(4) If rights to the seabed in a governmental sense existed, they passed directly from the Crown to the United States. -- We have shown that the United States, as a collectivity, came into being before the States. We have also shown that only the United States and not each separate State was recognized as sovereign internationally. While the States are "sovereign" for many domestic purposes, for international purposes there existed only one political entity, possessing all the attributes of external sovereignty. These included the governmental rights and powers over the seas adjacent to our coast recognized under international law during the 18th century. It is our view that international law did not then

recognize any general property right in the adjacent seas and seabed, although international law did recognize certain governmental rights in that area. Consequently, just as rights to lands beneath inland waters belong to the state government as an incident of its domestic sovereignty, so rights in the seas and seabed beyond our coast, if they existed, belonged to the federal government as an incident of its external sovereignty.

(a) The Supreme Court has determined that rights to the adjacent seabed in our federal system are an incident of the sovereignty of the national government. -- Under our federal system, the States are sovereign for many domestic purposes, while the federal government is sovereign for external or international purposes. (see Tr. 2654-2660) The significant attributes of external sovereignty include the control of foreign affairs, the power to make war and peace, and the representation of the United States as a nation state in the world community.

As previously noted, the Supreme Court has already determined that under English and American law rights to the lands beneath navigable waters pass with governmental powers as an incident of sovereignty (see pp. 166-169, supra). In Martin v. Waddell, supra, and Massachusetts v. New York, supra,

the Supreme Court found that rights to submerged lands under inland navigable waters belonged to the State as an incident of its sovereignty over those waters. In those cases there was no question of competing sovereignties, since the areas in issue were recognized to be state territory.

United States v. California, 332 U.S. 19, raised for the first time the application of the concept of dual sovereignty to ownership of the resources of the bed of the open sea adjacent to the coast of the United States.[11/] The Supreme Court held that rights to the seabed and subsoil of the marginal sea were attributes of federal rather than state sovereignty. In this respect, the Court stated that

> * * * the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under the water area * * *. [332 U.S. at 38-39.]

The Court noted that the exercise of governmental powers associated with the ocean and ocean bottom required power to exercise control consistent with international undertakings.

11/ The California case involved only the territorial sea extending three miles seaward from the coastline; it did not concern claims to submerged lands farther from the coast as does the present litigation.

The kinds of undertakings associated with external sovereignty were variously described by the Court as the power of dominion and regulation of revenue, health, and security, and the desire of the nation to engage in world commerce and live in peace. The Court concluded that those rights constituted the powers of external sovereignty to be exercised by the federal government. Whatever the nation does in the open sea "is a question for consideration among nations as such, and not their separate governmental units." 332 U.S. at 35.

In United States v. Louisiana, 339 U.S. 699, the Supreme Court applied the California rationale to the zone beyond the 3-mile territorial sea. The Court concluded:

> If . . . the three-mile belt is the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. [339 U.S. 699, 705.]

(b) The United States has always possessed the attributes of external sovereignty to which rights to the adjacent seabed would be incident. -- As previously noted, the Continental Congress asserted its supremacy over naval and maritime matters by creating, supplying and directing naval operations. Moreover, almost from its inception, the

Continental Congress asserted jurisdiction over admiralty and maritime activities in the adjacent seas. As previously discussed, Congress adopted a measure in 1775 under which appeals from the admiralty courts of the several States were referred to a special court established by Congress (Tr. 1738). As Professor Morris testified, Congress in 1779, upon the refusal of the court of admiralty for the State of Pennsylvania to abide by a decision of the Congressional Standing Committee on Appeals (Tr. 1739), asserted supremacy with respect to captures on the high seas and other international matters by adopting the following motion (Tr. 1740-1743):

> That Congress is by these United States invested with the supreme sovereign power of war and peace:
>
> That the power of executing the law of nations is essential to the sovereign supreme power of war and peace:
>
> That the legality of all captures on the high seas must be determined by the law of nations:
>
> That the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace:
>
> That a controul by appeal is necessary, in order to compel a just and uniform execution of the law of nations * * *.

This supremacy was reasserted by Congress in 1781 through the adoption of an ordinance which provided in part that ships (Tr. 1744)

> " * * * of these United States, as also all other ships and vessels commissioned by letters of marque or general reprisals, or otherwise, by the authority of the United States in Congress assembled, shall and may lawfully seize all ships, vessels and goods, belonging to the King or Crown of Great Britain, * * * and bring them to judgment in any of the courts of admiralty that now are or hereafter may be established in any of these United States by the authority of the United States in Congress assembled: and the said courts of admiralty are hereby authorized and required to take cognizance of and judicially to proceed upon all and manner of captures, seizures, prizes and reprisals of all ships and goods * * *."

Although Congress' authority in these matters was disputed (Tr. 1739-1743, 1745-1747), its assertions of external sovereignty were conclusively upheld by the Supreme Court in Penhallow v. Doane, 3 Dall. 54. As Professor Morris testified:

> The resolves of Congress prompted by these cases and the ruling of the Supreme Court in the Penhallow case conclusively established the right of appeal to Congress in matters of prize, as well as the supreme sovereign power of Congress in war and peace in the period prior to the adoption of the Constitution. [Tr. 1747.]

Both the Articles of Confederation and the Constitution affirmed the supremacy of Congress in matters relating to the adjacent seas. After reviewing the provisions of the Articles of Confederation (Tr. 1762-1764), Professor Morris testified:

> From an examination of the Articles of Confederation it is clear that the United States in Congress assembled retained whatever powers this new nation could exercise under international law in the seas adjacent to the coasts of the United States. The Articles gave Congress exclusive control over foreign affairs, over the navy, and over prize and capture on the high seas. [Tr. 1764-1765.]

Professor Morris also reviewed provisions of the Constitution (Tr. 1816-1820), and referred to portions of the Federalist Papers as follows:

> James Madison in Federalist No. 41 pointed out, the federal government needed the exclusive power to declare war, to grant letters of marque, and to maintain armies and fleets. John Jay in Federalist No. 4, and Alexander Hamilton in Federalist Nos. 11 and 24, underscore the need for conferring on the federal government control over the navy and coastal defenses, and of having unified control over naval, maritime, and navigation matters. In his examination of the federal judiciary in Federalist No. 80, Hamilton argued that it did not "admit of controversy" that the federal judiciary should have jurisdiction over all causes involving the peace of the country and all those originating on the high seas and being of admiralty or maritime jurisdiction. [Tr. 1820.]

In short, from before the signing of the Declaration of Independence through the ratification of the Constitution, one nation, rather than 13, existed for international purposes. Even though the States under our federal system retains sovereignty over many domestic matters, the supreme powers of government over the adjacent seas clearly passed as an incident of external sovereignty from the Crown to the United States as a single nation and not to the individual States.

(5) <u>If ownership rights to the seabed existed in a property sense, they passed directly from the Crown to the United States</u>. -- In point A above, the United States has shown that English law in the 17th and 18th centuries did not recognize general property rights in the adjacent seas and seabed. In point C1 above, the United States has shown that if English laws had recognized Crown rights to the adjacent seas and seabed, it was only as an incident of the governmental powers which the Crown exercised over that area. We also contended that if such rights existed and had been claimed or conveyed in the original grants and charters, they reverted to the Crown long before independence. We have just shown that if such rights in a governmental sense continued to exist they passed at independence to the United States collectively, and not to the States

individually. In point C1 above, we have also shown that if, contrary to the contention of the United States, the Court were to find that English law had recognized rights to the adjacent seabed in a property sense, those rights reverted to the Crown long before independence. We shall now show that even if English law continued to recognize ownership rights to the adjacent seabed in a property sense, those rights passed directly from the Crown to the United States at independence.

It is the position of the United States that rights to the adjacent seabed, if they existed in a strict property sense at independence, were of a character which would have passed to the United States collectively rather than to the States individually. The United States contends that the peace negotiations with the British show that rights to the adjacent seabed, if they existed, were of such a character that they would have passed in common to all Americans rather than to the individual States.

(a) Congress negotiated for the resources of the North American seas with the British for the United States collectively, rather than for the individual States. -- As previously noted, Professor Smith apparently concluded that by the Treaty of Paris in 1783, the adjacent seas and seabed out to 20 leagues had passed to each of the States indivually (Tr. 846). As Professor Morris testified,

fishing was the only issue with respect to the resources of the adjacent seas which was explicitly covered by that treaty with Great Britain (Tr. 1802). Professor Morris, who has done extensive research on the Treaty of 1783 and the fisheries question for his book The Peacemakers, concluded on the basis of the reports of Congress, the instructions to the Commissioners and the Treaty itself that the United States negotiated for the fisheries for the United States collectively and not for the individual States (Tr. 1779, 1807, 1835).

The first congressional committee which dealt with the fisheries issue, comprised of James Madison, Daniel Carroll and James Lovell, reported on January 8, 1782 (XXIII JCC pp. 477-479). The second congressional committee on that issue, comprised of Daniel Carroll, Edmund Randolph and Joseph Montgomery, reported on August 20, 1782 (XXIII JCC pp. 482-487). Both reports indicate that Congress viewed the rights to the fisheries as appurtenant to the United States as a whole and not to the States individually. There are repeated references in both reports, for example, to "the common rights of the United States" to the fisheries (Tr. 1789). The first committee, after voting that it was the position of Congress in the negotiations that all nations had a "common right of taking fish" from the seas more than 3 leagues from shore, asserted that (Tr. 1790-1791)

> " * * * if a greater or an indefinite distance should be alleged to be appurtenant by the law of nations to the shore, it may be answered, that the fisheries in question even those on the banks of Newfoundland, being of so vast an extent, might with much greater reason be deemed appurtenant to the whole continent of North America than to the inconsiderable portion of it held by Great Britain; * * * a right to the common use is incident to the United States as a free and independent community, they cannot admit that they have no such right, without renouncing an attribute of that sovereignty which they are found, as well by respect for his Majesty's honour as for their own interest and dignity, to maintain entire; that this right is no less indispensable in its exercise than it is indisputable in its principles * * *."

