THE ORIGINS OF THE 1982 CONVENTION ON THE LAW OF THE SEA*

Nine years after it began, the Third UN Conference on the Law of the Sea adopted the UN Convention On The Law Of The Sea on 30 April 1982. This article, the first in a series of three, traces the evolution of the law of the sea. In the beginning there was chaos. Out of the chaos an international legal order, based upon a three-mile territorial sea, gradually emerged. In time, this order was increasingly challenged by the unilateral claims of coastal states. Faced with the threat of legal chaos, the international community decided, in 1970, to convene the Third UN Conference on the Law of the Sea in an attempt to build a new international legal order for the sea.

I. THE BIRTH OF THE OLD LEGAL ORDER

ON the 30th of April 1982, the Third United Nations Conference on the Law of the Sea adopted the world's first comprehensive treaty dealing with all aspects of the seas and its resources. The treaty is called the UN Convention on the Law of the Sea. It was opened for signature in Montego Bay, Jamaica, on the 10th of December 1982 and was signed by 119 countries on that first day.

How will the convention affect the multi-faceted activities of man in ocean space? Will the convention safeguard the world community's interest in commercial navigation? How does the convention resolve the conflict between coastal fishermen and foreign fishermen? Will the convention lead to the better management and more equitable utilisation of the world's fish stocks? This article and the two to follow will attempt to answer these and other questions concerning the new treaty.

To begin, a brief retrospective look at the history of this branch of international law may be helpful. In 1493, Pope Alexander VI promulgated a Papal Bull, "Inter Caetera", under which a line was drawn down the Atlantic Ocean.[1] Under the Papal Bull, the ocean space and territories west of that line discovered by Spain belonged to her. The ocean space and territories discovered by Portugal, east of that line, belonged to her. The two powers, Spain and Portugal, concluded a bilateral treaty at Tordesillas on 7 June 1494, in line with the Papal Bull.[2] England, followed by Holland, protested against these agreements.

When the Spanish ambassador to England complained against the voyage of Sir Francis Drake to the Pacific, Queen Elizabeth I replied: "The

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1 For a history of these early developments, see R. Lapidoth, "Freedom of Navigation — its Legal History and its Normative Basis" (1975) 6 J. Mar. L. & Comm. 259 at 261-268; W. Fulton, *The Sovereignty of the Sea* (1911) p. 105-107. The Papal Bull is reprinted in (1973) 4 *Annals of International Studies,* p. 309.

2 (1973) 4 *Annals of International Studies,* p. 317.

use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, for as much as neither nature nor regard of the public use permitteth any possession thereof."[3]

The view of Spain and Portugal, often referred to as "Mare Clausum" was that the sea was capable of being subject to dominion and sovereignty. Spain claimed exclusive dominion over the Pacific Ocean and the Gulf of Mexico. Portugal claimed exclusive dominion over the Atlantic Ocean, south of Morocco, and the Indian Ocean. The opposing view of the English Queen, Elizabeth I, commonly referred to as "Mare Liberum" was that the sea was incapable of appropriation as it was a *res communis,* belonging to all nations. The struggle between these two schools of thought was to continue for three hundred years, from the fifteenth to the eighteenth century before the law was settled in favour of *mare liberum.*

In 1601, a naval commander of the Dutch East India Company captured a Portuguese galleon, loaded with a valuable cargo of spices, in the Strait of Malacca. At that time Portugal was under the dominion of Spain and Spain was at war with Holland. The ship, Santa Catherina, was brought to Amsterdam to be sold as prize. Some shareholders of the Dutch East India Company objected to the sale. The company retained a young Dutch lawyer, Hugo Grotius, to prepare an opinion on the question. Grotius completed his legal brief, entitled "De Jure Praedae" (on the Law of Spoils) in 1604, Chapter XII of the brief was entitled "Mare Liberum" (The Free Sea). This chapter was published annonymously in 1609.[4] Grotius later included it as part of a larger work entitled "Re Jure Belli ac Pads" which was published in 1625. According to R.P. Anand,[5] Grotius was aware of and influenced by the then prevailing Asian maritime practices of free navigation and trade in writing "Mare Liberum".

