

## FOREWORD

### Law of the Sea Negotiations 1971-1972-- from Internationalism to Nationalism

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If there exists a dominant theme which can be said to characterize the period between publication of the 1971 "Law of the Seas" issue of the San Diego Law Review and this current issue, it must be the dramatic trend away from international solutions to problems of ocean resource development and conservation and toward nationalistic solutions. This trend is evident in three major areas of the current law of the sea ("LOS") negotiations—the seabed question (*i.e.*, the question of the legal-economic regime to govern exploitation of non-living resources of the seabed and subsoil beyond the limits of national jurisdiction), fisheries management, and pollution control.

This issue contains timely and relevant articles on each of these important subjects—three articles relating to the seabed question, two on fisheries management problems, and one on pollution. In addition to the student contributions in the synopsis of recent

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developments in the law of the seas, student comments are also directed to three significant aspects of law of the sea issues, viz., the interests of land-locked states, the question of baselines for outlying archipelagoes, and marine archaeology.

(1) *THE SEABED QUESTION*. Since publication of the last issue of the San Diego Law Review devoted to the oceans, the United States Seabed Committee has met twice (July-August, 1971, and March, 1972), and the General Assembly has acted to expand the membership of that Committee from 86 to 91 members, most significantly adding the People's Republic of China, a factor which has as yet undisclosed ramifications. More "seabed regime" proposals have been submitted (see generally, "Recent Developments in the Law of the Seas III: A Synopsis," (Sovereignty—Seabed) pp. 665).

As noted above, this issue contains three articles dealing with varying aspects of the seabed question.

In "The Council of an International Sea-Bed Authority" (p. 404), Professor Louis Sohn discusses the problems involved in structuring the decision making organ of an international oceans organization so that (1) it will be politically acceptable to all interests and yet (2) it will be operatively functional. If a nationalistic solution to the seabed question is avoided and a meaningful international regime adopted, this may well be the single most important feature of the international machinery, for the decisions made by the "Council" will be the basis for all seabed operations. Professor Sohn goes beyond the proposal he originally prepared for the United States' draft seabed treaty and proposes in his article suggestions for a still more representative Council, indicating a number of alternative patterns. This work is thus a valuable contribution to those who must identify the issues, consider the alternatives, and negotiate the regime to be adopted at the Third Conference.

In "The Concept of 'Common Heritage of Mankind': A Political, Moral or Legal Innovation?" (p. 390) Stephen Gorove indicates some of the difficulties inherent in a much used term in the current LOS negotiations. Although most have tentatively concluded that "common heritage of mankind" as applied to ocean resources implies at least (1) non-appropriation of the area by nations or persons, (2) international machinery to govern activities conducted in the area, and (3) some form of assistance to developing countries from such activities, events occurring within the past year would seem to indicate that the desirable elements in this concept may not be a significant part (if any part at all) of the

new oceans regime likely to emerge from the 1973 Conference. Much support is now evident for an "economic resource zone" in which the coastal state (though acceding to a 12 mile limit for the breadth of the territorial sea) would possess exclusive or preferential rights to all living and non-living resources of the seabed, subsoil, and superjacent waters out to a maximum of 200 miles from the baseline. Should this regime come about for adjacent areas, it is likely that the regime discussed by Francis Auburn in "The Deep Seabed Hard Mineral Resources Bill" (p. 491) would be adopted for the area beyond 200 miles, thus creating either outright national jurisdiction (to 200 miles) or flag-nation jurisdiction (beyond 200 miles) for the entire ocean. The Bill discussed by Professor Auburn would permit deep seabed mining activities to be carried out under national laws and envisions parallel legislation in nations with advanced seabed mining technology (hearings on the Senate counterpart of the Bill will probably already have been held by the time this issue is published). Obviously, "common heritage of mankind" comes off rather badly in this scenario. As Professor Auburn notes in concluding his article, "for the vast majority of states who do not have the technological capabilities or capital to take part in mining, [the bill] offers no benefits from the area which the General Assembly holds to be the common heritage of mankind."