It is clear from this statement that the committee did not believe it was negotiating on behalf of 13 independent nations.

The report of the second committee, entitled "Facts and Observations in Support of the Several Claims of the United States not included in the Ultimatum of the 15th of June 1781," was drawn up for transmission to the American peace commissioners. This report, like the previous report, reveals both an intent of Congress to claim a common right of Americans to the fisheries of the North American seas, and also an intent to reject exclusive claims to the adjacent seas. The report contains a detailed analysis of English practice with regard to fisheries jurisdiction. The committee noted (Tr. 1795-1796):

> "(d) By inspecting the ancient treaties between England and the dukes of Brittany and Burgundy, we shall find that the portion of the sea which is supposed to belong to the coast is so far from being increased beyond fourteen miles, or even three leagues, that the liberty of fishing in every part thereof is asserted. * * *
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> (e) Queen Elizabeth too, being involved in a dispute with the king of Denmark concerning the fishery at Wardhuys, near the North Cape, instructs her plenipotentiaries to deny that "the property of the sea at any distance whatsoever is consequent to the banks." The king of Denmark does not attempt in his reply to establish what she had thus denied, but rests his exclusive claims upon the authority of old treaties between the two crowns. See Rymer's Foadera, tom. 16th, p. 425."

After completing its analysis of English practice with regard to fishery jurisdiction, the committee concluded (Tr. 1796):

> "Thus, it appears that, upon strict principles of natural law, the sea is unsusceptible of appropriation; that a species of conventional law has annexed a reasonable district of it to the coast which borders on it; and that in many of the treaties to which Great Britain has acceded, no distance has been assumed for this purpose beyond fourteen miles."

In its report to the American peace commissioners, this committee, like the previous committee, stressed the policy of the United States, and of other maritime powers, to limit exclusive claims in the sea:

> "As it is the aim of the maritime powers to circumscribe, as far as equity will suffer, all exclusive claims to the sea, we trust that his Most Christian Majesty will coincide with our present doctrines." [Tr. 1797-1798.]

Nowhere in the report does the committee refer to the adjacent seas as the territory of the coastal State. Although the committee recognized the exclusive right of coastal nations to the fisheries within a limited distance of the shore, it discountenanced the idea of treating the open seas as a territory:

> "But the sea cannot be holden or possessed, these terms implying appropriation. They accord well with havens, bays, creeks, roads or coasts; and also with "places," should this word be confined, as it ought to be in its interpretation, to waters susceptible of occupancy." [Tr. 1779.]

The instructions to the commissioner appointed by Congress to negotiate a peace treaty with Great Britain stated that the claim to the fisheries was a "common right" and that the inhabitants of the United States at the expiration of the war "should continue to enjoy the free and undisturbed exercise of their common right to fish on the Banks of Newfoundland, and the other fishing banks and seas of North America" (Tr. 1803). John Adams, in arguing before the British peace commissioners, reiterated that position, asserting "the right of the people of America" to share in those fisheries (Tr. 1804).

Finally, the treaty itself discloses that the rights to the fisheries of North America were obtained by the United States in collectivity and not for the individual States. Article III of the Preliminary Treaty provides

> " * * * that the People of the United States shall continue to enjoy unmolested the Right to take Fish of every kind on the Grand Bank, and on all the other Banks of Newfoundland; Also in the Gulph of St. Laurence, and at all other Places in the Sea where the Inhabitants of both Countries used at any time heretofore to fish * * *." [Tr. 1804.]

In short, the reports of Congress, the instructions to peace commissioners and the treaty itself show that Congress negotiated rights to the fisheries in North America in the treaty of 1783 on behalf of all Americans, not on behalf of the individual States. There is no reason to believe that Congress would have adopted a different position if the issue had arisen with respect to other resources of the seas or seabed, or even a property right to the seabed -- especially in light of Congress' recognition of the international character of this area.

(b) <u>The negotiations of the peace commissioners with respect to the lands west of the Appalachian Mountains also support the proposition that the negotiators, if the occasion had arisen, would have argued that rights to the</u>

property of the adjacent seas and seabed belong to the United States in collectivity. -- As we have shown in point C1 above, if the seabed of the adjacent seas was viewed by the colonies as public lands at all, it was viewed as the vacant or unappropriated land of those colonies. As we also showed in that point, any such vacant and unappropriated lands reverted to the Crown when the colonies were royalized and came under direct Crown control. We will now show that in negotiations concerning such vacant and unappropriated lands, specifically the western lands, Congress negotiated for these lands for the United States in collectivity and not on behalf of the individual colonies. Because the seabed, if viewed as property, would have been treated as vacant and unappropriated lands these negotiations are, in our view, evidence of the way Congress would have dealt with that area if the issue had arisen, especially in light of Congress' recognition of the area's international character.

As Professor Morris testified, Congress and the negotiators rested American claims to the western lands "upon the Treaty of Paris of 1763, upon the claim of the United States to the benefits of the French cession to Britain and upon

recent military conquests in the northwest" (Tr. 2348-2355; cf. Tr. 2314-2316). Apparently, the negotiations over the western lands concerned primarily Spain, which had settlements to the south and west of the American colonies. John Jay, the American peace commissioner in Madrid, was chiefly responsible for these negotiations. Jay's instructions from Congress, prepared by James Madison, stressed the importance of the boundary ceded by Great Britain under the 1763 Treaty of Paris, but did not refer to individual colony charter claims (U.S. Ex. 386). The commentary to the instructions, also prepared by Madison, set forth arguments that Jay might use, including an argument based on state charters. The commentary concluded, however, that the suggested arguments were merely set forth for the information of Jay in Madrid and the Minister Plenipotentiary at the Court of Versailles; the negotiators had full discretion to decide which arguments should be urged in the negotiations (Maine et al. Ex. 707).

In Professor Morris' opinion, the commentary gave priority to the Treaty of Peace of 1763 as the basic foundation for the position of the United States, a view shared by Ralph Ketcham and Irving Brant, who are authorities on James Madison (Tr. 2354-2355; U.S. Exs. 392, 391).

Finally, as was the case with the fisheries negotiations, the negotiations over the western lands and those for the 1783 Peace Treaty itself were all conducted on behalf of the United States as a collectivity, and not on behalf of the individual States (Tr. 1778). There is no reason to believe that rights to the seabed, had they been in issue, would have been asserted differently--on behalf of the individual States.

(6) Even if rights to the property of the adjacent seas and seabed existed and belonged to the States upon independence, such rights were lost as a result of the ratification of the Constitution and through the subsequent exercise by the United States of its foreign affairs powers. -- The United States believes it has shown that rights to the property of the adjacent seas and seabed did not exist under English law during the 17th and 18th centuries; it has also shown that even if such rights did exist, in either a property or a governmental sense, they would have passed directly from the Crown to the United States in collectivity. However, even if it were to be assumed arguendo that the States did own the adjacent seas prior to 1789, we contend further that the States would have lost their rights in the adjacent seas through their ratification of the Constitution and through the subsequent exercise by the United States of its foreign affairs powers. As we have previously

shown, if rights to the property of the seabed existed as an incident of governmental powers, those rights belonged to the United States by its powers under the Articles of Confederation, or, at least, under its powers under the Constitution, supra, pp. 196-200 . Even if the States possessed such rights in a strict property sense, they would have subsequently lost them after 1789 through the exercise by the United States of its foreign affairs powers.

As Professor Henkin testified:

> * * * Even if the States acquired some international sovereignty in 1776 they gave it up to the United States in 1789 when the "more perfect union" was formed by the Constitution. * * * No one suggests the States retained any international sovereignty after 1789 for any purpose. * * * [Tr. 1911-1912.]

That the United States has power to make international law whether by treaty or by custom and that such law is binding on the states is beyond dispute. Missouri v. Holland, 252 U.S. 416; Banco Nacional de Cuba v. Sabbatino, 276 U.S. 398, 425; cf. Henkin, Foreign Affairs and the Constitution (1973), pp. 219, 222-223. In our view, the United States effectively renounced or abandoned any rights to the adjacent seas beyond 3 miles to which it, or its component States, might have laid claim in 1789.

There is apparently no dispute between the witnesses for the United States and the defendant States that the 3-mile rule was established in England in the 18th century and by the United States as a nation in the early 19th century (Tr. 1154). In fact, the United States has been a leading exponent of a 3-mile territorial sea from the late 18th century down to the present (Tr. 1913). As Professor Henkin testified (Tr. 1913):

> It is beyond dispute that already in the 18th century the United States was claiming sovereign rights only out to three miles and the United States has been a leading proponent of a three mile territorial sea from that time right down to the present.

The dispute then is whether, apart from its adherence to the 3-mile rule, the United States may be said to have claimed or exercised rights to the seabed and subsoil beyond that limit. As Professor Henkin testified: "No one has ever suggested that the United States had made exceptions to this three mile rule where a State had asserted such rights in the past. * * * The United States surely has never claimed any exception to the three mile rule because of any old claims which might have been made by the States or colonies" (Tr. 1913).

In his book, The Law of Territorial Waters and Maritime Jurisdiction (1927), pp. 49-60, Dr. Jessup acknowledged that the United States did not recognize any concept of inherent, exclusive rights in the seas beyond 3 miles. For example, Dr. Jessup wrote (id. at 53):

> A categorical statement was made by the same Secretary of State in the following year. "The exclusive jurisdiction of a nation," he wrote to Mr. Jordan on January 23, 1849, "estends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands, and, also to the distance of a marine league, or as far as a cannon shot will reach from the shore along all its coasts."

Dr. Jessup clearly expressed the view that inherent rights extended only to 3 miles from shore and not beyond, whether in the seas or on the seabed. In his view any claims beyond 3 miles whether in the seabed or the seas above could be justified only on the basis of prescriptive rights. On that basis he explains some coastal states' claims to sedentary fish beyond 3 miles as well as Norway's claim to a 4-mile territorial sea. Id. at pp. 13-16. Cf. id. at pp. 34-35.