Ruth Lapidoth summarizes the Grotian thesis as follows: "Grotius bases the freedom of the high seas on two principles: 1. Things that can neither be seized nor enclosed cannot become property — they are common to all and their use pertains to the whole human race; 2. Things which have been created by nature in such a state that their usage by one does not preclude or prejudice their use by others, are common, and their use belongs to all men. According to Grotius, on the high seas nobody can claim dominion or exclusive fisheries rights nor an exclusive right of navigation. The sea is under no one's dominion except God's; it cannot by its very nature be appropriated; it is common to all, and its use, by the general consent of mankind, is common, and what belongs to all cannot be appropriated by one; nor can prescription or custom justify any claim of the kind, because no one has the power to grant a privilege adverse to mankind in general."[6]

Meanwhile, the view of the English government had moved from the *mare liberum* of Queen Elizabeth I to the *mare clausum* of the Scottish kings, the Stuarts. Perhaps mindful of Scotland's dependence on coastal fisheries and envious of the rise of Holland as a great maritime and trading power, King James I and his successors laid claim to the seas surrounding the British

3 Fulton, *supra* note 1, p. 107.
4 H. Grotius, *Mare Liberum* (1608) (English translation by R. V. D. Magoffm, 1916).
5 R. P. Anand, *Origin and Development of the Law of the Sea* (1983).
6 Lapidoth, *supra* note 1, p. 264.

Isles. In 1609, King James I issued a proclamation under which foreigners who wished to fish within eyesight of the British coast, fixed at 14 miles, had to obtain a licence. Under the reign of Charles I and II, Britian asserted sovereignty over all the seas surrounding the British Isles.

During the rule of the Stuarts in Britain, numerous legal scholars sought to refute the Grotian thesis of *mare liberum.* The most important of these was John Selden who published in 1635, "Mare Clausum sive De Dominio Maris". Ruth Lapidoth summarizes Selden's thesis as follows:

> "Selden maintains that the ancient law on the community of things has become modified in certain respects and that according to practice and custom, the sea was capable of appropriation. He cites many precedents from history to support this statement. Selden admits that to prohibit innocent navigation would be contrary to the dictates of humanity, but in his view the permitting of such innocent navigation does not derogate from the dominion of the sea — it is comparable to the free passage on a road across another's land — and it cannot always be claimed as a right. With respect to the argument that the sea cannot be appropriated because of its physical properties, he points to the example of rivers, lakes and springs, which even by Roman law could be appropriated. It is not true that the sea had no banks or limits — it is clearly bounded by the shores, and limits may be set in the open sea by nautical science. Selden denies that the sea is inexhaustible, and he maintains that is usage — eg fishing, navigation, commerce and the extraction of pearls and corals and the like-by others, may diminish its abundance and prejudice its use by its owner."[7]

The British claims to the seas around the British Isles were maintained, in whole or in part, through most of the seventeenth century. They were discontinued at the beginning of the eighteenth century when Britain achieved naval supremacy. *Mare liberum* was obviously more advantageous to her once she became the supreme naval power. Gradually, the balance tilted in favour of the doctrine of the freedom of the seas. However, as Lucius Caflisch has pointed out:

> "The doctrine was not, of course, carried to its extreme logical conclusion, namely, that no part whatever of the sea is susceptible of being placed under coastal state jurisdiction. Such a conclusion would have been a practical absurdity, for states have a vital interest in the protection of their laws, their security and, possibly, their neutrality within a strip of the seas adjacent to their coasts."[8]

A. *The Evolution of the Concept of the Territorial Sea*

According to Caflisch, the idea of a narrow belt of the sea placed under coastal state jurisdiction in matters of piracy and of offences committed in that area can be traced back to Bartolus (1314-1357), Baldus (1327-1400) and Jean Bodin (1530-1596). Alberto Gentili (1552-1608) was apparently the first scholar to use the expression "territorium" to describe the relationship between the coastal state and the sea adjacent to its coast. What was the nature of the coastal state's jurisdiction in this belt of the sea? It was limited to matters of capture at sea and of neutrality.

