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The Law of the Sea: Offshore Boundaries and Zones

Ludwik A. Teclaff
Fordham University School of Law

BOOK REVIEW

The Law of the Sea: Offshore Boundaries and Zones. Edited by Lewis M. Alexander. Columbus, Ohio: Ohio State Univ. Press, 1967. Pp. xv, 321. $12.50.

This collection of papers read at the first annual conference (June 27-July 1, 1966) of the Law of the Sea Institute, Kingston, R.I., is an ambitious attempt at comprehensive discussion of major problems of the law of the sea from an interdisciplinary point of view in which business, government and the social sciences are represented, as well as the legal profession. The papers present divergent and often sharply conflicting opinions, but one thread runs throughout the book—the sense of crisis and change on this last frontier of earth.

The preface is written by Senator Claiborne Pell of Rhode Island, author of *The Challenge of the Seven Seas*,[1] and most recently,[2] of a draft treaty to control exploitation of the natural resources of the seabed and subsoil. As befitting a senator from seafaring New England, his prefatory remarks deal extensively with the then proposed extension (now a reality) of the U.S. fishing zone to twelve miles so as to conserve near-shore fisheries and protect the interests of coastal fishermen. The twelve-mile zone is promptly challenged by Myres S. McDougal in the first chapter of the book. He doubts whether "a state can effectively control, conserve, and harvest fish with any kind of a contiguous zone, even one that embraces a whole continental shelf . . . fish just don't move, breed, or live this way."[3] He condemns outright the practice of certain Latin American states in extending their fishing zones and territorial waters to 200 miles as an example of special interest detrimental to any kind of regime of the ocean: "The only argument our Latin American friends have made to justify these claims is that if they have an extensive territorial sea they will sell the privilege of fishing and make money."[4] This is not the whole story, because the Latin Americans do have another argument—that until an effective and equitable system of protection is agreed upon, states with powerful fishing fleets could deplete their resources or the resources of the sea in general, and Burke, who co-authored with McDougal, *The Public Order of the Oceans*, in his chapter, "Law and the New Technologies," thinks that the modern trend may lead to the continental shelf becoming the fisheries limit of coastal states. This is the opinion independently reached by the reviewer, that when coastal states realize that the narrower zones do not protect their fisheries' interests, they will inevitably extend their jurisdiction outward, and are in fact already doing so.[5]

Fisheries figure prominently in Chapter 5, the paper of Professor Lewis M. Alexander, member of the executive committee of the Law of the Sea Institute and professor of geography at the University of Rhode Island, but he brings a

1. 1966.

2. March 1968.

3. The Law of the Sea: Offshore Boundaries and Zones 9 (L. Alexander ed. 1968) [hereinafter cited as Alexander].

4. Alexander 8.

5. Teclaff, Jurisdiction over Offshore Fisheries—How Far into the High Seas, 35 Fordham L. Rev. 409, 424 (1967).

geographer's comprehensive outlook to bear on the general problem of offshore zones. He stresses the unique characteristics of each sea and ocean and points out that length of coastline is a factor which should be taken into account in discussing the interests of various states in the width of the contiguous zone. As he says, "One country, for example, may press its demands for a twelve-mile territorial sea, and yet possess only ten miles of seacoast, while another, holding to the three-mile breadth, may border on the ocean for thousands of miles."[6] He gives a convenient table of offshore claims of the world, which shows the breadth of the territorial sea, the length of the coastline, and the states whose fishing limits exceed twelve miles.