On the other hand, Dr. Jessup testified in this case that the United States had historically recognized a concept of inherent exclusive rights of the coastal States to the

resources of the seabed beyond the territorial sea (Tr. 1178-1180). He apparently based this conclusion upon the argument of the United States in the Bering Sea Arbitration and certain legislation by the United States as an occupation government in the Philippines after the Spanish American War (Tr. 1178-1181).

It is difficult to determine how the arguments of the Bering Sea Arbitration support Dr. Jessup's contention that the United States recognized a concept of inherent exclusive rights to the seabed beyond the territorial sea. The resources in dispute in that controversy were fur seals. The United States, as Dr. Jessup pointed out, sought to regulate the capture of the seals on the high seas beyond the territorial waters on "the old doctrine of ferae naturae and a resulting right of property in the seal herd" (Tr. 624-625, 1181). Admittedly, the United States apparently sought to justify the control of the high seas fishery by reliance on the internationally recognized right of states to claim sedentary fisheries on the basis of occupation or prescription.

Although one authority relied on by Dr. Jessup (Tr. 622-641, 1174, 1178-1179) -- Carter [Oral Argument of James C. Carter on Behalf of the United States Before the Tribunal of Arbitration Convened at Paris Under the Provisions of the

Treaty Between the United States of America and Great Britain Conducted Feb. 29, 1892 (Paris 1893)], does assert that prescriptive occupation of the seabed is not necessary to a right to exploit sedentary fisheries, he does not assert that the coastal state has an inherent right exclusively to control those fisheries. As Professor Henkin testified:

> What [Carter] is saying is something different -- it is a kind of an estoppel notion -- when a nation has an industry which it develops off of its coasts, whether in the seabed or in the seas, it ought to have some kind of estoppel rights in it. [Tr. 2648-2649.]

As Carter argues, it is only when "that particular power chooses to improve that natural advantage by the creation of any industry, [that] it establishes a right which it can defend from invasion by citizens of other nations" (Tr. 633). Carter does not contend that a nation which had not developed that industry could exclude others from taking those resources. The United States in the conduct of its foreign policy recognized, as part of the freedom of the high seas, the right of other nations to develop seabed resources adjacent to the United States' coast prior to the Truman Proclamation. For example, the United States fully respected the Japanese development of the King Crab fisheries off the Alaskan coast. See United States

Department of the Interior, Fish and Wildlife Service, Bureau of Commercial Fisheries Circular 310 (1966), pp. 9-11.

Dr. Jessup also relied on action taken by the United States in the Philippines as an occupying force after the Spanish-American War (Tr. 592, 1180). As Dr. Jessup testified:

> After the Spanish American War, United States authorities interdicted all pearl fishing within 3 leagues of land except by licenced vessels, licenses could be issued only to vessels owned by citizens of the United States or natives, although foreign vessels which had fished there in the year immediately preceding could be licensed for 5 years. [Tr. 592; Maine et al. Ex. 345, pp. 213-217.]

The treatise relating to the history of the pearl industry relied on by Dr. Jessup, however, shows that the United States based its actions not upon any inherent exclusive right of the Philippines to the resources of the seabed but upon the recognized historical right of the native Philippine rulers to those resources (Maine et al. Ex. 345, pp. 215-217).

Professor Henkin pointed out (Tr. 1920-1921) that as recently as 1918 the United States disclaimed any jurisdiction over the seabed beyond the territorial sea. In that year a group of citizens proposed to develop oil resources in the bed of the Gulf of Mexico by erecting an artificial island some 40 miles from shore. In response to an inquiry by that group, the

Department of State formally stated that "the United States had no jurisdiction over the ocean bottom of the Gulf of Mexico beyond territorial waters adjacent to the coast." Hackworth, II Digest of International Law (1941) p. 680.

In 1945, President Truman issued the Truman Proclamation, setting out for the first time a claim by the United States to the resources of the seabed and subsoil of the continental shelf. Proclamation No. 2667, 59 Stat. 884. The Truman assertion, however, was not based on either of the theories upon which the defendant States apparently now rely. As Professor Henkin testified, "the United States has surely never claimed any exception to the three mile rule because of any old claims which might have been made by the States or the colonies" (Tr. 1913). Nor did the United States claim that the resources of the seabed and subsoil had always belonged to it on the basis of any customary rule of international law giving coastal states inherent, exclusive rights to those resources.

As Professor Henkin pointed out (Tr. 1921), official United States documents refer to the doctrine of the continental shelf as "of recent origin." 4 Whiteman, Digest of International Law (1965), pp. 743, 878. The Proclamation itself reflects the emergence of a doctrine "required" by current circumstances. In this respect, the Proclamation states:

> WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and
>
> WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources * * *.

If customary international law had already recognized inherent exclusive jurisdiction over seabed resources on the continental shelf, the Proclamation and its self-contained justification would have been unnecessary.[12/] The justifications given

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12/ The first two paragraphs of the Proclamation disclose that the primary resource of the seabed over which the United States wished to exercise exclusive jurisdiction was oil:

> WHEREAS the Government of the United States of America aware of the long range worldwide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

certainly do not suggest that the United States was relying on any existing principle of customary international law giving the United States inherent exclusive rights to seabed resources. As Professor Henkin testified, President Truman "was claiming it was 'reasonable and just' for the coastal nation to exploit the coastal resources, and he asserted that the United States would hence forth do so and would henceforth recognize the rights of other coastal states to do likewise" (Tr. 1921).

In conclusion, even if the colonies or States at one time claimed inherent exclusive rights to the resources of the seabed and subsoil out to 100 miles, the United States had long ago effectively renounced such rights and did not assert a right to those resources until 1945.

12/ Cont'd

> WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technology progress their utilization is already practicable or will become so at an early date * * *.

As recently as 1918, the United States had denied that it had jurisdiction over the very resources covered by the Truman Proclamation (see pp. 215-216, supra).

D. The Claims of the Defendant States in this Litigation are Inconsistent With International Law

1. Introduction. -- Thus far, this brief has been concerned primarily with English and American law. As we noted at the outset of this brief, the defendant States have the very great burden of introducing new arguments and new evidence sufficient to justify the overruling of the Supreme Court's prior decisions and the unsettling of long vested property rights. We believe we have shown that as a matter of English and American law the States have clearly failed to meet that burden. On the contrary we believe that the United States has established that English law did not recognize a concept of ownership of the adjacent seas and that, even if English law during the colonial period did come to recognize a limited property right in the adjacent seabed, it was in the late 17th century and only with respect to relatively small areas of the seabed. We have also shown if the seabed at large could have been appropriated at all, it could have been appropriated only in a limited sense. Moreover, to the extent that rights of property existed in the adjacent seas and seabed at the time of the American revolution, those rights passed directly from the Crown to the United States in collectivity. Finally, we have shown that even if the States individually possessed

rights to the seabed in 1789, they lost them as a result of their ratification of the Constitution or afterwards in the conduct of this Nation's foreign affairs.

The primary reason that rights in the adjacent seas passed to the United States in collectivity is that such rights depend to a large extent on international law for their content and it is the United States, rather than the individual states, that must determine, in the exercise of its authority over foriegn policy matters, what claims to make to the adjacent seas under international law. We will show that at no time relevant to the claims of the States have those claims been consistent with international law. Before discussing this aspect of the case, however, we note that English law as interpreted by the States' witnesses in support of the States' claims differs from international law as interpreted by the States' witness.

Professor Horwitz sought to establish that under English law the Crown claimed and exercised sovereignty over the English seas and that one of the incidents of that sovereignty was Crown ownership of the seabed. Professor Smith sought to establish that the colonies had obtained similar rights in the seas adjacent to the colonies under their grants and charters. In any case, both Professor Horwitz and Professor Smith testified that rights to the seabed adjacent to the colonies flowed from

sovereignty over the superjacent seas (Tr. 226, 434). Professor Horwitz appears to rely upon the grants and charters to establish that sovereignty while Professor Smith apparently believes that sovereignty over the adjacent seas was passed to the colonies as an incident of sovereignty over the mainland washed by the seas. However, Professor Smith maintained that this maritime sovereignty was expressed in the colonial grants and charters adding that this sovereignty was clarified and limited by the Treaty of 1783. As we have previously noted, Professor Smith's theory on the basis of sovereignty in the adjacent seas is inconsistent with the then prevailing English legal theory described by Professor Horwitz (supra, pp. 113-115).

Although asserting that claims to sovereignty of the seas off the American coasts would not have been inconsistent with the then prevailing international law (Tr. 474), Dr. Jessup apparently concluded that the colonial charters and grants were not claims to sovereignty over the adjacent seas under international law (Tr. 1142-1146). Consequently, if England did claim sovereignty over those seas under international law, it must have done so in some other way. However, as we have previously shown, the defendant States have not demonstrated that England claimed or exercised such sovereignty. As we view Dr. Jessup's testimony, he concludes that claims to the resources of the

seabed were permissible under international law in the 17th and 18th centuries on one of two theories. The first theory is that a State which once claimed sovereignty of the adjacent seas is entitled to the resources of the underlying seabed after renouncing that sovereignty, unless it also specifically renounced sovereignty of the seabed. (Tr. 505-507, 1149-1150) This theory, if recognized under international law, might support the claims of the States in these proceedings if they had established that the Crown had claimed and conveyed sovereignty of the adjacent seas to the original colonies. As we have previously shown, England did not claim or exercise such authority. We will now show that even if it had, international law during that period or later did not recognize claims to the seabed where sovereignty over the seas had been renounced.