[7] *Ibid.*, p. 266.

[8] L. Caflisch, "The Doctrine of "Mare Clausum" and the Third United Nations Conference on the Law of the Sea, in R. Blackhurst et. al., *International Relations in a Changing World* (Geneva: Graduate Institute of International Studies; Sijthoff, 1977), p. 201.

How broad a band of the sea off its coast could a state claim for this purpose? It was not originally conceived as a belt of uniform breadth following the coastline of a state. It existed only in those waters which fell under the range of guns effectively placed on the coast, the so-called canon-shot rule. The canon-shot rule had two defects. First, it was applicable only in those areas where guns had actually been emplaced on the coast. This meant that where there were no guns, the coastal state could make no claim. Secondly, the canon-shot rule did not produce territorial seas of uniform breadth because the range of canons varied greatly.

A second criterion was developed as a result of the practice of states such as Spain, England, Denmark and Norway. This was the line-of-sight rule. Under this rule, a coastal state could claim a band of the sea from its coast to as far as the human eye could see, within which, the coastal state could exercise powers to protect its security, to enforce its customs regulations and to protect the coastal population and its economic interests, for example, in fisheries. Like the canon-shot rule, the line-of-sight rule was imprecise and a coastal state could claim anything from three to twenty miles.

A third criterion emerged, largely as a result of the practice of the Scandinavians. According to Sayre A Swarztrauber,[9] Spain was the first country to apply the line-of-sight doctrine in 1565. The Dutch were the first to invoke the canon-shot rule in 1610. In the intervening period, the Danes instituted the use of an exactly fixed extent of territorial seas measured in marine leagues. The term "marine league" when used by Scandinavian publicists or by others referring to Scandinavian territorial waters, generally refers to a distance of four nautical miles. Otherwise, the term usually means three nautical miles. A Danish ordinance of 1598 ordered the seizure of any English ship hovering or fishing within two leagues of the coast. Thereafter, the Scandinavian states consistently measured their territorial sea boundaries in leagues. By the middle of the eighteenth century, the Scandinavians had evolved the common practice of claiming one marine league (four nautical miles) as the limit of their territorial seas, for the purpose of fishing as well as for neutrality.

The interesting story of how the three criteria, the canon-shot rule, the line-of-sight rule and the marine league rule gradually merged to become the three mile territorial sea has been recounted by Swarztrauber.[10] The first step was taken in 1761 by France when it equated the canon-shot rule with three miles. At that time, England and France were at war. A French privateer had seized two British ships off Jutland, in waters claimed by Denmark as her territorial seas. Denmark claimed one marine league or four nautical miles as the extent of her territorial seas. France recognized the canon-shot rule for the purpose of neutrality. The British complained on behalf of the owners of the two ships to the Dano-Norwegian Government. The latter, in turn, protested the seizures to the French. In the French memorial to the Danish government, France asserted that the seizures were legal and went on to state that it was prepared to depart from its previous position and recognize the Scandinavians' claim to a continuous belt of territorial sea provided it was three and not four miles.

9 S. Swartztrauber, *The Three Mile Limit of Territorial Seas* (1972).

10 *Ibid*., pp. 51-63.

11 English translation from Italian contained in Swartztrauder, *Ibid*., *p.* 55.

The second step was the publication in 1782 of a monograph entitled "The Duties of Neutral Princes towards Belligerent Princes" by Abbe Ferdinando Galiani. He wrote:

> "It would appear reasonable to me, however, that without waiting to see if the territorial sovereign actually erects some fortifications, and what calibre of guns he might mount therein, we should fix, finally, and all along the coast, the distance of 3 miles, as that which surely is the utmost range that a shell might be projected with hitherto known gun powder."