The immense complexity of the problem of distributing the living resources of the sea between the members of the international community and the lack of definitive scientific information are brought into sharp relief by the conflicting viewpoints of two fisheries experts, Wilbert McLeod Chapman in Chapter 6, "Fishery Resources in Offshore Waters," and Francis T. Christy, Jr., in Chapter 7, "The Distribution of the Sea's Wealth in Fisheries." Dr. Chapman accepts the sustained catch or sustained yield concept as a dividing line between two regimes of the sea. Free competition should reign, he feels, as in the nineteenth century, until a level of yield is reached beyond which the number of any particular species would begin to diminish and as a consequence the catch would diminish, too. As soon as this limit is reached or passed, some sort of quota system would have to be introduced, and he envisions two possibilities: "(a) to establish quotas for the fishery applicable to everyone and let the fishery go to those who are the most efficient; or (b) to divide the quota that can be taken by all fishermen by some agreed formula between the different nations involved."[7] He also argues that the resources of the sea are undeveloped or under-utilized (giving a figure of five per cent of the total living resources as being actually utilized at the present time). On this premise fishermen could go a long way yet, with the exception of some overfished-species, before it would be necessary to impose any quotas. Hence, his model would be most acceptable to nations with powerful and wide-ranging fishing fleets.

Dr. Christy points out that economists, in contrast to biologists, reject maximum sustainable yield as a meaningful concept for scientific management of fisheries, preferring the concept of maximization of the net economic revenue. To achieve this, however, it is necessary to limit access to the exploitation of sea resources. He discusses various methods by which such limitation could be imposed and concludes that it would be easiest to achieve under the jurisdiction of an international body or agency; world ownership of the resource would carry the right of exclusion and individual nations would have the right to share in the resource rather than the right of access to it. He does not embrace Chapman's optimism in the near inexhaustibility of the ocean's riches and neither does this reviewer. According to Christy, without adequate control some species could be exhausted in one fishing season. This would, of course, make the imposition of quotas after a certain degree of exhaustion, as Dr. Chapman advocates, entirely futile.

6. Alexander 71.
7. Alexander 102.

In Chapter 2, William C. Herrington, former special assistant for fisheries and wildlife to the U.S. Secretary of State, describes the background and achievements of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the Sea. He gathers the information conveniently in one place and shows the prominent role the U.S. State Department played in bringing about the convention. This is a type of activity that Professor McDougal deplores. He strongly opposes the calling of any further conferences: "I think it may take a hundred years for the law of the sea to recover from the last two international conferences which dealt with it, and I would regard the immediate call of another conference as an unmitigated disaster."[8] This is in stark contrast to the belief of William R. Neblett, who gives, in Chapter 3, a round-up of the accomplishments of the 1958 Geneva Conference on the Law of the Sea. Neblett sees definite advantages in having diplomats meet at the conference table. McDougal's objection is that whereas the international law of the sea was until now mainly the product of custom formed by ocean-related activities, issues not even indirectly connected with the sea intrude into general conferences. This reviewer is inclined to agree that caution should be taken in convoking conferences, simply because in the effort to achieve some compromise in an ideologically divided world, watered-down and superficial formulas may be accepted in lieu of genuine progress toward an effective regime of the sea. On the other hand, if matters are left to their customary laissez-faire processes, the result may be the division by zones of the riches of the ocean between the nations.

In Chapter 4, Robert L. Friedheim uses factor analysis, an interesting new technique (new, that is, in its application to legal problems) as a tool in finding out what really happened at the Geneva Conference. He describes factor analysis as: "a statistical technique for clustering variables into groups according to their intercorrelations. Variables correlating high among themselves and low with other variables cluster together and are said to determine a single underlying factor."[9] He shows, for example, that the combination of a narrow territorial sea with a larger zone of fisheries jurisdiction did not succeed because it brought together opponents of both measures. He also shows that whereas the Arab states, in voting against this proposal, were motivated mainly by security reasons, the Latin states were motivated by economic ones. Perhaps the greatest usefulness of factor analysis is in providing a clearer picture of the various alignments. The dominant alignment on the territorial sea and contiguous zone at the Geneva Conference was one which Friedheim labels for convenience "East-West"—basically the Soviet bloc, the "neutralists," the Arab group and some of the Latin American states versus the United States, its allies, the European group and the remaining Latin American states. On the fisheries issue, however, the polarization was "North-South" and factor analysis here shows very clearly the deep commitment of the European "conservatives" (conservative in their approach to the regime of the sea) to an "ideal theory."