The second theory asserted by Dr. Jessup in support of the States' claims -- and it is on this theory that he primarily relies -- is that international law always recognized an inherent, exclusive right of coastal states to the resources of the seabed beyond their territorial seas (Tr. 508, 523-563, 1161-1162). However, under English law as described by both Professors Horwitz and Smith the colonies obtained rights to the seabed as an incident of sovereignty over

the superjacent seas. Consequently, a theory relating to rights in an area admittedly beyond the seas over which sovereignty was claimed does not assist the States in these proceedings. As Professor Horwitz testified concerning English law, the Crown did not have rights in seas over which it did not claim sovereignty (Tr. 434). As we view their evidence, the States have not attempted to establish that Crown conveyed rights beyond areas of the sea over which it claimed sovereignty. Consequently, Dr. Jessup's second theory is irrelevant to the claims of the defendant States in these proceedings. However, we will show, contrary to Dr. Jessup's testimony, that international law did not recognize inherent, exclusive rights to the resources of the seabed beyond the territorial sea until the middle of the 20th century, after the Truman Proclamation.

2. International law did not recognized nor did England claim sovereignty beyond 3 miles in the seas adjacent to the coast of America in the 17th and 18th centuries. -- As the United States understands the claims of the defendant States, as expressed by the testimony of Professors Horwitz and Smith, they are based upon the contention that the English Crown and the colonies claimed and exercised in a territorial sense sovereignty over the seas in question out to 100 miles, and that the States succeeded to the sovereignty of these seas, and have never lost or given up that sovereignty at least in a proprietary sense. The United States will now show that neither the Crown, the colonies before 1776, nor the federal government during the remainder of the 18th century claimed sovereignty in a territorial sense over the seas adjacent to the colonies. The United States will also show that neither the Crown, the colonies in 1776, nor the federal government after 1776, claimed sovereignty in any sense of the term over the seas adjacent to the colonies beyond 3 miles.

a. International law did not recognize a concept of sovereignty over the seas in a territorial property sense during the 17th and 18th centuries. -- The contentions of the States raise questions under international law as to both the nature and the extent of the sovereignty over the adjacent seas which a State could claim under international law in the 17th and 18th centuries. The question of the nature of the sovereignty which a coastal State exercised in the adjacent seas from the colonial period through the 19th century was exhaustively litigated in United States v. California, 332 U.S. 19. In its brief in that case, the United States argued that international law did not recognize sovereignty over adjacent seas in a territorial or property sense even in the three-mile territorial sea until the late 19th or early 20th centuries. (U.S. Ex. 7, pp. 20-58).[13/] California, on the other hand, contended that a concept of sovereignty over the adjacent seas in a territorial or property sense was recognized under international law in the 17th and 18th centuries at the time the colonies received their original grants and charters (U.S. Ex. 8, pp. 174-185). Referring to

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13/ The cited portions of our California briefs are hereby incorporated by reference into this brief.

"the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas," the Supreme Court rejected the assertion that international law in the 17th and 18th centuries recognized sovereignty of the adjacent seas in a property or territorial sense. United States v. California, 332 U.S. at 31.

In California, the parties and the Court were concerned with sovereignty over a 3-mile territorial sea; claims of sovereignty or property beyond 3 miles were not in issue. The Court specifically determined that the concept of sovereignty over the adjacent seas in a territorial or property sense did not crystallize under international law until after the formation of the United States, and that the crystalization occurred largely through the efforts of the United States. (332 U.S. at 33). In arriving at its decision, the Court noted that the concept of a general property right in the adjacent seas and seabed was not established under English law even a century after American independence. (332 U.S. at 33). 14/

14/ As Professor Henkin noted (Tr. 1929), the concept of sovereignty over the adjacent seas in a strict territorial sense was still in doubt when Dr. Jessup wrote in 1927 The Law of Territorial Waters and Maritime Jurisdiction in an attempt to establish that proposition as a matter of international law.

Thus, the California case is controlling here, and we rely on the Court's opinion and our brief in that case with respect to the international law issues there decided. In this brief, we will concentrate on issues presented here which were not before the Supreme Court in the California case.

b. Under international law, sovereignty over the seas adjacent to the United States in 1776 extended no further than 3 miles. -- Although Professor Smith apparently concluded that the United States obtained sovereignty out to 20 leagues as late as 1783 (Tr. 845-848), both Dr. Jessup and Professor Henkin indicated that in the 18th century sovereignty over the adjacent seas beyond 3 miles was not recognized by England, America, or by general principles of international law (Tr. 150-153, 505, 1900-1901). Professor Henkin, noting that Dr. Jessup had written that even England had repudiated Selden's expansive stand in the 18th century, testified (Tr. 1901): "By 1776 any earlier claims to some kind of sovereignty in large areas of the seas, had lapsed and ceased to exist. Coastal nations, including Great Britain, were now asserting such rights only in a narrow coastal sea up to the portee du cannon, the reach of coastal cannon."

Dr. Jessup asserted that attempts by some states, in the 15th and 16th centuries particularly, to claim sovereignty over vast expanses of ocean had been defititely rejected by other nations and that a general principle of freedom of the seas was established in international law as early as the 17th century. Dr. Jessup testified that in the 18th century 3 miles

was generally viewed as the distance within which a nation could defend its territorial waters (Tr. 1141-1142). With respect to a 3-mile territorial sea, Dr. Jessup noted that "this was certainly developing in English practice in the 18th century, and probably the early part of the 18th century" (Tr. 1151). He later stated specifically that the 3-mile rule was consolidated in England in the 18th century (Tr. 1209). In short, witnesses for the States and the United States agreed that neither international law nor English practice in 1776 recognized a claim to sovereignty over the adjacent seas beyond "the portee du cannon" or 3 miles. Thus, the defendant States' claims to the resources of the seabed beyond 3 miles cannot be sustained by reference to the concept of the territorial or marginal sea.

c. Prior to the Truman Proclamation in 1945, rights to the resources of the seabed beyond territorial waters could be obtained under international law only by prescription or occupation. -- The defendant States contend that international law in the 18th century recognized exclusive rights of a coastal nation to the natural resources of the seabed beyond territorial waters. In support of this claim, Dr. Jessup testified that such rights existed either as a consequence of once having claimed sovereignty over broad expanses of the seas or as an incident of

sovereignty over the coast adjacent to the seas. With respect to the first ground, Dr. Jessup contended that a nation could claim rights to the resources of the seabed beyond territorial waters on the basis of abandoned claims to the sea above (Tr. 505-507, 1149-1150). With respect to the second ground, Dr. Jessup testified that the rights to the resources of the seabed beyond territorial waters recognized today under the Continental Shelf Convention of 1958, 15 U.S.T. (Pt. 1) 473, were recognized under principles of customary international law in the 17th and 18th centuries (Tr. 1162).

Referring to the curtailment in the 18th and 19th centuries of claims to sovereignty over vast stretches of the high seas, Dr. Jessup concluded that the right of a state to exploit the resources of the seabed "survived the curtailment of the ancient claims to vast expanses of ocean which were no longer supportable under the international law of that period" (Tr. 507). The only evidence relied upon was evidence relating to sedentary fisheries. As Dr. Jessup testified: "In other words, there was no interference with the traditional claims to the exploitation of the seabed as there was a curtailment of the previous claims to exercise rights over the surface waters" (Tr. 1149-1150). But, as we will show, those "traditional claims to the exploitation of the seabed" were universally recognized to

be based not upon any ancient claims to sovereignty over the superjacent waters but upon historic prescription or effective occupation; there is no evidence that when claims to seas beyond territorial seas were effectively ended claims to the seabed were retained. As Professor Henkin testified, the claims to the resources of the seabed that were made were based either on the ground that the seabed was under territorial waters or on a theory of prescription or occupation (Tr. 2631).

(1) The writings of publicists on international law recognize exclusive rights in the seabed beyond territorial waters only on the basis of prescription or occupation. -- If Dr. Jessup's theories in support of the States' claims to the resources of the seabed are valid, then international legal literature of the 18th, 19th and 20th centuries, up to the Truman Proclamation, should reflect one or both of the theories. Significantly, however, Dr. Jessup did not cite a single authority before the Truman Proclamation in support of his position.

(a) The writings of publicists on international law before the Truman Proclamation recognize that the resources of the seabed beyond territorial waters can be obtained only through prescription or occupation. -- We consider now the writings of publicists before the Truman Proclamation in 1945. Westlake clearly recognized that the right to sedentary

fisheries beyond territorial waters was based upon historic prescription or effective occupation. As he stated in his treatise (I International Law, 186-187 (1904)):

> The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under state protection, as that off the British island of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the state in question generally fixes for the littoral sea, as in the case of Ceylon it is practised beyond the three-miles limit generally recognised by Great Britain.

Oppenheim, citing both Westlake and Hall's Foreign Power and Jurisdiction, also recognized that sedentary fisheries beyond territorial waters were claimed on the basis of prescription or occupation. Oppenheim 1 International Law (1912), pp. 348-349, n. 2. Oppenheim also referred to the exploitation of coal or other mineral resources of the subsoil of the open seas by tunnels and other means. Id. at 357-359. He concluded that rights to those resources were acquired by occupation and listed five rules under which such occupation could be made (id. at 359):

> * * * There is no reason whatever for extending this freedom of the Open Sea to the subsoil beneath its bed. On the contrary, there are practical reasons--taking into consideration the building of mines, tunnels, and the like--which compel the recognition of the fact that this subsoil can be acquired through occupation.

Although it is impossible to review every publicist who wrote before the Truman Proclamation regarding rights to the resources of the seabed, beyond territorial waters, a survey of the leading digests of international law published in the last century discloses that, prior to the Truman Proclamation, exclusive rights to those resources could be obtained only through prescription or historic occupation. E.g., Westlake, supra; Oppenheim, supra; Oppenheim, I International Law (Lauterpacht ed., 8th ed., 1955, pp. 628-634, Hackworth, supra, pp. 672-680; Whiteman, supra, pp. 740-752.