The third step was the actions of the then newly independent, United States of America, in embracing the three-mile rule. In response to a French request to fix the limit of United States' territorial sea, the then secretary of state, Thomas Jefferson, informed the British and the French on the 8th of November 1793 that the United States was provisionally fixing its territorial sea at three miles. This became formalised by an Act of Congress in 1794.[12] According to Swarztrauber, the United States became the first state to incorporate the three-mile limit into its domestic laws.

Gradually, the three-mile territorial sea was incorporated into domestic laws, upheld by courts and advocated by publicists. The next important development occurred in 1818 when the three-mile rule was, for the first time, incorporated into a treaty between states. In the "Convention Respecting Fisheries, Boundary, and the Restoration of Slaves, October 20, 1818", concluded between Britain and the United States, a key sentence read:

> "And the United States hereby renounces, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, any, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America."[13]

In the course of the nineteenth century, the three-mile rule became almost universally accepted. Great Britain was its champion. It will be recalled that England, under Queen Elizabeth I, had challenged Spain's claim to exclusive dominion over the Pacific Ocean and the Gulf of Mexico and Portugal's claim to exclusive dominion over the Atlantic Ocean, south of Morocco, and the Indian Ocean. Under the reign of the Stuarts, the Scottish kings, the British pendulum had swung from *mare liberum* to *mare clausum.* At the beginning of the nineteenth century, with the defeat of Napoleon and the Congress of Vienna, Britain emerged as the world's greatest power, on land as well as at sea. It was logical for Britain, as the world's supreme naval power, to advocate the universal adoption of the three-mile territorial sea. As Lord Strang explained:

> "In manufacture, in merchant marine, in foreign trade, in international finance, we had no rival—As we came, by deliberate act of policy, to adopt the practice of free trade and to apply the principle of 'all seas freely open to all', we moved towards Pax Britannica, using the Royal Navy to keep the seas open for the common benefit, to suppress piracy

[12] An act in addition to the act for the punishment of certain crimes against the United States, June 5, 1974, Ch. 50, 1 United States Statutes at Large, p. 384

[13] Convention with Great Britain of October 20, 1818, 8 United States Statutues at Large, p. 248.

and the slave trade, and to prepare and publish charts of every ocean."[14]

The three-mile territorial sea was accepted by all the great powers and most of the medium and small powers during the nineteenth century. There were, however, some exceptions to the general rule. The Scandinavians continued to claim a limit of one marine league or four nautical miles. Spain and Portugal claimed a limit of six miles. Mexico claimed a limit of nine miles. Uruguay claimed a limit of five miles.

B. *Aftermath of First World War*

The First World War brought about important changes to the political geography of the world. The four defeated empires, Russian, Ottoman, Austro-Hungarian and German, were broken up and new nations were born. Finland, Latvia, Estonia, Lithuania, Poland, Arabia, Egypt, Yemen, Czechoslovakia and Yugoslavia became independent. A new international organisation, the League of Nations, was established. One of the tasks of the League was the codification of the law of nations. The Assembly of the League requested the Council to convene a committee of experts to determine those subjects of international law which should be considered for codification. In April 1925, the Council established the Committee of Experts for the Progressive Codification of International Law. The Committee selected eleven subjects for investigation and appointed a sub-committee to look into each subject. One of the eleven subjects was the territorial sea. The sub-committee on the territorial sea was chaired by Walter Schuckling of Germany and consisted of two other members, Barbosa de Magalhaes of Portugal and George W Wickersham of USA. The three members of the sub-committee were unable to agree Wickersham was for the three-mile territorial sea. Schuckling favoured a six-mile territorial sea with a customs, sanitary zone beyond. Barbosa de Magalhaes proposed one single zone of twelve miles in order to satisfy all the needs of states.

