Stefan A. Riesenfeld, the Arctic and the Law of the Sea

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Ladies and Gentlemen. My thanks to Dr. Martin Schulte and Dr. Francisca Hernanz for the invitation to speak today. It is my pleasure to come before the members of the DAJV and IABA. It is likewise my pleasure to speak here at the University of Köln both because it is the University of Köln and because it is a University with which Berkeley has had a long and greatly valued relationship.

The occasion of what would have been Stefan Riesenfeld’s 100th birthday brings back for all of us who knew him memories of what a fascinating man he was. I first met Steve in 1980, he was already 72. His first words directed to me personally were “that is the stupidest idea I have ever heard.” Not all who live past 70, 80 or 90 years old (as in Steve’s case) become or remain fascinating. I suspect Steve was always special. But there is someone fascinating about that much age, that much experience itself. All of humanity, with no – not one -- exception, is wedged into such a narrow slice of time. So when we meet someone who pushes slightly at the edges of that wedge, it is a special moment. Steve told me that his earliest memory was sitting atop his father’s shoulders at a parade in his native Breslau where the Kaiser with breastplate shining rode past to

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dedicate the hundred year hall commemorating the 100th anniversary of a battle against Napoleon. Two centuries of change wrapped in a living memory!

Today, I intend to talk about the changing Arctic and set it in the context of the Riesenfeld century and with reference to his dedication and passion for the law of the sea.

There is much news today about the Arctic and, in case you’ve missed it, many conferences and meetings about its future. In my experience having gone to many of these meetings, the speeches can be like ships passing in the dark – they come from different directions, go different places, and are concerned with themselves and unaware of the others. Needless to say this can be confusing, if not dissatisfying for audiences. I have come to conclude that a speaker’s thoughts about the politics and law of the Arctic are animated by some image of the Arctic. It is important to remember that much of the discussions of the past year about the Arctic are about an Arctic that has not yet come to pass. These discussions are based on images, on someone’s imagination, of the Arctic’s future and sometimes on residues of past images.

Thus in my remarks, I offer you three images of the Arctic that I believe are present in political and legal discussions today. I find them helpful as a framework within which one may situate discussions of the Arctic. Within these images in mind, I then offer a few comments on the relationships these images have with each other and with climate change.

The First Image – The Impassable Area

The first image of the Arctic is the image that has dominated our vision for centuries, it is the vision that dominated Riesenfelds’s lifetime and which it is important to recognize will persist for reasons I discuss later.
This image is in black and white. In it, pack ice – apparently empty of life, extends to the distant horizon beneath a slate grey sky. In this image the Arctic is inhospitable and impassable. In this image, the threat of USSR posed during the Cold War was not that Soviets would come across the ice, but rather that missiles would come over the ice. Here one does not think of crossing the Arctic Ocean, but rather one imagines heroic explorers reaching the North Pole only to quickly return. It was only one year after Steve was born in 1908 that Robert Perry, along with Mathew Henson and four Eskimos, were the first people to reach the North Pole. In 1932, Steve received his first Doctorate in law at the age of 24. It was only six years earlier in 1926 that first Amundsen and then Bryd were the first individuals to fly over the North Pole. I sailed to the Arctic as Navigator and Ship Salvage Diving Officer aboard the USCGC Polar Star in June of 1976 and, even then, we met the seasonal ice of the Arctic south of the Bering Straits and the permanent pack ice just North of Alaska; even then, no American surface vessel had broken ice through to the North Pole.

In this image, both law and politics are dormant, asleep. Boundaries with neighbors are sketchy and unclear, but there is no urgency to resolving them. In general, the citizens of the circumpolar states live in the southern regions and if the native peoples that live in the North wish to move about as if these unclear boundaries do not exist at all, there is little harm in their doing so. It may very well be that valuable resources exist in the region, but their exploitation, like the exploitation of the manganese nodules of the deep seabed, may not be technically possible and, even if possible, do not yet make commercial sense.

*The Second Image – The Ring*

The second image is that of the composite photograph depicting the extent to which summer ice has currently retreated. Here the center of the
Arctic remains impassable to all but icebreakers. And even for icebreakers such passages take time, consume fuel, and still involve substantial risks. But although the center remains impassable, there is now a ring of water around the Arctic Ocean. In contrast to the impassable sense of the first image, there is now the possibility of following the coastline skirting the land on one side and the ice on the other.

In this image, both law and politics involve ‘proximate bilaterality.’ In this image, each Arctic state focuses on its portion of the ring and in turn focuses on its immediate neighbors. It is in this sense of a focus on one’s immediate neighbors, that I say this image involves not only involves the bilateral, but emphasizes proximate bilaterality.

Each coastal asks what value – what oil or gas, what fish -- is in its portion of the accessible ring. And quite immediately, each Arctic state becomes more concerned with the location of its borders with its neighbors. And, for those of you knew Steve, it is here he would be excited and pouring over charts. The Canadians and the Danes discuss Hans Island and Lincoln Sea. Canada and the United States discuss a line in the Beaufort Sea while the United States and Russia discuss the line above the Bering Strait. Russia and Norway look at a part of the ring that has been accessible for a long time, the Barents Sea, and seek to refine the line between them and to further their separate uses of the area. Shared navigational use of the ring becomes an issue between neighbors (and to a small extent for states outside of the Arctic region). As the Northwest Passage opens up, the recurring discussion between Canada and the United States takes on a new sense of seriousness. For Russia whose coastline encompasses almost all of the Northern Route, the previously limited Russian practice regarding the right of such passage is examined more closely.