In Chapters 9-14 problems of the continental shelf and freedom of navigation, together with some more specialized aspects of the regime of the sea, are dis-

8. Alexander 3.
9. Alexander 48.

cussed. Professor Burke in "Law and the New Technologies" focuses on the inadequacies of the convention on the continental shelf to protect freedom of research on the ocean bottom. Although this was not the intention of its framers, the convention may be easily interpreted as giving the coastal states an absolute veto over such research on the continental shelf. He also discusses how far the domestic laws of coastal states can be extended to structures on the shelf. The practice of states seems neither settled nor uniform in this respect. Nobody questions that these laws apply, for example, to drilling rigs, since the convention gives coastal states sovereign rights to exploit the resources of the continental shelf, but there is much doubt as to other structures. Burke, for example, criticizes Dutch laws that, in an effort to control pirate radio stations, were made applicable to all structures on the continental shelf. It may be worth recalling here that prior to the adoption of the 1958 Convention, some authors expressed the opinion that the coastal state possessed full sovereignty over the continental shelf and the convention itself could be read as not prohibiting a more comprehensive extension of sovereignty.

The 1958 convention, as is generally known, is not clear as to the limits of the continental shelf. It stipulates that jurisdiction extends to the line at which the depth of the water is no more than 200 meters, or beyond that line, to the point at which exploitation is possible. Does this mean that nations can extend their jurisdiction beyond the shelf? Commander Harlow thinks not, and in Chapter 11, a symposium in which the other participants were William T. Burke, Northcutt Ely, Richard Young, Bernard E. Jacob, and Quincy Wright, he says: "To a great extent the final convention did incorporate the thoughts and language as recommended by this law committee. And I think it is significant to note that although they did depart to a certain extent from the geological concept of the continental shelf, thereby changing this concept from a strict geological sense into perhaps a unique legal sense, they nevertheless retained the terminology 'continental shelf'."[10] However, in the very interesting and informative paper (Chapter 9), "Geological Aspects of Sea-floor Sovereignty," K. O. Emery points out that the so-called continental rise, which is beyond the continental slope and continental shelf, is perhaps the richest area in minerals and especially oil wealth of the ocean bed and that if the seaward limit of jurisdiction were to be the 1,000-meter contour of the deep sea floor (clearly beyond the continental shelf), coastal states would have the exclusive right to all of the resources of the seabed that are now being exploited and many that are capable of exploitation. It would seem that the convention on the continental shelf does not provide criteria for the division of the ocean bed beyond the shelf in its geological sense (the view expressed by Professor Burke), and this division will have to be accomplished either by a new conference or by bilateral or multilateral regional conventions, as has already been done by the nations bordering the North Sea.

Willard Bascom, in his paper "Mining of the Sea" (Chapter 10), departs from this rather theoretical discussion of the continental shelf and gives a very interesting description of the practical aspects of exploration of mineral riches by private concerns, and Gerald E. Sullivan, in Chapter 13, discusses the com-

10. Alexander 183-84.

paratively little known problem of international regulation of communications for oceanographic equipment. Freedom of navigation is the subject of Commander Harlow's paper (Chapter 12) and centers, of course, on the width of the territorial sea. For a maritime nation like the United States with a powerful navy, the advantages of a narrow belt of territorial sea outweigh the disadvantages in the area of security. It is more important for the United States to be able to move its vessels quickly and without interference than to prevent vessels of other nations from approaching its shores. He points out that the idea of creating separate fishing zones from the territorial sea was conceived to avoid or minimize the conflict between protection of coastal fisheries and freedom of navigation. One may add that although separate fishery zones have been created and accepted, the territorial sea appears to be creeping outward in their wake, and it can hardly be maintained that its unilateral extension to twelve miles would be a violation of international law. When the territorial sea becomes coextensive with the fishery zones at twelve miles, the latter will very likely be redrawn, perhaps involving a further extension of the territorial sea.

In Chapter 15, F. J. Hortig, executive officer of the California State Lands Commission, illustrates, through the well-known California experience, the problem of establishing the maritime boundaries of the states of the United States, and Chapter 16, by Arthur Dean, also deals extensively with domestic issues, although its main theme is the continental shelf in general. It is an excellent outline of the problem of submerged lands in the United States, and the discussion of several selected cases in this area is of great value for a lawyer or anybody interested in submerged lands.

The "curtain-raiser" for this meeting of the Law of the Sea Institute is Myres McDougal's paper, "International Law and the Law of the Sea," which encompasses in broad sweep the whole range and complexity of the problems confronting the conferees. McDougal's task was to spell out the basic principles underlying the regime of the sea and he has acquitted himself with his usual brilliance and clarity. Of particular relevance is his insight that the choice for the regime of the sea is a limited one, limited by the general structure of the legal order, or as he himself has said, of the larger process of effective power. In the framework of his jurisprudence, he describes the nature of the legal order, in general, and the nature of the international legal order, finds both basically similar and relates them to the law of the sea, which he defines as a set of particular decisions establishing public order. They are derived from decisions that set up the "process of authoritative decisions." The two kinds of decisions form the international legal order. The common feature of all legal systems in protection of the common interests of all people. These interests are conveniently divided into inclusive (shared or shareable by all people) and exclusive (pertaining to a single nation or group). McDougal believes that the inherited regime of the sea has protected the common interests of mankind fairly well because: "For three centuries the important outcome of this cooperative enjoyment of the oceans has been a tremendous production of goods and services for distribution to the whole of mankind."[11] Therefore, he describes how it has worked so far rather than

11. Alexander 15.

suggests radical changes. If anything, he would like to see the inherited notion of the freedom of the sea extended, as witness his dislike of the concept of the territorial sea which, according to him, has outlived its usefulness and might be replaced by contiguous zones of undetermined width for specific purposes.

If McDougal's paper set the stage for the conference, the three last chapters of the book bring down the curtain on a note of satisfaction that so many problems were aired and from such an interdisciplinary point of view, tempered by the realization that the surface of the debate had barely been scratched. Chapter 17, a symposium in which law, government, engineering, and geography are represented, subjects the Geneva Conventions to searching analysis from the perspective of eight years of performance and also offers, in some instances, a quite detailed blueprint for solving some of the problems. Professor Goldie, for example, discusses a regime wherein titles created under the municipal law of each state would be recognized in the courts of other countries. This recognition would be assured through agreements as well as through establishing, under public international treaty law, conflict of law obligations of recognition. Henry Reiff, former head of the Department of History and Government at St. Lawrence University, stresses obligations and duties, especially with regard to the law of nuisances (e.g., oil pollution, dumping of debris on fishing grounds and disposal of wrecks at sea), and brings up some questions of considerable significance that are often overlooked at general conferences, such as coastal land fills and the rapid increase in sport fishing and construction of artificial reefs. Ralph Johnson addresses himself to the semantic difficulties of defining such terms as "vested rights" as a basis for distinguishing resources already exploited from those not yet claimed. With respect to exploitation of mineral resources, John L. Mero, president of Ocean Resources, Inc., appeals for maps showing the outer limit of domestic jurisdiction (he suggests the 2,500-meter contour) as a means of reducing the risks for the ocean miner, and Alexander Melamid proposes a series of sample studies of certain types of coastlines and of other geographical or economic phenomena as a basis for "plugging" some of the present loopholes in the Geneva Conventions. In Chapter 18, Clark M. Eichelberger and Francis T. Christy, Jr., propose an international regime of the seas under an international agency, a suggestion which was obviously far from acceptable to many participants in the conference. Chapter 19 by Giulio Pontecorvo takes us behind the scenes to see the ways in which the conferees were aligned and how many variables were introduced into the discussion by the diversity of disciplines represented.

Professor Alexander has done an excellent job in making these papers available to a wider public. They are a valuable contribution to the development of the law of the sea, and all interested in this subject will look forward to the appearance of the papers of the second and succeeding conferences.

LUDWIK A. TECLAFF*

* Associate Professor of Law and Librarian, Fordham University School of Law.