As Professor Waldock, after analyzing the writings of a number of publicists, concluded:

> The important point which emerges from the writings of the jurists is that, despite variations in doctrine, they were at one in not recognising any possibility of a legal title to the sea-bed or subsoil under the high seas being vested in a coastal State apart from effective occupation. The same is true of the small amount of state practice which existed in regard to submarine

> rights. There were a number of specific claims to exclusive rights to particular resources of the sea-bed in limited areas which were based on long enjoyment or at least on actual exploitation. The best known were various pearl, oyster and sponge fisheries. But these exclusive rights to resources on the sea-bed, when recognised as valid in law, were held to belong to the claimant States by reason of their actual enjoyment (generally from time immemorial) in particular areas and under a particular claim to exclusive jurisdiction. Similarly, in a few cases mine-shafts sunk ashore appear to have been driven outwards through the subsoil to points beyond the limit of territorial waters. These shafts were commonly said to constitute an effective occupation of the particular areas mined but no more. It is true that such claims to resources of the sea-bed or subsoil were made only by coastal States but they were justified as acts of occupation, not as the natural rights of coastal States. General or natural rights to adjacent extra-territorial resources were neither recognised nor claimed. [Waldock, The Legal Bases of Claims to the Continental Shelf, 36 Grotius Society 115, 119 (1951).]

(b) The writings of publicists on international law after the Truman Proclamation recognize that the doctrine expressed in President Truman's message was a departure from the traditional rules of international law. -- The writings of publicists after the Truman Proclamation discloses a controversy not over whether international law already

recognized a concept of inherent, exclusive rights, but over whether international law could, consistent with recognized principles of freedom of the seas, recognize such a new principle. As Professor Henkin testified, the question was whether the seabed was res communis like the superadjacent waters and thus not susceptible of exclusive claims or res nullius and open for acquisition.

Professor Waldock, writing in 1950, accurately described the nature of this controversy. After setting out that his purpose was to examine the doctrine of the continental shelf in light of the state practice prompted by the Truman Proclamation in 1945 and to sharpen the focus on the purely legal issues, Professor Waldock wrote (id. at 116-117):

> The opinion of writers was however divided on the question whether the sea is subject to the joint sovereignty of all States or to no sovereignty at all and there was an unfortunate confusion in the use of the Roman Law phrases res communis and res nullius. The view taken by the majority of modern writers, which was endorsed by the Permanent Court in the Lotus case, is that the high seas are not subject to the sovereignty of any State. But, whichever view was held on this point there was virtual unanimity on the principle that each and every State has equal

and independent rights of user of the high seas in time of peace. The corollary is that no individual State may lawfully assert exclusive rights of user in any part of the high seas without the acquiescence of other States, either express or implied from a prescriptive user over a long period. * * *

Opinions of writers were also divided concerning the status of the sea-bed under the high seas. Some writers * * * took the view that the surface of the sea-bed, outside territorial waters, has the same legal status as the high seas. According to this view the sea-bed is simply the bottom of the sea and, its use being equally free to each and every State, exclusive rights can be obtained, if at all, only through the acquiescence of other States. Consequently a State claiming exclusive rights in the sea-bed would have to show either a prescriptive user over a long period or the express modern acquiescence of other States. Other writers, * * * treated the sea-bed not as part of the sea but as territory covered by the sea and therefore res nullius in its strict sense in Roman Law. In consequence, these writers considered that sovereignty can be acquired over the sea-bed, as it may be over land, by 'effective occupation' without the acquiescence of other States and subject only to no unreasonable interference in the free use of the high seas above.

Almost all writers, whichever view they took of the status of the sea-bed itself, regarded the subsoil as capable of 'effective occupation', subject to no unreasonable interference with the free use of the high seas above. * * *

Also instructive is the report of a committee to the International Law Association Conference in 1948 where the issue was extensively thrashed out for the first time by leading international lawyers, shortly before the International Law Commission began its deliberations. The Committee reached agreement that under the existing international law the coastal state could acquire rights in seabed outside the territorial sea but only through effective occupation. A minority argued that the coastal states had inherent exclusive rights in the seabed of the continental shelf beyond the territorial seas and supported that conclusion on developments beginning with the 1942 agreement between Great Britain and Venezuela, the Truman Proclamation and the reactions of governments thereto. No one stressed or even hinted there might have been any such special rights under customary international law before 1942. Report to the 43d International Law Association Conference 1948 (1950) pp. 90-94. Cf. Report to the 44th International Law Association Conference 1950 (1952); Young, The Legal Status of Submarine Areas Beneath the High Seas 45 American Journal of International Law 225 (1951); Hurst, The Continental Shelf, 34 Grotius Society 153 (1949).

H. A. Smith, in his The Law and Custom of the Sea (3rd ed. 1959), reflects the position which publicists took after the Truman Proclamation but before recognition of the doctrine of the continental shelf in regard to the international law regarding seabed resources (pp. 81-82):

THE BED OF THE SEA

> If the view suggested earlier is correct that all maritime territory really consists of land submerged under water, it follows that the land lying at the bottom of the high seas is a "no man's land," what the Roman law calls a res nullius, rather than a res communis, something owned in common by all mankind. For most purposes the point is one of merely theoretical interest, but in one or two respects it raises questions of some minor practical importance. These chiefly concern what are called "sedentary" fisheries--oysters, sponges, etc.
>
> It now seems to be well established by practice that particular States may acquire by usage and undisturbed possession an exclusive title to the small portions of the sea-bed in which these products are to be found. * * * Recent technical developments have made it possible to drill oil wells in shallow waters, such as those off the Mexican coast and in the Persian Gulf. If these drillings are made outside territorial limits they clearly constitute an occupation of the bed of the sea.

> Although the matter is not in itself one of very great importance it serves to illustrate an important principle. The reason why the high seas are free for all is that the area as a whole is physically incapable of effective occupation and possession. Clearly this principle admits of exception when in fact a particular State shows that it is capable of exercising effective control over a small portion of the sea-bed lying at a moderate depth and reasonably close to the land. Objection could rightly be taken if the control was so exercised as to interfere with the common right of navigation upon the surface or with the common right of fishing for swimming fish.
>
> For the same reason occupation of the sea-bed may be effected by extending tunnels or mine workings to a point beyond the three-mile limit.

Thus, Smith recognized that under traditional international law rights to the resources of the seabed beyond territorial waters could be obtained only through prescription or occupation.

The United Nations Secretariat "Memorandum on the Regime of the High Seas," prepared by the Secretariat, U.N. Doc. A/CN.4/32, July 14, 1950 (mimeo.), II Yearbook of the International Law Commission 1950, pp. 67-98 (text in French), as found in Whiteman, 4 Digest of International Law (1965), pp. 743-744, which laid the foundation for the consideration of the continental shelf question by the International Law Commission, took the position that international law prior to the Truman Proclamation required an

occupation of the seabed to establish a state's right to exploit a resource. Thus, the Memorandum stated (p. 75):

> 240. . . . The international law of what, for the sake of brevity, we venture to call the pre-Truman era, adopted a differentiation long accepted in the law relating to water-courses between the bed of the water-course and the waters themselves, and recognized that the use of the waters beyond the limits of the territorial waters could not be made the exclusive right of a given State, but that, on the other hand, the bed of the sea could be made subject to permanent exclusive occupation. It laid down as a condition of such occupation that it would violate to an intolerable degree the freedom of the States concerned to navigate on the high seas. Hence, it was generally accepted that where it was planned to erect installations designed to cross a busy stretch of water, that is to say, in a place where ocean routes converged, such installations, whether the preliminary or the final structures, should not be commenced directly from the high seas, but only from the territorial waters, or even from the land itself. There was no objection under international law to the working of mines by means of galleries running as far out to the open sea as possible (provided, of course, that they did not penetrate the subsoil of the territorial waters of another State).

That memorandum also recognized that the Truman Proclamation and the principle enunciated therein was an attempt to change existing international law (pp. 75-76):

241. These rules were dominant in international law in this field until 28 September 1945, when President Truman's Proclamation introduced substantial modifications. Not only does the prohibition against any interference by one State with the subsoil or bed of the territorial waters of another State remain, but it is extended to cover all portions of the bed or subsoil forming part of the continental shelf of the littoral State, even if covered by the high seas. The littoral State is thus given a rigidly exclusive right to the bed and subsoil of its continental shelf in the high seas. The exploitation, and even utilization, in the wide sense defined above, of that continental shelf are strictly reserved to it. The natural factor constituted by the continental shelf determines the spatial limits within which the littoral State has exclusive rights.

242. Another new feature introduced by President Truman's Proclamation is that where the subsoil of the high seas forms part of the continental shelf it may, without any possible third-party objections, be occupied directly from the high seas themselves without its being necessary to do so from the territorial waters of the continental shelf. The Proclamation involves no change in the law relating to the occupation of such portions of the bed and subsoil of the high seas as do not fall within the limits of the continental shelf.

(c) The only international judicial precedent relating to seabed resources before the 1958 Continental Shelf Convention came into force affirms that traditional international law recognised an exclusive right to such resources beyond the territorial sea only on the basis of prescription or occupation. --- The decision in the Abu Dhabi Arbitration in 1951, establishes that the continental shelf doctrine represented a departure from the customary international law regarding the resources of the seabed beyond territorial waters which began to evolve only in the mid-twentieth century, primarily with the Truman Proclamation. In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi, I International and Comparative Law Quarterly, 247 (1952). That case arose a number of years after the Truman Proclamation and after a number of international bodies, including the International Law Association and the International Law Commission, had begun deliberations on the continental shelf question, but before the conclusion of the United Nations Conference on the Law of the Sea leading to the Continental Shelf Convention which came into force in 1964. Specifically at issue in the Abu Dhabi arbitration were rights to the petroleum resources of the seabed beyond territorial waters. Under a concession entered into in 1939, a British company was granted the exclusive right for 75 years to

exploit the oil resources in "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all islands and the sea waters which belong to that area." (id. at 249) A dispute arose over whether the contract included both oil rights in the seabed under the territorial seas of Abu Dhabi and oil rights in the submarine areas lying outside those territorial seas, and the matter was submitted to arbitration under the terms of the contract. Lord Asquith of Bishopstone was appointed umpire.

