

# San Diego Law Review

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Volume 15  
Issue 3 *Law of the Sea X*

Article 3

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4-1-1978

## Introduction

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### Recommended Citation

H. G. Knight, *Introduction*, 15 SAN DIEGO L. REV. 365 (1978).  
Available at: <https://digital.sandiego.edu/sdlr/vol15/iss3/3>

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# Introduction

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The editors, faculty advisers, and patrons of the *San Diego Law Review* are to be congratulated on this decennial issue in its "Law of the Sea" (LOS) series. Though considerably short of the Nation's bicentennial just ended, the past ten years have seen an enormous growth of interest in law of the sea—more issues have been raised, more proposals made, more claims asserted during this period than in all the previous history of the subject.

The Articles and Comments in the ten LOS issues of the *Review* have tracked the emergence of new issues, have analyzed those issues in light of technical, economic, political, social, and legal factors, and have reviewed the national and international policy options available to the participants in the law of the sea debates.

The series has contained Articles covering the entire range of topics involved in the Third United Nations Conference on the Law of the Sea (UNCLOS III) and ancillary negotiations—fisheries, continental shelf, pollution, deep seabed mining, maritime boundaries, military use of the sea, policy processes, artificial islands, the exclusive economic zone, navigation in territorial waters and straits, dispute settlement, technology transfer, landlocked nations, and so on. But perhaps on no single issue has the series so faithfully recorded the emergence and development of concepts as with regard to the regime to govern deep seabed mining.

I therefore thought it appropriate in this decennial *Introduction* to reflect for a moment on the coverage of the seabed question in the nine previous issues and to note how the various Articles and

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Comments provide a chronicle of the seabed saga. In LOS I (1969), the lead Article by Clark Eichelberger,<sup>1</sup> then Executive Director of the Commission to Study the Organization of Peace (CSOP), outlined the nature of the seabed issue which had emerged just two years earlier through President Johnson's remarks at the christening of the *R. V. Oceanographer*<sup>2</sup> and Arvid Pardo's legendary statement to the United Nations General Assembly.<sup>3</sup> Eichelberger's short Article concluded with an iteration of principles for a seabed regime proposed by the CSOP that same year. Although LOS I contained no other Article or Comment on the seabed question, the problem had nonetheless been presented accurately in the light of the idealism and hope that abounded in the early years of the law of the sea negotiations.

By the time of LOS II (1970), things were warming up a bit. The Stratton Commission had presented a range of alternatives for seabed mining, and John Mero wrote *A Legal Regime for Deep Sea Mining*<sup>4</sup> in which he supported a simple registry system for governing mining activities. The United States Government opted for a different alternative, however—a comprehensive international seabed agency.

The 1970 United States draft seabed treaty was described in a far too lengthy Article by me in LOS III (1971).<sup>5</sup> Befitting the growing attention being given to the seabed issue, two other Articles on the question appeared in LOS III, one by Frank Newton,<sup>6</sup> and the other by Margaret Gerstle.<sup>7</sup>

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1. Eichelberger, *The United Nations and the Bed of the Sea*, 6 SAN DIEGO L. REV. 339 (1969).

2. Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are and remain, the legacy of all human beings.

Remarks of the President, Commissioning of the new research ship, the *Oceanographer*, Navy Yard Pier 2, Jul. 13, 1966, reprinted in Eichelberger, *The United Nations and the Bed of the Sea*, 6 SAN DIEGO L. REV. 339, 340 (1969).

3. Dr. Pardo proposed examination "of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests [of mankind]." U.N. Doc. A/6695 (1967).

4. Mero, *A Legal Regime for Deep Sea Mining*, 7 SAN DIEGO L. REV. 488 (1970).

5. Knight, *The Draft United Nations Conventions on the International Seabed Area: Background, Description, and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 459 (1971).

6. Newton, *Seabed Resources: The Problems of Adolescence*, 8 SAN DIEGO L. REV. 551 (1971).

7. Gerstle, *The UN and the Law of the Sea: Prospects for the United States Seabeds Treaty*, 8 SAN DIEGO L. REV. 573 (1971).