The committee of Experts decided to send questionnaires on seven of the eleven subjects to various governments. Attached to the second questionnaire was a draft article which read as follows:

"Article 2

Extent of the rights of the riparian State. The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitute) from low-water mark along the whole of the coast. Beyond the zone of sovereignty, states may exercise administrative rights on the ground either of custom or of vital necessity..."[15]

The dissenting views of Schuckling and de Magalhaes were appended to the questionnaire. In reply to the question whether the law of the territorial sea should be made the subject of an international convention, twenty-five states replied that a convention to codify the law of the territorial

[14] Lord W. Strang, *Britain in World Affairs* (1961), pp. 99-100, as quoted in Swarztrauber, *supra* note 9, pp. 64-65.

[15] League of Nations, Second Session of the Committee of Experts for the Progressive Codification of International Law, Official Records, (1926) 20 Amer. J. Int'l L. (Spec Supp.), Report of the Sub-Committee on Territorial Waters, p. 141.; S. Rosenne, *Committee of Experts for the Progressive Development of International Law [1925-1928]* (2 Vols., Oceana, 1972), Vol. 2, p. 98.

waters would be possible and desirable. Only three states, France, Italy and Poland replied that the time was inopportune for such a convention. Spain objected to the questionnaire because the proposal was contrary to Spanish law. Austria and Switzerland abstained.[16]

On the question whether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea, twenty-two states, including France, Italy and the US, favoured a convention. Six states, including the UK and Japan, replied in the negative. Austria and Switzerland again abstained.[17]

After examining the replies, the committee of Experts reported to the League's Council that seven subjects were ripe for codification. The League decided to convene conferences to examine three subjects, including the territorial sea, beginning in 1929. A Preparatory Committee was appointed to prepare detailed bases of discussion for the conferences. The Preparatory Committee drew up, *inter alia,* the following bases of discussion:

> "Basis of Discussion No. 3
>
> The breadth of the territorial waters under the sovereignty of the coastal state is three nautical miles...
>
> Basis of Discussion No. 5
>
> On the high seas adjacent to its territorial waters, the coastal state may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its customs or sanitary regulations or interference with its security by foreign ships.
>
> Such control may not be exercised more than twelve miles from the coast."[18]

C. *The Hague Codification Conference of 1930*

The Conference was held at the Hague in March 1930 and was attended by the representatives of forty-eight governments. The rules of procedure of the conference provided that drafts would be approved by a two-thirds majority of the delegates voting in the committee, although only a simple majority would be required in the plenary for final approval. The positions of the various delegations were as follows: ten states, South Africa, USA, Great Britain, Australia, Canada, China, Denmark, India, Japan and the Netherlands, favoured the three-mile limit. Two states, Greece and the Irish Free State, also supported the three-mile limit but they could accept a contiguous zone. Seven states, Germany, Belgium, Chile, Egypt, Estonia, France and Poland would support the three-mile territorial sea provided a contiguous zone was added. Three states, Iceland, Norway and Sweden, favoured a four-mile territorial sea. Finland also supported a four-mile territorial sea but wanted a contiguous zone as well. Six states, Brazil, Colombia, Italy, Romania, Uruguay and Yugoslavia favoured a six-mile territorial sea. Six others, Cuba, Spain, Latvia, Persia, Portugal and Turkey wanted a six-mile territorial sea together with a contiguous zone.

16 Swartztrauber, *supra* note 9, p. 134.

17 *Ibid.*

18 S. Rosenne, *League of Nations Conference for the Codification of International Law* (1930) (4 Vols., Oceana, 1970), Bases of Discussion II – Territorial Waters, Vol. 2, pp. 251-252, Document C.74.M.39.1929.V.