As described by Lord Asquith in his decision (id. at 247-248:

> 2. The nature of the disputes referred to arbitration and the subject-matter of this Award are formulated in a letter from the claimants to the respondent dated July 18, 1949. The letter runs as follows:--
>
> > "The arbitration is to determine what are the rights of the Company with respect to all underwater areas over which the Ruler has or may have sovereignty jurisdiction control or mineral oil rights.
> >
> > "The Company claims that the area covered by the Agreement of January 11, 1939 (notably Articles 2 and 3 thereof), includes in addition to the mainland and islands:
> >
> > "(1) All the sea-bed and subsoil under the Ruler's territorial waters (including the territorial waters of his islands), and

"(2) All the sea-bed and subsoil contiguous thereto over which either the Ruler's overeignty jurisdiction or control extends or may hereafter extend, or which now or hereafter may form part of the area over which he has or may have mineral oil rights."

The issues: The questions referred to arbitration can usefully be paraphrased by expanding them into four, of which the first two deal with territorial waters and the second two with the submarine area outside territorial waters--

(i) At the time of the agreement of January 11, 1939, did the respondent--the Sheikh--own the right to win mineral oil from the subsoil of the sea-bed subjacent to the territorial waters of Abu Dhabi? (There seems to be no doubt about this.)

(ii) If yes, did he by that agreement transfer such right to the claimant company?

(iii) At the time of the agreement did he own (or as the result of a proclamation of 1949 did he acquire) the right to win mineral oil from the subsoil of any, and, if so, what submarine area lying outside territorial waters?

(iv) If yes, was the effect of the agreement to transfer such original or acquired rights to the claimant company? (The Sheikh in 1949--10 years after this agreement--purported to transfer these last rights to an American company--the "Superior Corporation": which the Petroleum Development Company claim he could not do, since he had already 10 years earlier parted with these same rights to themselves.)

Lord Asquith added (id. at 248):

I would add that the parties requested me to express a view both on question (iii) and on question

> (iv), even if owing to the answer given to one of these questions, the other should become academic; and the view expressed upon it at best an obiter dictum.

Notwithstanding Dr. Jessup's opinion to the contrary (Tr. 518), in our view Lord Asquith's decision reflects a full understanding of the rules and principles of international law relating to the resources of the seabed beyond territorial waters. Lord Asquith not only analyzed in detail the practice which had arisen in connection with the continental shelf doctrine before and after the Truman Proclamation (Abu Dhabi Arbitration at 253-259), but in doing so referred to the important literature which discussed this issue, including the report on the subject by the United Nations Secretariat and the International Law Commission report and draft articles.

After evaluating the developments and practices with respect to the continental shelf following the Truman Proclamation, Lord Asquith concluded (id. at 257):

> I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.
>
> Whether there ought to exist a rule giving effect to the doctrine in one or other and, if so, which of its forms is another question and one

> which, if I had to answer it, I should answer in the affirmative. There seems to me much cogency on the arguments of those who advocate the ipso jure variant of the doctrine.

He then stated the reasons why he believed a doctrine of the continental shelf ought to be the rule. Nonetheless, after noting the progress that was being made in obtaining international recognition of the doctrine by the United Nation's International Law Commission, Lord Asquith added (id. at 257-259):

> These draft Articles have been prayed in aid by the claimants with the implication that they are, or are intended to be the expression of principles which are already part of international law, not merely of principles which ought to, or might with advantage, form part of that law in future. If this is indeed the contention of the claimants, I am of opinion that it is ill-founded. It is clear that the Codifying Commission of the International Law Commission is charged with two distinct functions, (1) that of recording existing rules of international law, and (2) that of indicating what the law should be; promoting as the phrase runs, "the progressive development of international law" by preparing draft conventions on "subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States." It seems to me clear that these Articles were framed in the discharge, not of the first but of the second of these functions. As the Commission in paragraph 6 of its commentary on Article 2 says: "The Commission has not attempted to base on customary law the right of a State to exercise control and jurisdiction for the limited purposes stated in Article 2, and though numerous proclamations have been issued over the past decade it can hardly be said that such unilateral action has already established a new customary law."

Finally, Lord Asquith concluded (id. at 257):

> I therefore cannot accept these Articles as recording, or even purporting to record, established rules: and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939.

International arbitrations such as the Abu Dhabi Arbitration represent international judicial action which are evidence of specific rules of international law. The publicists who have dealt with the development of the continental shelf doctrine have so treated the Abu Dhabi Arbitration. E.g., Whiteman, supra, at 747-750; Kunz "Continental Shelf and International Law: Confusion and Abuse," 50 American Journal of International Law 828-830, 832 (1956). The Supreme Court of Canada in the recent case, previously discussed, involving rights to the resources of the continental shelf cited the Abu Dhabi Arbitration in support of its opinion. Re Offshore Mineral Rights of British Columbia, supra, p. 376; U.S. Ex. 34.

(2) None of the authorities relied upon by Dr. Jessup support his conclusion that customary international law recognized a right to the resources of the seabed beyond territorial waters apart from prescription or occupation. -- When specifically asked which publicists supported his view that customary international law prior to the Truman Proclamation recognized the inherent, exclusive rights of coastal states to the resources of the seabed beyond territorial waters, Dr. Jessup

testified that he relied "very heavily on the reasoning" in an article by Lauterpacht entitled "Sovereignty Over the Seas" in the British Year Book of International Law (Tr. 1173-1174). Apart from the Lauterpacht article, Dr. Jessup indicated he relied only "upon the conclusion of the International Law Commission and on statements in the Judgment of the International Court of Justice in the North Sea Cases * * *[and] the Bering Sea Argument of the United States" (Tr. 1174, 1175). In our view, none of the authorities relied upon by Dr. Jessup supports his position.

(a) Lauterpacht recognised no principle of customary international law prior to the Truman Proclamation which entitled a coastal State to the resources of the seabed beyond territorial waters in the absence of prescription or occupation. -- The ideas and conclusions expressed by Lauterpacht in his 1950 article regarding the international law of the seabed and subsoil upon which Dr. Jessup relied are reflected in Lauterpacht's subsequent edition of Oppenheim's International Law (8th ed., 1955). Since Lauterpacht was the only specifically named publicists relied upon by Dr. Jessup, we shall

examine in detail Lauterpacht's treatment of that area of the law. With respect to "The Surface of the Bed of the Open Sea" Lauterpacht wrote:

> * * * There has been a tendency in the past to assume that the surface of the bed upon which the open sea rests must be likened in legal condition to the waters of the open seas themselves. * * * In fact there exist numerous cases in which States habitually exploit through the activity of their nationals the resources of the surface of the sea-bed. Although it is traditional to base some of these cases on the ground of prescription, it is not inconsistent with principle, and is more in accord with practice, to recognize that, as a matter of law, a State may acquire, for sedentary fisheries and for other purposes, sovereignty and property in the surface of the sea-bed, provided that in so doing it in no way interferes with freedom of navigation and with the breeding of free-swimming fish. This is a case in which the requirement of effectiveness of occupation must be interpreted by reference to the reason of the thing and to the judicial and arbitral pronouncements in which such effectiveness is treated as a matter of degree determined by the nature of the area in question. [Oppenheim, 1 International Law (Lauterpacht ed, 8th ed., 1955), pp. 628-629.]

He also reiterated Oppenheim's position that the resources of the subsoil may also be claimed through effectively occupying the subsoil by tunnelling or other means, referring to Oppenheim's five rules for effective occupation of such areas (id. 629-631). Lauterpacht specifically indicated that this position was the traditional view of the law regarding the seabed and subsoil by noting that the position may have undergone a change since the Truman Proclamation:

> * * * In so far as the right of the State to the continental shelf appurtenant to its territory has come to be recognised by International Law, such right extends both to the subsoil of the sea and to its bed. [Id. at 629.]

Lauterpacht also specifically traced the development of the continental shelf doctrine:

> §287d. Following upon the Proclamation of the President of the United States of September 28, 1945, a number of States have asserted rights to the so-called continental shelf. * * * Similar proclamations were subsequently issued under the responsibility of the United Kingdom by certain States under its protection and by a large number of other States, including Argentina, Chile and Peru. * * *
>
> The reasons which have inspired the conception of the freedom of the sea and which assisted in its development are not, it is asserted, in conflict with the recognition of the rights of the coastal State to exclusive exploitation of the natural resources of the sea-bed and the subsoil of the continental shelf. The direct proximity of the coastal State; the fact that the continental shelf constitutes a natural prolongation of its territory and that the mineral deposits of the shelf and of the mainland may form a common pool; the special interest of the coastal State in the exploitation of the resources of the continental shelf; the circumstance that it is, geographically, in the best position to do so; and its legitimate reluctance to permit other States to establish themselves, for that purpose, in the direct proximity of its coast--all these factors, it is said, substantiate the reasonableness of the claim of the coastal State to these areas. Whatever may be the deductions made by writers from the notion of the freedom of the sea in relation to its sea-bed and subsoil, such deductions cannot, according to some, prevail in relation to the possibilities, revealed by modern science and developments, of exploiting the resources of the bed of the sea and its subsoil. It is, on that view, consonant with the nature of

> things that the conception of effectiveness as a condition of possession or acquisition of title should in this case be applied only in a general and substantially figurative manner--as, indeed, it has been applied in the past to some situations relating to title to territory.
>
> While the geographical notion of the continental shelf--conceived as the submarine areas contiguous to the coast up to a point where the sea is more than two hundred metres deep--may give rise to difficulties, and although it introduces a measure of actual inequality as between various States, it has now become widely accepted and is believed to express accurately the notion of coastal submarine areas as constituting the natural seaward extension of the territory of the State. [Id. at 631-634.]

