

Cases and Materials on the Law of the Sea *Second Edition*

Louis B. Sohn[†]
John E. Noyes
Erik Franckx
Kristen G. Juras

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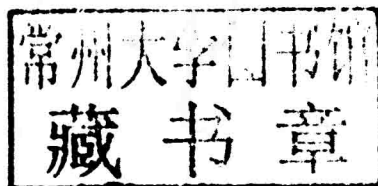
Second Edition

Louis B. Sohn[†]

John E. Noyes, *California Western School of Law*

Erik Franckx, *Vrije Universiteit Brussel*

Kristen G. Juras, *University of Montana School of Law*



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Preface

Much has changed since the publication of the first edition of this text—Louis B. Sohn & John E. Noyes, *Cases and Materials on the Law of the Sea*—in 2004. The oceans have faced continuing environmental stresses, increased interest in the resources of the continental shelf and the deep seabed, new security threats, tensions over contested maritime boundaries, and significant developments in shipping. These challenges have prompted changes in international law, and international law in turn has helped to shape how the world reacts to these challenges. Reactions have come not just from states, but from international organizations and international judicial and arbitral bodies. The pages of this second edition reflect many of these significant developments.

Readers familiar with the first edition will note a change in emphasis in this second edition. The first edition sought both to present a sensibly organized set of teaching materials and to survey the full range of law of the sea issues, in order to at least introduce topics and point readers to relevant commentary. In this second edition we focus primarily on teaching materials, opting for depth rather than breadth of coverage. To provide an overview of the broad field of the law of the sea, we recommend that these *Cases and Materials* be used in conjunction with Louis B. Sohn, Kristen Gustafson Juras, John E. Noyes & Erik Franckx, *Law of the Sea in a Nutshell* (West, 2d ed. 2010).

The organization of this second edition of *Cases and Materials on the Law of the Sea* tracks that of the *Nutshell*. Chapter 1 introduces the law of the sea and questions about international law and international legal process. Chapters 2, 3, and 4 examine the basic concepts of high seas freedoms, vessel nationality, and flag state jurisdiction. The next two chapters concern matters that are fundamental in determining the location of various coastal zones: baselines (Chapter 5), and principles and processes applicable to maritime boundary delimitations (Chapter 6). Although many substantive issues, e.g., fisheries, cut across different zones of coastal state sovereignty or jurisdiction, such zones have been of central importance in the law of the sea, and we explore them in Chapters 7 (internal waters), 8 (the territorial sea, contiguous zone, straits, and archipelagic waters), 9 (the exclusive economic zone), and 10 (the continental shelf). Chapter 11 then examines the regime governing mineral resources in the Area, i.e., the seabed beyond the limits of national jurisdiction, and the controversy over access to genetic material in the Area. In Chapters 12, 13, 14, and 15, we explore matters where new norms and institutions have transformed traditional practice. Chapter 12 concerns marine pollution and

principles of international environmental law. Chapter 13 examines high seas fisheries and the roles of regional and global organizations in conserving and managing fish stocks that range across various zones of the oceans. In Chapter 14 the focus is on maritime security. Finally, Chapter 15 analyzes the dispute settlement system created by the 1982 United Nations Convention on the Law of the Sea. The Appendix includes the 1982 Convention on the Law of the Sea and the 1994 Part XI Implementation Agreement, so that students can have ready access to essential treaty material in one volume; other treaties are excerpted throughout the text.

Different instructors may of course emphasize different themes, and—particularly if there is not time to cover the entire text—they may wish to pick and choose among different materials. In courses emphasizing security issues, Chapter 2, Chapter 4, Sections D–F, and Chapters 7, 8, and 14 deserve particular emphasis. A focus on environmental issues would certainly include Chapter 2, Sections D and G, Chapter 4, Sections A and B, Chapter 7, Section C, Chapter 11, Section D, and Chapters 12 and 13. An instructor concentrating on international litigation may want to select international court and arbitral tribunal decisions from throughout the book, and should particularly emphasize Chapters 12, 13, and 15 (and indeed may wish to assign Chapter 15 early in the course). In a course concerning the allocation of offshore resources, Chapters 5, 6, 8, 9, 10, 11, and 13 deserve significant attention.