Because views were so divergent, no formal vote was taken on any of the proposals in the committee. A possible compromise consisting of a three-mile territorial sea and a nine-mile contiguous zone was squashed by strong British oppostion. The conference therefore ended in failure. Swarztrauber has expressed the view that by allowing the conference to fail, "the great maritime powers ended their oligarchical maintenance of the maximum *mare liberum*. The Conference suggested to all that the great powers were no longer committed to enforcement of the three-mile limit. From 1930 on, the rule was subjected to increasing criticism, and its significance became diminished by the rapid development of the concept of the contiguous zone."[19]

D. *The Contiguous Zone*

What is the contiguous zone? The concept is that beyond the territorial sea, however limited, there would be a zone of the sea in which the coastal state would not have sovereignty but would exercise certain functional jurisdiction. Although the name, "contiguous zone", was not used until the Hague Conference of 1930, the idea had a long history. For example, in the early nineteenth century, Britain asserted customs jurisdiction to a distance of 300 miles from its shores.[20] The United States had always claimed exclusive customs jurisdiction inside a twelve-mile limit.[21]

In the 1930 Hague Codification Conference, it was proposed to create a contiguous zone beyond the territorial sea. In this zone, the coastal state would be empowered to prevent or punish infringements by foreign vessels, in its territorial sea, of the coastal state's regulations regarding customs, sanitation and national security.[22] Although the proposal was not adopted, due mainly to British opposition, the concept was increasingly reflected in the practice of states. Between 1930 and 1940, the following contiguous zone claims were made:[23]

State	Extent	Purpose of Claim	Means & Date of Implementation
China	12 miles	Customs	Customs Preventive Law of 19 June 1934
Colombia	20 kms	Customs	Customs Law of 19 June 1931
Cuba	5 miles	Sanitation	General Law on Fisheries of 28 March 1936
Czechoslovakia	12 miles	Anti-smuggling	Treaty with Finland, 21 March 1936

19 Swartztrauber, *supra* note 9, p. 140.

20 Act for the More Effectual Prevention of Smuggling, 12 July 1805, 45 Geo. III, c. 121, and the Act for the More Effectual Prevention of Smuggling, 13 August 1807,47 Geo. III (Sess. 2), c. 66.

21 Sec. 27 & 54, Act to Regulate the Collection of Duties on Imports and Tonnage, 2 March 1799, Ch. 22, 1 United States Statutes at Large 627 at 648 and 668; Sec. 581, Tariff Act of 1922, 21 September 1922, Ch. 356, 42 United States Statutes at Large 858 at 979.

22 League of Nations Conference, *supra* note 18, Vol. II, p. 34.

23 Swartztrauber, *supra* note 9, p. 148.

Denmark	12 miles	Anti-smuggling	Act No. 316 of 28 November 1935
Dominican Rep.	3 leagues	Naval security area	Law No. 55 of 27 December 1938
Ecuador	15 miles	Fishing	Decree No. 607 of 29 August 1934
El Salvador	12 miles	Police & Fishing	Law of Navigation and Marine of 23 October 1933
Finland	6 miles	Customs	Customs Regulation of 8 September 1939
France	20 kms	Fishing	Presidential Decree of September 1936
Guatemala	12 miles	Port authority jurisdiction	Regulations of 21 April 1939
Hungary	12 miles	Anti-smuggling	Treaty with Finland of 23 November 1932
Iran	12 miles	Marine supervision	Act of 19 July 1934
Italy	12 miles	Customs	Customs Law No. 1424 of 25 September 1940
Lebanon	20 kms	Customs	Order No. 137/LR of 15 June 1935
Norway	10 miles	Customs	Royal Resolution of 28 October 1932
Poland	12 miles	Customs	Customs Law of 27 October 1933
Syria	20 kms	Customs	Customs Code of 15 June 1935
Venezuela	12 miles	Security, customs, sanitation	Presidential Decree of 15 September 1939

E. Developments After the Second World War

After the second world war, the United States eclipsed Great Britain in both naval and land power. The burden of defending the principle of the freedom of the seas, in general, and the three-mile territorial sea, in particular, was therefore transferred from the British to the Americans. For over a hundred years, the British had single-handedly enforced the three-mile territorial sea by precept, by example and where necessary, by force. American policy was less consistent.

