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The
Evolution of
International Marine Policy and Shipping Law

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**The Evolution of International Marine
Policy and Shipping Law**

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Foreword

I am pleased to contribute the foreword to this monumental work on the history and development of maritime transport. This much-needed study provides a valuable background for the understanding of international marine policy and shipping law, which, in a variety of international settings, has been the subject of searching examination and reexamination in recent times. Only a meticulous analysis of the traditions of the great maritime states, which have come to the historical forefront from time to time and have thus shaped all aspects of maritime transport, can aid its understanding. This unique contribution to the subject meets all such requirements, and the learned author merits congratulations on his achievements.

This work will be of great interest to all for whom maritime transport is of importance. Not only will it provide valuable information for the maritime lawyer and policymaker, but it will also be an asset to legal and historical scholars who are interested in maritime matters. I recommend the book to the general reader as well because of its fascinating presentation.

At a time in history when the sea and the regulation of its uses is one of the international community's main preoccupations, a study such as this will surely aid not only attempts to unify divergent maritime law, but also the achievement of greater equity in ocean uses.

Nagendra Singh
Judge of the International Court of Justice
Vice-President of the Court
1976-1979

Preface and Acknowledgments

This book unites the artificially created divergences among the various marine law and policy aspects affecting international maritime transport. This has been done by tracing the evolution of this most traditional ocean use and the rules within which it operates, from its hazy beginnings to the present, when it faces its greatest-ever challenge from competing ocean uses in an unequally divided world.

Much of this work is based on insights gained during my almost three decades of experience in the “ocean business” as mariner, lawyer, consultant, and academic. As a result, it is impossible to properly acknowledge my indebtedness to all those in every part of the globe who helped me, directly and indirectly, in compiling these insights. Their help, patience, and understanding is collectively but most gratefully acknowledged.

The work for this book was carried out with the encouragement of Professor Edward D. Brown of the Centre for Marine Law and Policy, University of Wales, Cardiff, and Professor Alastair D. Couper, head of the Department of Maritime Studies, also at the University of Wales. My gratitude goes to both—to the former, whose internationally acclaimed scholarship gave guidance to my efforts, and to the latter for providing a new and progressive interdisciplinary environment without which this type of study could not have been carried out.

The International Development Research Centre, Ottawa, awarded me a two-year research associate grant, which not only enabled me to work in Cardiff but also facilitated research in Europe, Africa, Asia, Latin America, and the Caribbean. Without such generous help, this work could not have been undertaken.

Completion of the book was greatly assisted by the resources of the Faculty of Law, Dalhousie University, where I have been a member of the faculty’s Marine and Environmental Law Programme since 1975, as well as by the inspiring academic climate provided by my faculty colleagues under the leadership of Professor Ronald St. J. Macdonald, Q.C., dean of law until 1979, and Professor William H.R. Charles, the present dean.

Two scholars, colleagues, teachers, and true friends, Professor Douglas M. Johnston and Brian Flemming, Q.C., can take particular credit for whatever this book might achieve, as they shaped, nurtured, and encouraged my work in so many ways. To both I give my deep and sincere thanks.

I am most deeply grateful to Judge Nagendra Singh for honoring me by writing the foreword to this book.

Without logistic support, books such as this cannot be completed. My sincere gratitude for assistance far beyond the call of duty goes to my sec-

retary, Suzanne McQuinn, now Administrator of the Dalhousie Ocean Studies Programme, who typed several versions of this study. Her editorial suggestions in particular were greatly appreciated. My thanks also go to Theodore McDorman for his assistance in preparing the index.

Last but not least, there is no doubt whatsoever that Judith Hammerling Gold, friend, wife, scholar, physician, and psychiatrist, was the major contributor to this work. Not only did she display endless love and forbearance for the middle-aged academic ambitions of the sea-captain she originally married, but, in addition, she constantly encouraged and helped him through the difficulties of writing this kind of book. Her practical criticism of the many stages of the book ensured its completion.