This nationalistic tendency is probably due to two factors, though it is difficult to tell which is dominant or, indeed, which may have precipitated the other. The first is the ascendant nationalism of the developing countries. Some tentative support from developing nations for an international or "common heritage" approach in the oceans was indicated shortly after Dr. Pardo's initiative in the 1967 General Assembly where prognostications of great wealth to be shared by developing countries were made. As studies indicated a reduced magnitude of benefits to be garnered from the development of ocean resources, the nationalistic element began to emerge, and the developing nations are today in the forefront of the drive for a 200 mile "economic resource zone."

The second factor is the position of the United States' Department of Defense ("DOD"). DOD seeks maximum mobility in the oceans through its proposals to limit the breadth of the territorial sea to 12 miles and revise the notion of "innocent passage"

to provide for "free transit" through, under, and over international straits. Articles I and II, submitted by the United States delegation to the July-August, 1971, meeting of the U. N. Seabed Committee contain these proposals. Several "straits states," particularly archipelago nations such as Malaysia, Indonesia, and the Philippines, have adopted systems of straight baselines which would effectively bar or limit passage through their many straits. This important facet of the DOD position is discussed in a student comment by Michael A. Leversen, "The Problems of Delimitations of Base Lines for Outlying Archipelagos."

In order to secure its passage or transit objectives, DOD is probably willing to grant to developing nations (who, it must be remembered, have the preponderant voting power at the 1973 Conference) essentially whatever they desire, so long as it does not conflict with DOD's perceived needs of naval mobility. At first, of course, and as noted above, it was supposed the LDC's desired an international regime, and this was offered in the form of the United States' Draft United Nations Convention on the International Seabed Area. Now, however, it appears that DOD (through the United States delegation) may offer acceptance of the 200 mile "economic resource zone" concept as the appropriate quid pro quo for the straits passage proposal.

The role of the land-locked states in the nationalist-internationalist posturing featured in the current LOS debates is also of some importance. In a student comment, "The Interests of Land-Locked States in Law of the Seas," Patrick Childs identifies many of the interests of land-locked states and their position in the international law of the sea negotiations. One interesting possibility is that these states, whom one would suppose to support an international regime for extraction of living and non-living ocean resources beyond relatively narrow national limits, may in fact opt for their coastal neighbors' point of view on broad economic resource zones in return for long sought after transit privileges.

(2) *FISHERIES MANAGEMENT*. The fishing problem, because of the complex legal-political-biological-economic-social factors involved, is generally conceded to be the real "chess game" of the current LOS negotiations. Thomas A. Clingan, in "A Second Look at United States Fisheries Management" (p. 432) suggests that we "try something new" in our domestic fisheries policy and advances an imaginative proposal which contemplates the entire range of fishery management and allocation problems, from the need for international action down to activities at the state and local level. In an equally farsighted and imaginative article, "Bridging the Gap to International Fisheries Agreement: A Guide

for Unilateral Action," (p. 454) Jon L. Jacobson points out that, similar to the "creeping nationalism" inherent in the seabed question, national assertions of jurisdiction over ocean space for fisheries purposes "contributes to the creeping disintegration of an important area of the earth's surface that might otherwise, if given time, be set aside as the 'common heritage of mankind.'" Professor Jacobson, whose work, like that of Professor Clingan, is partially supported by the National Sea Grant Program, offers a proposal for characterizing the inevitable national action in this area of ocean law so as not to prejudice the possibility for future meaningful international cooperative efforts, a laudable objective in light of current trends in the LOS negotiations.

There are several explicit goals in the United States proposals for both a seabed regime and an international fisheries regime. Among these are the protection of national security, the development of needed energy and food resources, the providing of assistance to developing countries, and the protection of the marine environment. However, the goal of developing workable international institutions to govern activities in ocean space may be, in the long run, the most important result of the current LOS effort. If this is the case, much emphasis needs to be placed on the value of such an international cooperative effort in terms of its effect on future world government, either as a base from which to build a new entity or as a model from which to draw revision ideas for the United Nations. Thus, desires for rational biological, economic, or social solutions to the fisheries maze should perhaps not be allowed to *totally* eliminate the international community's vital interest in establishment of a viable system of international relations and cooperation. The contributions of Professors Clingan and Jacobson contain proposals geared to these long range objectives.