LOS IV (1972) marked the high point of coverage (four Articles) and the emergence of a new facet of the seabed problem with the publication of Francis Auburn's *The Deep Seabed Hard Mineral Resources Bill*.<sup>8</sup> Critics of the approach of the United Nations to the seabed question were now seeking unilateral legislation to create a favorable climate for the exploitation of deep seabed mineral resources. But the volume also contained Articles by Stephen Gorove<sup>9</sup> on the "common heritage of mankind" concept, by David Stang<sup>10</sup> on the details of negotiations at the United Nations Seabed Committee and by Louis Sohn<sup>11</sup> on details of a possible "council" for an international seabed agency. The issues were now being drawn more sharply, and the *Review's* Articles reflected these questions: Should deep seabed mining be regulated internationally or nationally? What does "common heritage" really mean? Who will have real power in an international seabed agency? What is the Group of 77 really after in these negotiations?

Answers, unfortunately, were not forthcoming; but the debate continued, and in LOS V (1973) two complementary pieces appeared on the subject of the proposed United States deep seabed mining legislation. The first, by John Laylin,<sup>12</sup> was a "pro" piece explaining the merits of the proposed bill. The second, by me,<sup>13</sup> was a "con" piece, arguing that the Congress should defer enactment of the bill until UNCLOS III had an opportunity to make an international solution feasible. As most readers know, I subsequently came to the conclusion that UNCLOS III did not offer any real hope of a timely international agreement and thus joined Mr. Laylin and others in supporting that legislation.

LOS VI (1974) gave us a respite on the seabed question per se. Nonetheless, the Articles appearing in that volume dealt with several important disciplines and topics having an effect on the seabed ques-

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8. Auburn, *The Deep Seabed Hard Mineral Resources Bill*, 9 SAN DIEGO L. REV. 491 (1972).

9. Gorove, *The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation?*, 9 SAN DIEGO L. REV. 390 (1972).

10. Stang, *The Donnybrook Fair of the Oceans*, 9 SAN DIEGO L. REV. 569 (1972).

11. Sohn, *The Council of an International Sea-Bed Authority*, 9 SAN DIEGO L. REV. 404 (1972).

12. Laylin, *The Law to Govern Deepsea Mining Until Superseded by International Agreement*, 10 SAN DIEGO L. REV. 433 (1973).

13. Knight, *The Deep Seabed Hard Mineral Resources Act—A Negative View*, 10 SAN DIEGO L. REV. 446 (1973).

tion—economics, the politics of the negotiations, the economic zone, and the plight of landlocked States. By this time, of course, the first session of UNCLOS III was underway in Caracas; and, ultimately, following the Geneva session in 1975, the Conference would produce a negotiating text on the seabed question (as well as other issues). LOS VII (1975) also carried no Articles on the specific subject of the seabed question. It was almost as if the 1974-1975 volumes represented a time for mulling over the issues which had been raised during the 1967-1973 period—an incubation period for the emergence of radically new approaches to the seabed issue.

LOS VIII (1976) carried an analysis of the Single Negotiating Text (SNT) provisions on the international seabed regime by A. V. Lowe.<sup>14</sup> The SNT had now become the focus for negotiations, though it was not yet obvious to all what the real underlying values were for the underdeveloped nations. It was clear, however, that the major obstacle to reaching international agreement on law of the sea issues would be the seabed question. As Carlyle Maw observed in his *Foreword* to LOS VIII: "Time may be running out. If the Conference is to succeed, nations must decide now that the time has arrived to compromise and to conclude the negotiations."<sup>15</sup> Unfortunately, this compromise was not to be forthcoming. The reason became clear in LOS IX (1977) in an Article by Elisabeth Mann Borgese entitled *The New International Economic Order and the Law of the Sea*.<sup>16</sup> The cat was finally out of the bag! The criticisms of national policy began in LOS IX, too, with Jack Barkenbus' *Seabed Negotiations: The Failure of United States Policy*.<sup>17</sup>

And so we arrive at LOS X, the 1978 issue. Looking back over the first nine issues, one can see clearly the development of the seabed issue, culminating in the revelation that all along it had been simply one facet of a larger quest by the underdeveloped nations for an economic reformation. But parallel with this conceptual approach, the delegates and scholars continued their meticulous appraisal of the current proposals and negotiating texts. LOS X reflects this dichotomy with two Articles on the seabed question. The first, by Elisabeth Mann Borgese, is entitled *A Constitution for the Oceans: Comments and Suggestions Regarding Part XI of the Informal*

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14. Lowe, *The International Seabed and the Single Negotiating Text*, 13 SAN DIEGO L. REV. 489 (1976).

15. Maw, *Foreword*, 13 SAN DIEGO L. REV. 483, 488 (1976).

16. Borgese, *The New International Economic Order and the Law of the Sea*, 14 SAN DIEGO L. REV. 584 (1977).

17. Barkenbus, *Seabed Negotiations: The Failure of United States Policy*, 14 SAN DIEGO L. REV. 623 (1977).

*Composite Negotiating Text*.<sup>18</sup> In it, the author critically examines in great detail the latest version of the negotiating text produced by UNCLOS III and continues the trend she began last year by indicating the relationship between law of the sea and the efforts of underdeveloped nations to restructure the world political and economic system.<sup>19</sup>

It cannot be stressed enough that the adoption of [the common heritage] principle by the General Assembly as a norm of international law marked the beginning of a revolution in international relations. It has the potential to transform the relationship between poor and rich countries. It must and it will become the basis of the new international economic order, of which the Law of the Sea Convention, whether one likes it or not, is both a forerunner and an essential part.<sup>20</sup>

That excerpt alone is meat enough for a three-day symposium, but the author continues with an exceptionally acute critique of the present draft. Whether one agrees or disagrees with Borgese's analysis, this Article is sure to take its place as one of the more important written on the seabed question in the LOS series.

The other seabed Article, by Frank La Que, is entitled *Different Approaches to International Regulation of Exploitation of Deep-Ocean Ferromanganese Nodules*.<sup>21</sup> In the author's own words, the piece examines "the advantages or disadvantages, real or perceived, of several approaches as they might be viewed by developing nations in terms of what they think they need."<sup>22</sup> Five different approaches are briefly described, following which Mr. La Que analyzes first the advantages (real or perceived) and second, the disadvantages (real or perceived) of each approach. Further analysis is given on the effects of the approaches on the economies of developing countries, on the transfer of technology, on the location of land-based processing plants, on the control of distribution of refined metals, and on capital costs of holding ocean metals from market to protect prices. La Que's Article, like that of Borgese, is certain to be considered a very useful

18. Borgese, *A Constitution for the Oceans: Comments and Suggestions Regarding Part XI of the Informal Composite Negotiating Text*, 15 SAN DIEGO L. REV. 371 (1978).

19. Borgese, *The New International Economic Order and the Law of the Sea*, 14 SAN DIEGO L. REV. 584 (1977).

20. Borgese, *A Constitution for the Oceans: Comments and Suggestions Regarding Part XI of the Informal Composite Negotiating Text*, 15 SAN DIEGO L. REV. 371, 375-76 (1978).

21. La Que, *Different Approaches to International Regulation of Exploitation of Deep-Ocean Ferromanganese Nodules*, 15 SAN DIEGO L. REV. 477 (1978).

22. *Id.* at 478.

analysis focusing on current aspects of the seabed question.

The other two lead Articles deal with fisheries and pollution. *Significant Fishery Management Issues in the Law of the Sea Conference: Illusions and Realities*,<sup>23</sup> by Farin Mirvahabi, analyzes three major sub-issues involved in the international fishery management problem: the 200-mile exclusive economic zone, conservation of living marine resources, and regional fishery problems. Each of these sub-issues is examined in terms of the work of UNCLOS III as well as in terms of a non-treaty or non-agreement world.

In *Custom and Land-Based Pollution of the High Seas*,<sup>24</sup> James E. Hickey, Jr., examines both the customary and the conventional international law concerning land-based pollution of the marine environment. This Article is timely and important, for it has long been conceded in the debates of the Third Committee at UNCLOS III that land-based pollution accounts for the vast majority of pollutants introduced into the marine environment. Although considerable attention has been given in the past to problems of pollution from offshore oil production and from vessels, the much more significant problem of land-based pollution has not received the comment and analysis it deserves. Thus, just as this issue in the LOS series indicates a shift in the seabed question from a technical problem to one of international economics, so Hickey's Article indicates a shift in concern from the obvious sources of marine pollution—oil exploitation and ships—to the more important and vastly more difficult problem of land-based marine pollution.

To conclude this *Introduction*, then, it is obvious that a veritable explosion in law of the sea affairs has occurred in the decennium 1969-1978. It is also obvious that the *San Diego Law Review* has kept pace with that explosion. It is to be hoped that the second decennium will see not only some progress toward an acceptable settlement of the many problems extant in law of the sea, but also that the LOS series will continue to provide a forum for the identification and analysis of the many new issues that are sure to arise during the next ten years.

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23. Mirvahabi, *Significant Fishery Management Issues in the Law of the Sea Conference: Illusions and Realities*, 15 SAN DIEGO L. REV. 493 (1978).

24. Hickey, *Custom and Land-Based Pollution of the High Seas*, 15 SAN DIEGO L. REV. 409 (1978).