Abbreviations

- A.M.C.** American Maritime Cases Law Reports
BIMCO Baltic and International Maritime Conference
C.C.E.D. Penn. Circuit Court, Eastern District, Pennsylvania
CIF Cost, insurance, and freight
C.Rob. Charles Robbins Law Reports
CAACE EEC Shipowners' Association
CENSA Council of European and Japanese Shipowners
CMI Comité Maritime International
CRISTAL Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
EEC European Economic Community
EEZ Exclusive Economic Zone
Eliz. Queen Elizabeth I (Legislation)
FAO Food and Agriculture Organization of the United Nations
Fed.Cas. U.S. Federal Cases Law Reports
GCBS General Council of British Shipping
GESAMP Joint Group of Experts on the Scientific Aspects of Marine Pollution
GNP Gross National Product
grt Gross Registered Tonnage
H.L.Cas. House of Lords Cases Reports
IAEA International Atomic Energy Association
IBRD International Bank for Reconstruction and Development (World Bank)
ICC International Chamber of Commerce
ICES International Council for the Exploration of the Sea
ICJ International Court of Justice
ICNT Informal Composite Negotiating Text (at UNCLOS III)
ICS International Chamber of Shipping
ICSU International Council of Scientific Unions
IDA International Development Association
IFC International Finance Corporation
IHO International Hydrographic Organization
ILA International Law Organization
ILC International Law Commission
IMCO Inter-Governmental Maritime Consultative Organization
IMCOSAR IMCO Search and Rescue System
INMARSAT International Maritime Satellite System
INTERTANKO International Association of Independent Tanker Owners
IOC International Oceanographic Commission

- IUMI** International Union of Marine Insurance
L.J.K.B. Law Journal of King's Beach Law Reports
LNG Liquid Natural Gas
LSI Law of the Sea Institute
MEPC Marine Environmental Protection Committee (of IMCO)
MSC Maritime Safety Committee (of IMCO)
NSDAP Nationalsozialistische Deutsche Arbeiterpartei (Nazi party)
OCIMF Oil Companies International Marine Forum
OECD Organization for Economic Cooperation and Development
P&I Protection and Indemnity
P.C.I.J. Permanent Court of International Justice
SCOR Scientific Commission on Oceanic Research
Sess. Session
SOLAS Safety of Life at Sea
Stats. Statutes
TOVALOP Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution
ULCC Ultra Large Crude Carrier
UNCITRAL United Nations Commission on International Trade Law
UNCLOS I United Nations Conference on the Law of the Sea, Geneva, 1958
UNCLOS II Second United Nations Conference on the Law of the Sea, Geneva, 1960
UNCLOS III Third United Nations Conference on the Law of the Sea, 1973-
UNCTAD United Nations Conference on Trade and Development
UNCTAD I United Nations Conference on Trade and Development, First Session, Geneva, 1964
UNCTAD II United Nations Conference on Trade and Development, Second Session, New Delhi, 1968
UNCTAD III United Nations Conference on Trade and Development, Third Session, Santiago de Chile, 1972
UNCTAD IV United Nations Conference on Trade and Development, Fourth Session, Nairobi, 1976
UNCTAD V United Nations Conference on Trade and Development, Fifth Session, Manila, 1979
UNEP United Nations Environmental Program
UNESCO United Nations Educational, Scientific, and Cultural Organization
U.N.T.S. United Nations Treaty Series
Vict. Queen Victoria (Legislation)
VLCC Very Large Crude Carrier
WHO World Health Organization
WMO World Meteorological Organization

Introduction

Most comprehensively viewed, the international law of the sea comprises two very different sets of principles. One set of principles, establishing certain basic, overriding community goals, prescribes for all states the widest possible access to, and the fullest enjoyment of, the shared use of the great common resource of the oceans. The other set of principles, commonly described as jurisdictional, expresses certain implementing policies designed economically to serve the basic community goals of shared use by establishing a shared competence among states in a domain largely free from the exclusive public order of any particular state.

—Myres S. McDougal (*American Journal of International Law* 54, 1960)

As this is written the Third United Nations Conference on the Law of the Sea (UNCLOS III), which has been in preparation as well as in session for more than a decade, slowly draws to a conclusion. Whether the final outcome of this enormous international search for consensus is a definitive convention or not has become almost an academic question. However, the ocean atlas of the Earth will be a very different one at the end of this most intensive of all law-reform movements. The end of the conference will thus mark the beginning of a new era for the oceans, great parts of which will now be subject to radically new controls, domination, regulation, and jurisdiction. Like everything else in the late twentieth century, the uses of the ocean will be complicated and fraught with conflict in a search for greater equity for the widely differing interests of people in a very unevenly divided world.

Strangely, however, in whatever form it will eventually take, the new law of the sea has in the past decade addressed itself to almost all areas of ocean use except the one that since before the dawn of history, has been preeminent—the use of the ocean as a means to transport people and their goods from place to place on this planet, so much more of which is water than is land. Marine transport has been discussed in an almost abstract manner, as if it did not really fit or belong within the public domain but needed to be confined to the more “private” region of international commerce, which was considered to be outside the scope of the law of the sea. This book intends to show that this is an anomaly and that there is a clearly discernible thread linking marine transport from the earliest times up to the present debate on the oceans.