(3) *POLLUTION*. In "Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster," David A. Walmsley takes the reader away from the high rhetoric of militant environmentalists and militant industrialists to the nuts and bolts problems of using the United States' legal system to secure redress for damages resulting from oil pollution at sea and to prohibit or regulate such activities in the future. In observing that the Santa Barbara diaster "adequately demonstrates

the legal system's incapacity, or at least its clumsiness, in handling catastrophic occurrences arising out of the exploitation of the outer Continental Shelf," Walmsley makes some suggestions about the proper role of law in environmental protection.

Obviously, this area is coming in for a good deal of attention at the international level. Two issues seem to be of primary importance at the present. First is the understandable lack of enthusiasm about environmental protection on the part of developing nations who view pollution as basically a "good" economic indicator because it means development is occurring. Why, these nations ask, should they retard development for the sake of "quality of life" arguments by nations who have already achieved their technological growth at the cost of no small amount of pollution? Convincing the developing world that it is in their long run economic and technological interest to assist in curtailing destruction of the environment, and particularly the marine environment, is likely to be a large task.

The second issue concerns what international body or agency is going to do what to whom? The Inter-Governmental Maritime Consultative Organization (IMCO) is concerned with marine pollution originating from vessels, but because of its maritime industry orientation the organization has difficult problems of acceptance by the majority of developing states. The United Nations Seabed Committee is primarily concerned in its pollution activities with pollution originating from seabed and subsoil exploitation efforts. Even if both succeed in adopting strong anti-pollution regimes, it remains the fact that only about 10% of all ocean pollution comes from these two sources and that the remaining 90% is from land based sources (*i.e.*, air pollution fallout into the ocean, and drainage of adjacent land areas). The United Nations Conference on the Human Environment (Stockholm) has a "total environment" perspective, but is likely to produce little more than a resolution suggesting that the 27th General Assembly create an international environmental protection organization.

The issue is where to place the emphasis and what objectives should be given priority. Jacques Piccard pointed out the mind boggling inclusivity of the problem at the *Pacem In Maribus II Convocation* on Malta last summer when he observed, after hearing much discussion on problems of pollution of the Mediterranean, that the problem of the Mediterranean could not be validly separated from the problem of pollution of the world ocean; that the latter could not validly be separated from land and air pollution; that the latter could not validly be separated from the rate of tech-

nological advancement; and that the latter could not validly be separated from the rate of population growth. Thus, ultimately, the solution to ocean pollution must lie in a careful reexamination of our entire conception about the role of man in the ecosystem and particularly his numbers and his use of available resources. In the interim, however, temporary palliatives must be sought, and the efforts of such bodies as IMCO and the United Nations Seabed Committee are to be supported. If our present legal system is inadequate to cope with the problem, as Walmsley suggests, then perhaps we ought to be more vigorous about revising it.

(4) *NON-EXTRACTIVE USES OF THE SEABED*. An increasingly important aspect of ocean space use is the plethora of proposals for non-extractive use of the seabed and water column. These concepts include floating cities, giant port facilities, underwater parks and aquatic preserver, undersea resort facilities, floating airports—the list is limited only by one's imagination. Among these interests is that of marine archaeology, discussed in a student comment by Howard H. Shore, "Marine Archaeology and International Law: Background and Some Suggestions" (p. 668).

The issue of non-extractive uses has been raised before the United Nations Seabed Committee by Belgium in connection with a proposal for a "superport" to be located some 27 kilometers off the Belgian coast, on its continental shelf. Serious jurisdictional questions have been raised in connection with the proposal, and it is clear that one desirable outcome (upon which there would probably be substantial agreement) of the 1973 Conference would be an extension of the continental shelf doctrine to include, as within the exclusive purview of the coastal state, non-extractive uses of the seabed. Clearly, such an agreement would well contemplate the marine archaeological issue as well.

*CONCLUSION*. Whoever writes the forward for the 1973 "Law of the Seas" issue of the San Diego Law Review, let us hope that he will be able to report a turning back to basically international solutions to ocean resource problems. Viewing that as unlikely, however, I believe that the contributions contained in this issue may offer some of the most creative concepts yet in an effort to take "creeping nationalism" in stride and so handle it at the current LOS negotiations and in the 1973 Conference as not to forever prejudice the possibility of a meaningful international oceans regime.