Although this text includes much modern material, it also seeks to place the law of the sea in historical context. Current legal formulations draw on previous ones, and past solutions may still hold valuable lessons for lawyers and policy makers seeking ways to address current problems. Throughout the book, we have given attention both to traditional law of the sea topics and to topics—such as port security, the depletion of fish stocks, and the operation of new international institutions—that have gained much attention in recent years.

This set of law of the sea materials is also, we believe, useful in examining core issues of international law and international legal process. These issues have relevance to a wide variety of subject areas. For example, what are generally understood to be sources of international law, and what is the priority of each source vis-à-vis other sources? Why are some rules (e.g., those governing maritime delimitation) open-textured, while others are much more determinate? The great significance of treaties in international law requires consideration of how treaty law is made and how complex multilateral treaties change. What are the advantages and disadvantages of different mechanisms for change? What are the roles of “soft law” in the development of international law? How are problems of collective action addressed with respect to common spaces and common resources? What is the legal status of non-state actors,

such as international organizations, and what functions should they carry out? Some questions about the rights of individuals under international law are explored in this volume. What are the functions of international dispute settlement mechanisms? Why do parties choose one forum over another? Various tribunals—the International Court of Justice, the International Tribunal for the Law of the Sea, arbitral tribunals, claims commissions, regional international courts such as the European Court of Justice, and municipal courts—are examined throughout the book. What challenges are posed by the proliferation of international tribunals? How should overlaps in jurisdictional competencies of international courts and tribunals be addressed? Finally, how should conflicts be resolved between the municipal laws of different states? Principles of private international law (conflict of laws) may be applied to conflicts between the laws of flag states and coastal states concerning events on board vessels, particularly when vessels are located in internal waters or the territorial sea. We hope this volume will prompt students to think about such issues, as well as about law of the sea topics.

Readers seeking more information about particular topics in the law of the sea quickly discover what may seem an overwhelming number of books and articles. *Law of the Sea in a Nutshell* and *Notes in this Cases and Materials* volume introduce some valuable reference materials. Additional citations to and overviews of law of the sea topics may be found in such excellent recent treatises as R.R. Churchill & A.V. Lowe, *The Law of the Sea* (3d ed. 1999), Donald R. Rothwell & Tim Stephens, *The International Law of the Sea* (2010), and Yoshifumi Tanaka, *The International Law of the Sea* (2012).

A few technical notes: Omissions in the edited readings in this book are indicated either by ellipses or by brackets. However, some citations and footnotes have been omitted with no such indications. We have updated the status of treaties as of September 2013. Internet citations were also accurate as of September 2013.

The name of our colleague and mentor, Louis B. Sohn, remains on this edition of *Cases and Materials on the Law of the Sea*, the first since his death in 2006. Louis Sohn greatly influenced modern international law. He participated in the 1945 San Francisco drafting conference that established the United Nations and, during 1969-1971, worked as the first Counselor on International Law at the U.S. Department of State. His vision, dedication, vast knowledge, and skill made him instrumental in the development of the modern law of the sea. In his capacity as a U.S. delegate to the Third United Nations Conference on the Law of the Sea from 1974 to 1982, he was one of the primary architects of the dispute settlement provisions of the 1982 Law of the Sea Convention.

Louis Sohn also contributed significantly to many other areas of international law, including human rights, international environmental law, international organizations, arms control and disarmament, and dispute settlement. Those active in the International Law Section of the American Bar Association, the American Society of International Law, and the American Branch of the International Law Association know about his dedication to and leadership of those organizations. Louis Sohn also served as a reporter for the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1986). In his distinguished career as a scholar and teacher at Harvard Law School, the University of Georgia School of Law (where he taught Kristen Gustafson Juras and Erik Franckx), and The George Washington University Law School, he encouraged many of his students to pursue careers in international law. Reflections about Professor Sohn and the law of the sea appear in John E. Noyes, Louis B. Sohn and the Law of the Sea, 16 *Willamette J. Intl. L. & Dispute Resolution* 238 (2008).