Implicit in Lauterpacht's analysis is the view that no principle of international law prior to the Truman Proclamation permitted exploitation of seabed resources on a basis other than prescription or occupation. As Professor Henkin testified, the earlier article by Lauterpacht--relied on by Dr. Jessup--took exactly the same position (Tr. 1919-1920). Thus, Lauterpacht does not support Dr. Jessup's conclusions with regard to the international laws governing the natural resources of the seabed and subsoil beyond territorial waters.

(b) The arguments of the United States in the Bering Sea Fur Seal Arbitration do not support Dr. Jessup's position. -- As we have noted, apart from Lauterpacht, Dr. Jessup also relied for his conclusions upon the arguments of the United States in the Bering Sea Fur Seal Arbitration. In the section dealing specifically with United States foreign policy, we showed that the United States argument in the Fur Seal Arbitration did not support the concept of an inherent, exclusive right of the coastal State to the resources of the sea or seabed beyond territorial waters. The argument clearly recognised that some sort of development of the resources or occupation of the seabed was necessary by a nation before other nations would be barred from interfering with the resources (see pp. 213-214, supra). The United States' argument thus does not support Dr. Jessup's position.

(c) The proceedings of the International Law Commission recognised that traditional international law permitted exclusive exploitation of the resources of the seabed beyond territorial waters only on the basis of prescription or occupation. -- The International Law Commission was asked to consider and evaluate international law as it related to the seas and prepare draft conventions on these matters for the consideration of a United Nations Conference to be called on that subject.

The Commission held its first meeting on the subject of the Law of the Sea in 1950. As noted above, Dr. Jessup relied on the deliberations of the Commission.

Although the Commission considered the theoretical question whether the seabed was res nullius or res communis, it was more concerned with the practical matter of recognizing a regime which would permit exploitation of the resources than with a theoretical legal characterization of the status of the area. I Yearbook of the International Law Commission 1950, pp. 214-231. The remarks of the representative of the United States are illustrative of this approach and were summarized as follows:

> 71. Mr. HUDSON said that the matter was one of great importance. He felt that in taking it up the Commission should be guided by a social philosophy. The continental shelf was not only a legal or juridical concept, but was also of economic and social significance. There were means of exploiting submarine resources for the benefit of mankind. The exploitation of such resources was at the moment confined mainly to petroleum, but methods would be found of obtaining other minerals, foodstuffs, etc. Undertakings for the exploitation of submarine resources would therefore increase reapidly in the future. It was said that the mineral oil resources now under exploitation would give out sooner or later. It would therefore be necessary

> to exploit submarine resources; but even if existing resources did not become exhausted, he did not imagine that that would prevent the establishment of concerns for the exploitation of the resources of the high seas. * * *
>
> * * * * *
>
> 73. * * * Consequently fantastic deposits of oil would certainly be discovered in the subsoil of the Persian Gulf. He felt that lawyers had no right to prevent the exploitation of those resources for the benefit of mankind. The Commission should bear social considerations in mind when examining the question of the continental shelf. It should consider in what way it could adapt the rules of international law to the requirements of humanity. [Emphasis added; id. at 214, paras. 71, 73.]

Mr. Francois, the Commission's Rapporteur on the Law of the Sea, agreed with Mr. Hudson. His statements were summarized as follows:

> Mr. FRANCOIS expressed his agreement with Mr. Hudson's ideas. As to the way in which the Commission could deal with the question, he thought the best thing would be to have a general discussion during which the different points of view could be expressed. * * * As to the point raised by Mr. Amado, he agreed that the question of the continental shelf was comparatively recent; but a large number of proclamations by States already existed, which constituted a starting point for the formulation of positive law. The Commission, whose duty it was not only to codify the

> existing rules of international law, but also to study the progressive development of that law, would do well to press on with its work, so as not to be overtaken by events. It should not wait until a multitude of regulations had given international law an orientation incompatible with the interests of mankind. It was more difficult to amend a law that had already been established by States, than to guide it into the desired channel by the enunciation of certain rules or principles. The Commission should not be too timid but should set forth the principles that, in its opinion, were in the interests of humanity. [Id. at 215, para. 78.]

Throughout these early discussions, the members of the Commission viewed their work with respect to the continental shelf to be more a matter of progressively developing international law than merely codifying customary international law. As one member stated; the Commission "was confronted with what was perhaps an entirely new conception of international law and was dealing with a phenomenon which might be classed among the great events in the history of international law" (id. at 216, para. 1; cf. 215, para. 81b; 217, para. 1; 220, para. 32; 230, para. 44; 230, para. 51).

Thus, the International Law Commission recognized the importance of establishing a new regime that would permit the orderly exploitation of continental shelf resources without

otherwise infringing upon the other more important traditional freedoms of the sea, navigation and fishing. Since res communis characterizations and res nullius/of the seabed and subsoil were incompatible with that goal, those characterizations were rejected as unsuitable for the new regime. As the summary of the comments of the Representative of Great Britain, Professor Brierly, indicates:

> There were three possibilities for that area of control: it might be argued that it was res nullius. That must be counted out as being incompatible with the principle adopted the previous day. If the shelf were res nullius, it could be acquired by any State, whether littoral or not; and that was inadmissible. It could be argued again that it was res communis; but that too was incompatible with the previous day's decision. Res communis was common property, and the continental shelf in that case could not be subject to the control and jurisdiction of any particular State. It would be better to say that the continental shelf belonged ipso jure to the littoral State. Whether the littoral State had sovereign rights over the continental shelf hardly mattered, though he was inclined to think that control and jurisdiction, which were exclusive, amounted to sovereignty and could be so described. If this right belonged ipso jure to the littoral State, there was no necessity for the latter to make any claim or annexation. Such a proclamation or annexation might of course serve to indicate that a state had begun to work its zone of control, but legally it was not necessary. [Id. at 227, para. 8a, 228, para. 18.]

Contrary to Dr. Jessup's testimony, therefore, the International Law Commission like every other authority which considered the Truman Proclamation, believed that the doctrine asserted in that document and the ensuing Convention on the Continental Shelf was a departure from the principles of international law which governed the seabed and subsoil beyond territorial waters prior to 1945. (Cf. Gutterridge, Regime of the Continental Shelf, 44 Grotius Society 89). Indeed, the nature of this departure was explicitly brought to the attention of the 1958 United Nations Conference on the Law of the Sea which acted upon the draft articles on the continental shelf prepared by the International Law Commission. The record of the Conference discloses:

> After commenting on various phases of the International Law Commission (ILC) Draft Articles on the Continental Shelf, the U.S. representative took the opportunity to point out that
>
> Of all the subjects included within the scope of the seventy-three articles of the draft prepared by the International Law Commission, none--as a group--treat of more recent concepts than those pertaining to the continental shelf. Prior to very recent years, the legal status of the continental shelf, outside the recognized territorial seas was, in considerable measure, undefined. But the progress of events now requires an expansion of international law in this area.

> Much of the work of Committee IV lies in the realm of the "progressive development of international law," envisaged in Article 13(a) of the Charter of the United Nations, and in Article 15 of the Statute of the International Law Commission. At the same time consideration must be given to such international law as may now exist in connection with the subject matter to be dealt with, as for example existing international law with respect to the freedom of the seas. [Whiteman, Conference on the Law of the Seas: Convention on the Continental Shelf, 52 American Journal of International Law 632.]

(d) The opinions of the International Court of Justice in the North Seas Cases recognized that prior to the Truman Proclamation coastal States could acquire rights to the resources of the seabed beyond territorial waters only by prescription or occupation. -- As we have previously noted, Dr. Jessup testified that he relied upon the judgment of the International Court of Justice in the North Sea Cases for his conclusion that the inherent, exclusive rights of a state to exploit the resources of the seabed beyond territorial waters was recognized under international law prior to the Truman Proclamation. In Dr. Jessup's view, the judges who joined in the judgment were "top flight international lawyers" (Tr. 1175). As we will show, however, those justices viewed the continental shelf doctrine as a change from the traditional, pre-Truman

Proclamation, position under international law that exclusive rights to the resources of the seabed beyond territorial waters could be obtained only through prescription or occupation.

As Dr. Jessup testified, the issue in North Seas Cases was which principles of international law govern the delimitation of the lateral boundaries of the continental shelves of adjacent States. The Netherlands and Denmark sought to impose on Germany the rules provided under Article 6 of the Continental Shelf Convention of 1958 on the ground that those rules had obtained the status of customary international law. Germany asserted that the Convention rules were only binding on the parties to the Convention, and Germany was not a party. The Court ultimately agreed with Germany and held that Article 6 of the Convention was not binding upon Germany as customary international law.

In its judgment, the International Court cautioned that "in the pronouncements the Court makes on these matters, it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such." North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, page 37, par. 60. Nonetheless, in arriving at its

conclusion with respect to the delimitation of the continental shelves of adjacent states, the Court necessarily commented on the origin and development of the more general underlying doctrine. The Court at a number of places, for example, characterizes the first three Articles of the Convention, which described the nature and scope of the rights of the coastal state in the shelf, as "reflecting or crystallizing received or at least emergent rules of customary international law relative to the Continental Shelf" (p. 39. par. 63).

If, as Dr. Jessup suggested, customary international law from the 17th and 18th centuries onward had recognized the nature and scope of the coastal States' exclusive rights to the shelf, the Court would not have described such rights as "emergent." On the other hand, if states had only begun to assert such rights in the previous decade or so, it would be reasonable to describe them as "received or at least emergent." In our view, when the Court spoke of "received or at least emergent rules of customary international law" it had in mind rules which evolved from a state practice that began essentially with the Truman Proclamation and which very quickly received wide acceptance in the approximately 20 years between the

Proclamation and the coming into force of the Continental Shelf Convention in 1964. Thus, in reference to a review of the genesis and development of the method of shelf delimitation found in the Convention the Court stated:

> * * * Such a review may appropriately start with the instrument, generally known as the "Truman Proclamation", issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. [pp. 32-33, par. 47.]