There is little doubt that the law of the sea is divided into its “public” and “private” components. This is a relatively recent development historically; its origin lies in the national policies of the major maritime states, which saw the advantages of such a division. The traditional private

or commercial aspect of ocean use was then conveniently sidelined in order to create a new area of dominance by new interest groups—within the same states—which dominated the public-law aspect. Although probably neither planned nor foreseen at the time, this division was to serve the traditional maritime states well in the battle to defend the concept of the “freedom of the seas” in later years. If the jurisdictional bridgehead were to fall, the commercial fortress would then be a second line of defense.

The complications caused by the existence of two law-of-the-sea components, which created not only two monolithic and strictly separated areas of international law and policy but also a gray area in between, is what faced the newly emerging nations of the Third World in the 1950s and 1960s. Their strength and unity in demanding a more equitable share in the manifold uses of the oceans was, therefore, required to be divided into completely different policy formulations in different forums. Only in recent years has this dilemma become clear to some of these countries, and it has had a direct result on the growing demands for a new international order. However, solutions are further complicated by the fact that the colonial past has imposed the twin structures of ocean law and policy on the governmental systems of most Third-World states. Only major policy changes, often precluded by other priorities, could change this difficult position, which itself contributes to the general development problem.

The traditional explanation of what we consider an anomalous division has always been that the more recent public-law-and-policy aspect of ocean use was to provide a service to the political aspirations of jurisdiction, whereas the traditional private-law component was to interpret the economic and commercial aspects of marine transport. This neat division appears nonexistent when one views the political and historical processes that have influenced ocean uses. There has hardly ever been a political or jurisdictional aspect in the law of the sea that has not had its effect on the commercial and economic use of the sea. The reverse is equally true. It is for these reasons that this examination and analysis will be historical in character as well as in methodology. It is felt that the history of the law of the sea has been frequently misinterpreted and largely misunderstood by those who seek to defend, as well as by those who wish to overturn, the status quo of traditional maritime power. We will attempt to show that marine transport has, throughout history, been a key concept, one that has waxed and waned vis-à-vis the many other oceanic considerations but that has always been the sign of the true maritime power.

It would be unoriginal to say in the late 1970s that the real difficulties of UNCLOS III have been largely politicoeconomic rather than legal. However, the conference was attempting to deal with difficulties that were being couched in terms of “have” versus “have-not” and North versus South, within a traditional legal framework that was inadequate even before such

new demands were placed on it. Although the scientists have seen the sea as a biological whole for a long time, policy makers and lawyers still attempt to place their policies and legal drafts into neat compartments. We wish to focus attention on marine transport to show that no concept relating to the ocean can be isolated, that no maritime policy can be separated from others, and that the field of marine affairs—like the sea itself—is a *complete* unit that will only benefit mankind equitably if it is seen, understood, and left whole.

As has been stated, in the past decade ocean law has been undergoing its most searching examination ever. UNCLOS III, which started out as an ambitious law-making and codification exercise, slowly became a world ocean-law-reform movement, suffering from all the commensurate problems that plague not only law-reform movements but also all other world bodies in recent years. In this conference we witness a full display of the self-centered interest of over 150 nation-states, dozens of regional groupings, many similar-interest groups—in both politicoeconomic and geographic terms—and the difficult conference diplomacy of the North versus South, “have” versus “have-not” confrontation. However, the stakes are very high. The clarion call for new economic equity only thinly disguises the underlying demand for a greater share in everything the oceans have to offer. The oceans have much to offer. There are fish and other seafood for the 6 billion people of the world of the very near future; there is oil and gas for a world that is going to run out of such land-based resources even more rapidly; there are minerals to feed the wheels of an unequally industrialized world. These are the multiple uses of the sea—some ancient, some modern, and many still in the future. We speak here of the near future—there is hardly anything today that can be said to be in the distant future. These many uses include the sea as a dumping ground for human wastes as land-dumping sites become scarcer, and the use of the ocean’s waters for tidal energy as we run out of other sources. We will have to turn the salty water of the ocean into fresh water to feed the arid land regions of the world, which soon will have to be utilized. The sea will soon be a new habitat for people escaping the problems of overpopulation, pollution, and land scarcity.

The most ancient of all uses of the sea—ocean shipping—will be under particular pressure in the new law of the sea; yet it has scarcely been considered in this, the largest of all international conferences. The purpose of this book is to examine this particular use. We wish to step back a little from the technocratic and legal urgencies of UNCLOS III and the many other forums where the ocean debate is taking place, and to look at the evolution of international maritime law and commerce, its problems, its inequities, and its greatness. We will attempt to return to basics—not to describe nor to reinterpret history, but to examine it with the hindsight of well over three millennia of constant ocean use.