In preparing the two editions of this book, we have benefited from the insights, comments, and support of many colleagues—a few now sadly departed—including William Aceves, Craig Allen, Caitlyn Antrim, David Bederman, William Burke, David Caron, Jonathan Charney, James Cooper, Barry Hart Dubner, Richard Finkmoore, Paul Irwin, Mark W. Janis, James Kraska, Dino Kritsiotis, Barbara Kwiatkowska, Coalter Lathrop, William Lynch, Phyllis Marion, Stephen McCaffrey, Richard McLaughlin, Samuel P. Menefee, John Norton Moore, John Murphy, James Nafziger, Dolliver Nelson, Myron Nordquist, Alex Oude Elferink, Bernard Oxman, Michael Reed, Ashley Roach, Shabtai Rosenne, Harry Scheiber, George Taft, Jon Van Dyke, Jorge Vargas, and George Walker. David Swanson of David Swanson Cartography expertly prepared the maps and diagrams used in this edition. Rachel Smith provided essential research support for the first edition, and much of her work has found its way into this second edition. Students at California Western School of Law, the University of Georgia School of Law, Harvard Law School, and the University of San Diego's Oxford summer program also offered valuable comments about drafts of these materials. The help of student research assistants—Joey Bentzley, Elizabeth Bonner, Carmen Casado, Pamela Combo, Cavan Cox, Stacey Meinen, Omar Nassar, Jill Klein, Karine Peropyolkina, Elizabeth Pietanza, Lara Prodanovich, Scott Robinson, Justin Tipp, Jessica Walker-Keleher, Liam Vavasour, and Ashkan Yekrangi—is gratefully acknowledged, as is the work of California Western School of Law's Faculty Support Services (especially Joyce Stallworth, Heddy Fujikawa, Jackie Sewell, and Ana Contreras). We also thank the library staffs at California Western School of Law

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John E. Noyes

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Erik Franckx

Brussels

Kristen Gustafson Juras

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Table of Acknowledgements

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Articles, Books, and Treatises

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International Seabed Authority

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MOX Plant Case: Dispute Concerning International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. United Kingdom) (Annex VII Arbit.), © 2003, 2008 Permanent Court of Arbitration

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International
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Abbreviation

ADIZ	Air Defense Identification Zone
ASIL	American Society of International Law
ASLP	Archipelagic sea lanes passage
BCN	Biological, chemical, and nuclear [weapons]
CBP	[U.S.] Customs Border and Protection
CDEM	Construction, design, equipment, and manning
CLCS	Commission on the Limits of the Continental Shelf
CSI	Container Security Initiative
C-TPAT	Customs-Trade Partnership against Terrorism
DISERO	Disembarkation resettlement offers
DOALOS	See UNDOALOS
EC	European Community
ECFI	European Court of First Instance
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EU, E.U.	European Union
FAO	United Nations Food and Agriculture Organization
FOS	Foot of the slope
GMDSS	Global maritime distress and safety system
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICE	[U.S.] Immigration and Customs Enforcement
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILO	International Labor Organization

IMCO	Inter-Governmental Maritime Consultative Organization (now IMO)
IMDG Code	International Maritime Dangerous Goods Code
IMO	International Maritime Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, unreported, and unregulated [fishing]
LL/GDS	Land-locked/geographically disadvantaged states
MAR	Mid-Atlantic Ridge
MOR	Mid-ocean ridge
MOU	Memorandum of Understanding
MSC	Maritime Safety Committee
NAFO	Northwest Atlantic Fisheries Organization
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
NIEO	New International Economic Order
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PREPCOM	Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea
PSI	Proliferation Security Initiative
RFMO	Regional fishery management organization
SBC	Seabed Disputes Chamber of the International Tribunal for the Law of the Sea
SFRY	Socialist Federal Republic of Yugoslavia
SOFIA	State of World Fisheries and Aquaculture
TAC	Total allowable catch
UN, U.N.	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNDOALOS	United Nations Division for Ocean Affairs and the Law of the Sea
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization