

FOREWORD

Law of the Sea Needs for the 1970's

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These are exciting times for an ocean lawyer, for the Law of the Sea is in a period of reconstitution; simultaneously, the arena for remaking ocean law also could become the amphitheatre for constitutive changes in our international system—or, as is predicted by a coterie of doomsayers, just another ring of an antediluvian circus. Looked at in this light, the following *Law of the Seas Symposium* can be judged, either by the degree to which its authors follow the “Rules of Play” for this constitutive period, or by the extent to which they meet the need for new debates before the next United Nations Conference on the Law of the Sea, presently scheduled for 1973.

NEEDS FOR “REALITY PRINCIPLES”

During the 1970's, there will be a critical need to be drawn back as often as necessary to what the politician calls “the Big Picture” and the teacher would call “the Global Context”. The articles

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which follow spell out the way in which detailed areas must fit into that picture. Through them run these common facts, or "Reality Principles", which lie behind remolding of the Laws of the Sea:

POINT ONE: *Most nations are "have nots", predicted to see ever-vaster gaps with the "haves"; in this context, "have nations" are expected to take steps to offset this trend during the formulation of new international practices and rules. This is embodied, for instance, in the General Assembly's requirement that any new deep seas regime be grounded on "equitable sharing," as H. Gary Knight explains in The Draft United Nations Convention on the International Seabed Area below. Professor Knight then comprehensively analyzes the draft tabled by the United States for Seabed Committee discussion. Both the physical problems in drawing seaward lines for future regimes, and the knotty representational problems for any new seabed body which he describes, therefore, must be debated in terms of how they do something toward changing the nature of this spreading gap in resources—not whether the resources on the seabed in particular are huge or small.*

POINT TWO:—*Thus, proposals by any "have" nations of rules which specially favor them because of their advanced technology will (a) have a low likelihood of adoption, and (b) tend to isolate their proponents from the mainstream of developing international law. The article by "Peggy" Gerstle, Senator Pell's assistant, on the political—as distinct here from the legal—background of the United States proposal discloses the degree to which this reality underlay the final draft regime. Frank Newton, in his article on "Seabed Resources", also paints with a broad brush to put the debate into its historical framework as an arena of adolescent growing pangs for international law. As he sees it, the last decade's problems accelerated, first, the need for reshaping or refining the Law of the Sea, and second, the need to come to grips with the question of how much authority regarding activities in the ocean may be required for United Nations organs to fulfill what they are expected to accomplish there.*

The costs of isolation, especially in terms of reduced maneuverability for our own survival, are far too great for this point to remain an open question. The real issue, then, for those who fear vaguely defined and unrestricted control by new bodies to deal with pollution or seabed resources, is: "How do we so tailor the annexes to any treaty so as to spell out safeguards which delegates want to 'see in advance'?" rather than whether to balk at unforeseeable bugaboos.

POINT THREE:—*Nations shall likewise have to come to grips with widespread concern that rules proposed on one side or an-*

other's alleged "security" motives may put other states into a possibly intolerable jeopardy. This is reflected in Clark M. Eichelberger's article below in which he shows how the full panoply of Law of the Sea subjects, in which peaceful use is but one, eventually came to be put on the agenda for 1973. His discussion should be read together with his earlier article on *The United Nations and the Bed of the Sea* in 6 SAN DIEGO L. REV. 339 (1969) which recalled, *inter alia*, the eighth principle proposed by the Commission to Study the Organization of the Peace, that "the seabed, and subsoil thereof, should be used for peaceful purposes only."

While the visible arms control issues will be shifted to the Disarmament Committee, "subliminal" concerns will underlie delegates' positions on questions like the width of the territorial sea, the seabed regime, passage through straits or freedom of scientific inquiry. Only dialogue which speaks to these concerns, it is submitted, will be able to meet this felt, but unvoiced, need within the delegate community.

POINT FOUR:—*Each coastal populace expects its government to protect any livelihoods which depend on fish and shellfish harvests or on recreational uses of beaches and nearshore waters.* This was one of the acknowledged-but-skirted facts of the 1958 conference which will be high on the agenda in the 1970's. The much discussed problems of Latin American fishery rights are dramatically contrasted by Edward J. Oliver's survey of United States practices in exercising *National Rights to Offshore Fishing*, which discussed the "Wet War" in the North Pacific. Captain Oliver notes in particular the absence of harmful side-effects on foreign relations when a coastal state's enforcement of fisheries rules comply with either (a) a system of abstention upon which nations can agree for mutual advantage, or (b) an acceptable fisheries zone.

This article should be read with the superlative fisheries discussions at 7 SAN DIEGO L. REV. 371 (1970) by Milner B. Schaefer, Wilbert M. Chapman, Francis T. Christy, Jr., Victor L. Arnold and Daniel W. Bromley.

In a way, this same "Reality Principle" lies behind two other seemingly unrelated articles in the Symposium. Norman Wulf has tackled the problem of *Freezing the Boundary Dividing Federal and State Interests in Offshore Submerged Lands*. Here, the political

subdivision's higher concern for injuries to its coastal beaches, waters, lobsters and fishermen mirrors the coastal nation's claim to overriding needs for safeguards vis-à-vis the world community.¹ In a similar way, even so urbane an area as the need for greater flexibility in shipping custom, apparent from Dr. F.J.J. Cadwalader's article titled *An Englishman's Safe Port*, will have to incorporate some awareness of the livelihoods affected by any proposed change—or by any failure to make that change.

NEEDS FOR NEW LEGAL MATERIALS IN ENGLISH

The *Symposium* can also be seen in terms of its place in the new sources of English language debate so sorely needed to prepare for international decisions in the 1970's. Several developments could aid in avoiding the unpreparedness which might have attended the 1958 conference but for the work of the International Law Commission before hand. First, there was the creation in 1965 of a series of annual meetings known as the Law of the Sea Institute, held in Kingston, Rhode Island. The *Proceedings* each year, from 1966 on, have been the principal English language source for comments on the developing Law of the Sea since the ILC's 1956 study and the Geneva Conference volumes and secretariat studies in 1958 and 1960 which resulted in the four main world treaties on the High Seas, the Territorial Sea and the Contiguous Zones, the Continental Shelf and the Living Resources of the Sea. The volume out this February, for example, carried, under the rubric of "The United Nations and Ocean Management", analyses of 1) General Assembly and Seabed Committee activities, 2) international fisheries, 3) seabed exploitation machinery, 4) the Intergovernmental Oceanographic Commission, 5) roles of the World Meteorological Organization and the Intergovernmental Maritime Consultative Organization in environmental monitoring, 6) North Sea and European Community management of fisheries, oil and gas exploration and transport, 7) the Canadian Arctic Waters Pollution Prevention Bill, 8) Latin American 200-mile claims, and 9) Soviet Maritime Laws. Regretably omitted is the business report on other LSI activities which include its Occasional Paper series and its Annotated Bibliography Loose-leaf Service under the title "Marine Policy, Law, and Economics" which began with 186 entries by Ann L. Hollick of Johns Hopkins, supplemented by the earlier listing of sources in Professor Albert

1. This parallel between federal-state solutions and possible international ones was expanded upon by the writer in *State Jurisdiction over Oil Spills in a Federal System*, 1971 CONFERENCE ON PREVENTION AND CONTROL OF OIL SPILLS.

Koers's "The Debate on the Legal Regime for the Exploration and Exploitation of Ocean Resources: A Bibliography for the First Decade, 1960-1970" of over 800 entries.

Periodic journals in English just did not exist, except for the odd symposium issue, until the *San Diego Law Review* undertook to start an annual symposium series on the Law of the Seas with its July 1969 issue. That issue provided articles on the U.N. Seabed Debate, how coastal zone decisions leave future uses out of the decision-making process, the result of unifying admiralty and civil procedure rules, and the December 1968 Soviet Maritime Code, all of which were then on the frontier of oceans law. The July 1970 issue followed up with some of the best treatments available of international fisheries, deep sea mining, denuclearization of the ocean floor, and oil spills, with the first student notes on international pollution and access to the beach to appear in print. The current *Symposium* continues this "advanced guard" tradition.

The first journal exclusively on oceans law in English was launched by the Jefferson Law Book Company in Silver Spring, Maryland in 1969 as the *Journal of Maritime Law and Commerce*, a quarterly with lead articles, shorter articles and comments, documents, admiralty case reports and book reviews. At about the same time, the American Society of International Law's *International Legal Materials* volumes began to include a significant proportion of oceans law documents not readily available elsewhere in many instances.

A final note: a distinctly oceans-oriented publisher, the Nautilus Press, was started in the National Press Building in Washington, D.C. 20004. In its *Nautilus Paper Series*, for example, are treatments of the *Northwest Passage* and, more recently, *The Northeast Passage*, as well as scheduled books in 1971 on Federal and Seacoast State Laws affecting Offshore Mining, and coastal zone management.

In this list of publication events, the large contribution of the *San Diego Law Review* stands out, for it was the only one which was both student-inspired and student-run, both at an exemplary level of personal and professional competence in this writer's experience. Were this to have happened at a Harvard or Yale, one would have been highly commendatory; when a newer school provides such

high levels of talent, there are no adequate words of commendation for the three years of editors who brought out these symposia.

THE LAW OF THE SEA CONFERENCE NUMBERS GAME

With over 130 potential members of the next Conference (or even, in theory, 156), a two-thirds vote could require a consensus of at least 84 governments for any new rule. Even a simple majority could require 66 states to agree. Compare this with the situation in 1958 when 55 states could have had to agree if no one abstained, although rules were in fact carried by from 43 to 78 yeas votes.

A few Seabed delegates say the numbers are now too high for the next Conference to agree on anything of substance. The 1958 experience just does not back them up, for roughly two out of every three substantive measures put to the vote were adopted during over 145 recorded votes. Indeed, over half of these were adopted with not a single negative vote cast; that is, a typical vote was "65 for, 0 against, 1 abstaining."

The longer answer may lie in the development of two consistent alignments, somewhat analogous to the two-party lineups which have made the British House of Commons workable with 630 members and our House of Representatives with 435. U Thant warned of one possible division between the "haves" of the North and the "have-nots" of the South. The writer suggests a far different breakdown is observable already, namely, that between delegations which see the reconstitutive nature of the 1970's attempts to redefine oceans law, and those which do not. The significance of that division is this: the non-constitutive viewers have far less at stake in the Conference; the constitutive states, on the other hand, cannot let the next Law of the Sea Conference fail. Their stake, at the very minimum, lies in securing 1) the community regime intended to implement perceived "common heritage" rights, and 2) revised rules which reflect the real-world global context outlined above.

Both on their face and in their drafting history, for example, the unusually statesmanlike compromises of the Nixon Draft cast the United States firmly in the constitutive camp, while some developing states have taken preliminary stances which seem closer to the non-constitutive camp. There is some danger, of course, that idealized "pronouncements" at the general principles stage will be mistaken for declared intentions to form a workable consensus in 1973 or at any postponed date. There is a far greater danger, however, that soberly-taken steps to make that Conference succeed in reconstitutive terms will be misconstrued . . . and the feasible chance for that consensus thus thrown away.