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1

The Origins of Shipping

The Sea with its winds, storms, dangers, doesn't change; it calls for a necessary uniformity of juridical regimes.

—Pasquale Stanislao Mancini, (Inaugural Lecture, University of Torino, 1861)

The Setting and the Beginning: The Ancient Mariners

It is quite feasible that our planet has the wrong name. Ancient people named it Earth after the land they found themselves surrounded by. For centuries upon centuries, people believed that the planet's surface consisted almost entirely of earth and rocks with the exceptions of some small bodies of water, such as the Mediterranean. If they had known then that almost three-quarters of their planet were covered with water, they might more correctly have named it Ocean.

The very vastness of the oceans is astounding. It is possible to be on a ship over 1,500 miles from the nearest land and, at one point in midocean, to be over 3,500 miles from the nearest continent. The seas themselves contain 330 million cubic miles of water—80 times as much as all land above sea level.¹ Land's tallest peak, Mount Everest at 29,000 feet, could be sunk without trace in the sea's deepest depth, the Mariana Trench at 36,000 feet. Moreover, if all the irregularities on the surface of the earth, both above and below sea level, were to be smoothed out, no land would show at all and the seas would cover the entire globe to a depth of 12,000 feet.² Yet despite this overpowering magnitude of the watery mass on our planet, people have tried since well before the dawn of history to make use of the sea. It is certain that humans were making long voyages by sea many centuries before they were able to go more than a short distance on land.³ At the same time the sea, as a cradle of life, has also sustained it. Recent archeological and historical discoveries tell us that at least 3,000 years ago fishing had already developed into a highly organized craft.⁴ It has remained so ever since. Today over three-quarters of the world's population depends on fish for the greater part of its animal protein.⁵

But here we concern ourselves with man, the sailor. We now know that there were sailors before there were farmers and shepherds; that there were

ships before people had settled in villages and made the first pottery.⁶ Seafaring has been a vital part of human history and progress for a simple reason. The most efficient means for moving people and materials in any quantity is by flotation in some sort of craft in the water. We know that the simplest form of water craft, the 10-meter North American birchbark canoe, could carry 3,600 kilograms, including the weight of eight men. Such a cargo would require thirty-five porters on land, providing that each porter could carry 80 kilograms all day long.⁷ If the cargo consisted of a large and heavy piece, which neither men nor beasts of burden could carry, then a ship was the answer. We know that a queen of ancient Egypt had a pair of stone obelisks with a total weight of 700 tonnes moved the entire length of Egypt on the Nile.⁸ The Romans gave us the basic principle of marine transport when they determined it cost more to cart a large quantity of grain 75 miles than to ship it by sea from one end of the empire to the other.⁹ The principle of marine transport has thus remained a central part of human life. Only the methods have changed.

The world has known so many types of ships that one has replaced another very quickly, and the older ones are forgotten. We have few records save an occasional rock drawing. The Egyptians are generally credited with inventing the sail some 8,000 years ago.¹⁰ However, it is quite possible that ships were sailed in other areas of the then-unknown world, which has given us no records. Before the sail, it was necessary to paddle or punt. The sail—probably evolved from the wind catching soldiers' shields or palm-leaf shades on the craft—was, of course, the turning point. Ships became more sophisticated, larger, and faster in a relatively short time. We should note that the adoption of wind power for land use did not take place until almost 7,000 years after the first square sail was hoisted aboard an Egyptian ship.¹¹

Western civilization undoubtedly began in the littoral areas of the Mediterranean, and shipping probably originated off its eastern shores. The records are scanty or nonexistent, but there is sufficient evidence that there was already much navigation in Minoan times and a little later, almost at the dawn of recorded history, in the Phoenician era.¹² The strong Mediterranean tradition has until recently discounted the existence of sea travel in other, then-undiscovered, areas of the globe. For example, it has been stated with some authority that navigation was nonexistent in early India.¹³ However, recent archeological excavations contradict this notion. It was found that brisk seaborne trade existed between the Indus people and the Sumerians in the late Third and the Second Millennium B.C.¹⁴ However, we really know very little about these very early times since almost no records have survived. We must rely on the dim tracts of potsherds, mysterious artifacts, and other such objects. A handful of words, "bringing of forty ships filled with cedar logs," written by an unknown scribe listing the accomplishments of Pharaoh Snefru of Egypt in about 2650 B.C., brings us