Moreover, in examining the status of delimitation provisions of the Convention as customary international law, the Court specifically declared:

> 96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. [Id. at p. 51.]

This statement, in our view, shows unequivocally that the continental shelf doctrine was recognized by the Court to be a departure from previous law. Finally, at the end of its opinion, the Court stated with unmistakable clarity:

> 100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal regime of the continental shelf, have been examined for that purpose only. This regime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to oversystematize a pragmatic construct the developments of which have occurred within a relatively short space of time. [Id. at p. 53.]

Our position that the majority opinion of the Court recognized the continental shelf doctrine as a recent departure from traditional international law regarding the rights of the coastal States to the resources of the seabed beyond territorial waters is also supported by the separate opinions of the members of the Court who joined in the majority opinion. Justice

Bustamante Y Rivero, President of the Court, referred to the doctrine of the continental shelf as "a new institution" in the following passage in his opinion (id. at p. 58):

> 2. The reasoning I have followed in drawing up the present opinion was the following: although the institution of the continental shelf is a new institution, it is the fact that its application has now become very widespread. Numerous States, in all continents, have adopted its fundamental principles into their legislation and constantly apply them. In this sense, it is not going too far to say that the regime of the continental shelf has today a concrete existence and a growing vitality.

Justice Rivero described the origin of this "new institution" as the state practice and writings of publicists on the subject which began with the Truman Proclamation

> Since the governmental proclamations which lay at its origin (about 25 in number) have but rarely been challenged, but have, on the contrary, set a trend in motion, they have thereby acquired the character of relevant factors from the point of view of International law. While it is true that some proclamations formed the subject of reservations on the part of certain other States, those reservations arose from the fact that the rights proclaimed over the continental shelf gave to this concept an ambit which the objecting States considered excessive; it must consequently be concluded therefrom that the expression of

> such reservations merely constitutes further evidence of the effective nature of the institution from that time on. The writings of publicists have firmly supported the concept of the continental shelf and have recognized as legitimate its legal foundation, namely: the utilization of the natural resources of the seabed and subsoil for the benefit of the neighbouring peoples and of mankind in general. In several bilateral agreements, States have subsequently confirmed the system by adopting it for their mutual relations. Finally, the Geneva Conference tried to systematize the principles of the new institution in the 1958 Convention on the Continental Shelf and sought to define the methods by which they can be applied. [Id. at p. 58.]

Justice Padilla Nervo, in his separate concurring opinion, specifically refers to the "new concept of the continental shelf expressed in the Truman Proclamation and in subsequent governmental proclamations" (id at p. 95; cf. pp. 87-88). Referring to the 1958 Geneva Conference on the Law of the Sea, he stated that the continental shelf was considered a "new subject of international law" (id. at p. 88).

Justice Amroun, in his separate concurring opinion, also viewed the doctrine as having evolved under international law only since the Truman Proclamation (p. 103). He stated (id. at p. 105-106):

6. Not so long ago, an eminent jurist could still write that the proclamations of States do not constitute more than a recital of facts in which it is difficult to "trace an ethic widely accepted as constituting law, that is to say, embodying a concept of general interest or of equity". He saw therein rather the contrary, discerning, of course, "in the background, pretexts or anxieties as to the needs of humanity", but considering as by far the most dominant "a concern for individual interests and, at the most, for national interest, which in the law of nations is no more than an individual interests".

The representatives of certain countries echoed this doctrinal point of view at the Geneva Conference on the Law of the Sea in 1958.

And in fact, up to the eve of that Conference, it could be claimed that the doctrine of the continental shelf was still no more than a custom in the process of formation.

Today it must be admitted that these encroachments on the high seas, these derogations from the freedom thereof, beginning with the Truman Proclamation of 28 September 1945, are the expression of new needs of humanity. From this it may be deduced that just as reasons of an economic nature concerning navigation and fishing justified the freedom of the high seas, reasons of the same nature which are no less imperative, concerning the production of new resources with a rich future, and their conservation and their equitable division between nations, may henceforward justify the limitation of that freedom. Thus the American Proclamation, which deliberately cut the Gordian knot of the question whether the immense resources discovered under the high seas would remain, on the model of the high seas themselves, at the disposal of the international community, or would

> become the property of the coastal States, set the fashion, and was followed by a series of similar documents and by the support of legal writers, culminating in the Geneva Convention of 29 April 1958 on the Continental Shelf. The proposal of the Federal Republic of Germany for the exploitation of submarine riches for the benefit of the international community, which adopted an idea of P. Fauchille, received no support at the Conference, a number of countries being anxious to reserve their rights over the continental shelf or the epicontinental platform prolonging their coasts, and certain of them fearing in addition the enterprises of the industrialised nations, which were better equipped for a de facto monopoly of this exploitation.
>
> This aggregate body of elements, including the legal positions taken up by the representatives of the majority of the countries at the Geneva Conference, even by those who expressed reservations, amounts here and now to a general consensus consensus constituting an international custom sanctioning the concept of the continental shelf, which permits the Parties to lay claim to delimitation between them of the areas of the North Sea continental shelf appertaining to them, for the exercise of exclusive rights of exploration and exploitation of the natural resources secreted in the bed and subsoil of the sea.

Elsewhere in his lengthy opinion, Justice Ammoun specifically characterized Articles 1 and 2 of the Continental Shelf Convention, which describe the nature and scope of the coastal States' rights, as a result of progressive development of the law rather than merely as declaratory of the law (id. at pp. 123-124):

As has been seen, Articles 1 and 2 of the said Convention, which establish the institution of the continental shelf, were not the result of a codification of the international law in force, forming part of the lex lata, but the effect of the progressive development of the law, de lege ferenda, referred to in Article 13 of the Charter of the United Nations and Article 15 of the Statute of the International Law Commission. The case of the provisions of Article 6, paragraph 2, could not be different, inasmuch as they apply the principle laid down in Articles 1 and 2.

Has this progressive development of the law reached the stage, in respect of what is stated in paragraph 2 of Article 6, of settled custom, since the adoption of the equidistance method by the International Law Commission in 1953, and subsequently by the Geneva Conference in 1958, in both cases by a very large majority?

Admittedly, the notion of the continental shelf itself, which made its first appearance in State practice in 1945, took only a dozen years to become a universally recognized custom. The voices of authoritative writers and jurists of all kinds, at international conferences, were unable to stem the current of legal thinking resulting from unprecedented scientific progress and the rapid development of the economic and social life of the nations. That is to say that this recent rule of the law of the sea, under the pressure of powerful motives and thanks to State practice and the effect of international conventions, was within a short time converted into a customary law meeting the pressing needs of modern life.

In short, the Justices of the International Court of Justice recognized that the continental shelf doctrine was a recent development in international law having its roots in the Truman Proclamation.

(3) State practice prior to the Truman Proclamation recognized exclusive rights to the resources of the seabed beyond territorial waters only upon the basis of prescription or occupation. -- The States' witnesses have not cited a single example prior to the Truman Proclamation of state practice recognizing an inherent, exclusive right of a coastal State to resources beyond its territorial water. To the contrary, all the evidence referred to by Dr. Jessup is inconsistent with the existence of any such principle of customary international law. The instances of control of sedentary fisheries beyond territorial waters, for example, were based upon claims of historic prescription, effective occupation or on sovereignty over the seas in which those resources are found.

The evidence presented by Dr. Jessup routinely stressed the historic nature of the rights claimed. Thus, after acknowledging that "British claims to the pearl fisheries on Ceylon were bolstered in the 20th century by assertions of a prescriptive rights and by arguing that their locations in Palk's Bay

or the Gulf of Manaar placed them in so called territorial bays" (Tr. 575-576), Dr. Jessup stated:

> The earliest conflicts were over the adjacent lands, wrested, for example, by the Dutch from the Portuguese, and not over the pearl beds and banks themselves which had been claimed also by the native kings and princes of Ceylon and India. [Tr. 578.]

Later, in referring to these fisheries, Dr. Jessup testified that "these pearl fisheries (near Ceylon) had been worked from time immemorial" and that "those in the Red Sea have been exploited since centuries before the Christian era" (Tr. 584). There are numerous other examples in Dr. Jessup's testimony of state practice recognizing that rights to seabed resources can be acquired by occupation or prescription (Tr. 566-614). In discussing the writings of one mid-18th century authority, Dr. Jessup testified (Tr. 611): "Vattel . . . admits that nations may acquire a right of property in such fructus founded on long continued exclusive enjoyment."

There would be no need to justify the acquisition of rights to sedentary fisheries on long continued usage if coastal states inherently possessed them. As Professor Henkin pointed out (Tr. 1919), even Dr. Jessup recognized that claims

to sedentary fisheries were justified on the basis of prescription or occupation, never on any inherent, exclusive right. E.g. Jessup, supra, pp. 13-16, 34-36. And, as we have previously noted, examples of tunnelling from shore have always been recognized by authorities on international law as constituting an effective occupation of the subsoil of the high seas.

The only example of claim to an inherent exclusive right to seabed resources specifically cited by Dr. Jessup was the position taken for the United States by Mr. Carter in the Fur Seal Arbitration. As we have previously shown, however, the argument of the United States did not recognize an inherent, exclusive right to seabed resources but assumed that some kind of affirmative action or occupation by the coastal state is necessary to establish a claim to the resources. In any event, the Fur Seal Arbitration represents a 19th century claim by a coastal state to control the exploitation of resources beyond territorial waters which was not respected by other nations and was rejected by an international tribunal as inconsistent with international law (see pp. 213-214, supra, Tr. 625).

CONCLUSION

For the foregoing reasons the Special Master should find that the United States is entitled as against the defendant States to the natural resources of the sea-bed underlying the Atlantic Ocean beyond 3 geographic miles from the coastline.

Respectfully submitted.

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JUNE 1979