The point that unlike the British, American behaviour was less consistent and coherent is well brought out by what the United States did in 1945. In that year, President Truman issued two proclamations relating to the sea. In the first proclamation, the United States asserted its jurisdiction and con-

trol over the natural resources of the subsoil and sea bed of the continental shelf contiguous to the United States coast.[24] The term "continental shelf was described in an accompanying press release as generally extending to the point where the waters reached a depth of 600 feet or 200 metres isobath. In the second proclamation, the United States "regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale..."[25] The proclamation provided that the conservation zones would be established and maintained through agreement with those States whose subjects traditionally fished the areas in question.

The actions of United States were immediately emulated and exceeded by her regional neighbours. Mexico issued a similar proclamation one-month after the United States.[26] A year later, Argentina not only claimed sovereignty over her continental shelf but also to the water column above the shelf.[27] Between 1946 and 1957, ten other states claimed sovereignty over their continental shelves and the superjacent water.[28] Between 1947 and 1955, five Latin-American states: Chile,[29] Peru,[30] Costa Rica,[31] Ecuador,[32] and El Salvador[33] declared 200-mile limits for exclusive fishing rights. On the 19th of August, 1952, the representatives of Chile, Ecuador and Peru issued a joint declaration, the Santiago Declaration on the Maritime Zone. The declaration specified its purpose as the conservation and preservation "for their respective peoples, the natural riches of the zones of the sea which bathed their coasts." In order to achieve this purpose, the three governments "proclaim as the standard of their international maritime policy, that to each one of them belongs the sovereignty and exclusive jurisdiction over the sea that washes their respective coasts, up to the minimum distance of two hundred nautical miles from the said coasts."

Swarztrauber blamed the Truman proclamations for providing the basis for the Latin-American claims. He reasoned thus: "The Latin Americans had become concerned about the modern US fishing vessels seen off their coasts. Whether or not their concern was well-founded, they feared that their waters might be "overfished" by foreigners and they wished to extend their

24 Proclamation No. 2667, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", September 28, 1945, (1946) 40 Am. J. Int'l L. (Supp) 45; Whiteman, (1965) 4 Digest of International Law 756.

25 Proclamation No. 2668, "Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas", September 28, 1945, (1946) 40 Am. J. Int'l L. (Supp.) 46; Whiteman, (1965) 4 Digest of International Law 956.

26 Swartztrauber, *supra* note 9, pp. 162-165. This national legislation on law of the sea can be found in United Nations, *Laws and Regulations on the Regime of the High Seas,* Vol. 1 (1951) (UN Legislative Series, Document No. ST/LEG./SER.B/51v.2).

27 "Decree No. 14708 concerning National Sovereignty over Epicontinental Sea and the Argentine Continental Shelf, 11 October 1946," in United Nations, Laws and Regulations on the High Seas, pp. 4-5.

28 Panama in 1946, Chile and Peru in 1947, Costa Rica in 1949, Nicaragua and El Salvador in 1950, South Korea in 1952 and Cambodia in 1957.

29 Chilean Presidential Declaration of 23 June 1947.

30 Peruvian Presidential Decree No. 781 of 1 August 1947.

31 Costa Rican Regulation No. 363 of 11 January 1949 as amended by Decree No. 739 of 4 October 1949.

32 Ecuadorian Decree No. 1085 of 14 May 1955.

33 El Salvadorian Decree No. 1961 of 25 October 1955.

exclusive fishing boundaries to eliminate outside competition. But such a bold departure from customary law would require a suitable pretext; it was fortuitous for them that the Truman Proclamations came when they did."[34]

Russia had, in 1927, claimed a twelve-mile territorial sea. This had reflected the fact that Russia had traditionally been a land power rather than a sea power. This was still true in the period immediately after the second world war when the Soviet navy was relatively small. During this period, the Soviet objective was to keep the ships and aircraft of her adversaries as far from her coasts as possible. The Soviet Union's Warsaw Pact Allies followed her lead by declaring twelve-mile territorial sea.[35]

Many new states were born between 1945 and 1960, as a result of the dissolution of the British, Dutch and French colonial empires. One of the questions which each new state had to consider was the extent of its territorial sea. Some opted for the three-mile rule but most have claimed territorial seas of more than three miles, especially twelve miles.