*The Third Image – The Semi-Enclosed Sea*
The third image is an image of the Arctic in the not too distant future, perhaps as early as 2030. In the summer of that year, for the first time, there is no summer ice. It is an image of a semi enclosed sea. And it is important to appreciate that this semi enclosed sea is five times larger than the Mediterranean. Indeed, it might be more appropriate to call it a semi-enclosed ocean. In the same vein, it is important to appreciate that even if the seabed of the Arctic were entirely divided up between the circumpolar states (of which I am doubtful), a significant part of the superjacent waters of the Arctic Ocean will be high seas. And this image leads to two significant shifts from the second image. First, one looks not only to one’s neighbors, but one looks across the sea. Second, like all semi enclosed seas, the states inside will become concerned with the states outside the sea entirely and the states outside will become increasingly interested in asserting their interests in the semi enclosed sea. Because of both of these shift, in the third image, law and politics are concerned with governance of a shared area.

Let’s take these two shifts one at a time. First, one looks not only to one’s neighbors, but one looks across the sea. In the third image, many of the coastal development projects viewed as possible in the second image have come about. There are many more people in the Arctic and significantly more activity. The emphasis in the second image of drawing jurisdictional lines between neighbors along the ring increasingly in the third image shifts to an emphasis on governance of a shared area, the semi enclosed sea. And if the challenge now is governance, then the critically important point to recognize is that all turns on Russia. The Arctic as a semi enclosed sea is dominated in terms of coastline by Russia and Canada. And between the two of them, it is quickly apparent that in terms of population, economic activity, and watershed emptying into the Arctic Ocean, it is Russia that is most present in the Arctic. That fact is problematic in that the possibilities of successful shared governance are highly dependent on the regulatory capacities of the states involved. And
in this regard, the reality on the ground is that the Russian regulatory state is a work in progress, and a particularly slow work in progress in the Russian hinterland.

The main institutional effort at Arctic governance at present is the Arctic Council. But although the Council has an innovative structure and has produced important studies in its short existence, it is also an institution of limited capacities with certain issues beyond its mandate.

The second shift in outlook that accompanies the third image is that of the circumpolar states looking outward and the states of the rest of the globe looking in. In particular, in the third image, there can be little doubt that the fishing fleets of East Asia and Northern Europe in time will begin to operate on the Arctic high seas, perhaps in significant numbers. Recall that fish are particularly sensitive to the temperature of water and have already been observed to be moving northward. Again governance will become important and, at a minimum, one will see, for example, the creation of a regional fisheries organization. Simultaneously, as regional efforts at governance advance, we can expect that states outside the region will ask why the Arctic Ocean should be the province of only a handful of states and seek to globalize such efforts at governance at least for those areas beyond national jurisdiction. And, if you recall Steve’s book The Protection of Coastal Fisheries in International Law from the 1940’s, you know this also would be an area of great interest to him.

Finally, we must acknowledge that cooperative governance as a historical matter is not to be assumed. In particular, in the third image there arises a possibility that was impossible in the first image -- namely the militarization of the surface of the Arctic Ocean. Is it so far-fetched to imagine the symbolic entry of a convoy of destroyers by 2020, of an aircraft carrier by 2030? In one sense this might be seen as merely a symbolic militarization given the operation of submarines under the arctic ice for many decades. But symbols often matter more than one might think. And again at some point, this surface presence will include the
military vessels of non circumpolar nations. A general agenda item, even if unlikely, perhaps better thought of now rather than later is a regional demilitarization of at least the surface waters of the Arctic Ocean.

*The Influence of the Three Images*

The influence of each of these images on law and politics is changing as a result of warming in the Arctic and the social and economic consequences of that warming. First, it is important to note that, depending upon one’s position, these three images exist simultaneously in many discussions. Second, the general effect of warming is to give more influence to the issues present in the second and third images, and in essence to accelerate our moving from the first image toward the third image. But, third, warming of the Arctic does not eliminate the first image. One must remember that climate change does not alter at all the angle of the Earth and that the first image remains a strong image of the Arctic in the winter season. The Arctic may be getting warmer and more ice free in summer, but it is no less dark in winter. The winter ice may become an annual, rather than perennial, ice coverage and therefore not as formidable, but it will not disappear. Indeed, one estimate is that it would take an average 30 degree temperature rise globally to render the Arctic ice free in winter. Recognition of the persistence of winter is crucial because the economic boom visions of the second and third images must be seen in seasonal terms. Shipping routes will be used for only months of the year, not the entire year and there may be transition periods where the risks of such use increase. Likewise, the anticipated expansion of offshore oil and gas activities must be seen in terms of the ability of such structures to withstand the structural demands of the winter season.

*Conclusion*
The changing Arctic presents many issues and the discussions ongoing thus often can talk past each other. Each of the three images of the Arctic described above is important to addressing the Arctic’s future. Given that the prime driver of interest in the Arctic is resource exploitation, then we can rest assured that there will be much discussion in the second image. It is the third image that raises the national, regional and global governance of the region that we will need to consciously fold into the discussions to come.