F. *First UN Conference on the Law of the Sea*

At the end of the Second World War, a new international organisation, the United Nations, was created to take the place of the League of Nations. One of the purposes of the UN is to encourage the progressive development of international law and its codification. Pursuant to this purpose, the General Assembly of the UN established the International Law Commission. The Commission is mandated to select topics of international law for codification. The Commission began its work in 1949 and chose fourteen topics including "the high seas" and "territorial waters". In 1954, the Commission submitted to the General Assembly provisional articles concerning the regime of the territorial sea. Article 3, on the breadth of the territorial sea was, however, left blank.[36] The General Assembly, in turn, circulated the draft articles to member governments and asked for their comments. Only eighteen replies were received. Three states, US, UK and the Netherlands favoured three miles; one state, Sweden, favoured four miles; four states, Egypt, Haiti, South Africa and Yugoslavia favoured six miles; one state, Mexico, favoured nine miles; one state, India, favoured twelve miles; El Salvador favoured 200 miles; Philippines favoured the archipelagic principle and six others, Australia, Belgium, Brazil, Iceland, Norway and Thailand reserved their positions.[37]

In 1955, the International Law Commission again submitted draft articles to the General Assembly and requested the views of member states. This time, article 3 was not left blank. It read:

"Article 3

Breadth of the territorial sea

1. The Commission recognises that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles.
2. The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles.

34 Swartztrauber, *supra* note 9, p. 169.
35 *Ibid.*, pp. 169-174.
36 [1954] 2 Y.B. Int'l L. Comm. 153-162.
37 [1955] 2 Y.B. Int'l L. Comm. 19-41.

3. The Commission, without taking any decisions as to the breadth of the territorial sea within that limit, considers that international law does not require states to recognise a breadth beyond three miles."[38]

Twenty-five replies were received but most of the replies were non-committal. The Commission took the replies into account in drawing up a draft convention which was submitted to the General Assembly in 1956. Article 3 was revised to read:

"Breadth of the territorial sea

Article 3

1. The Commission recognises that international practice is not uniform as regards the delimitation of the territorial sea.
2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
3. The Commission without taking any decision as to the breadth the territorial sea within that limit notes, on the one hand, that many states have fixed a breadth greater than three miles, and on the other hand, that many states do not recognise such a breadth when that of their own territorial sea is less.
4. The Commission considers that the breath of the territorial sea should be fixed by an international conference."[39]

The General Assembly decided in 1957 to convene a conference of plenipotentiaries to consider the draft convention prepared by the Commission.[40] The First UN Conference on the Law of the Sea opened in February, 1958, in Geneva. The Conference was confronted with a plethora of proposals on the limit of the territorial sea, ranging from three to 200 miles. The United States initially proposed a three-mile limit with an exclusive fishing zone out to twelve miles.[41] Ceylon, Italy, and Sweden[42] proposed six miles. Variations of the twelve-mile limit were proposed by Colombia, USSR, India, Mexico, Burma, Indonesia, Morocco, Saudi Arabia, Egypt and Venezuela.[43] Realising the futility of pressing the three-mile limit, the US and UK attempted to reach a compromise at six miles. The British proposed a six-mile limit with a right of innocent passage for aircraft and vessels, including warships, between three and six miles.[44] The US proposed a territorial sea of six miles and exclusive fishing rights for another six miles, with the proviso that foreign states whose nationals had traditionally fished those coastal waters (for at least five years) could continue

38 *Ibid*., p. 35.

39 *Ibid*., p. 256.

40 G.A. Res. 1105 of 21 February 1957, UN. Gen. Ass. Off. Rec., 11th Sess., (1957) Supp. No. 17, p. 156. (A/3572)

41 First United Nations Conference on the Law of the Sea, Off. Rec., (1958), United States proposal, Vol. III, p. 249, Document A/CONF.13/C.1/L.140 of 1 April 1958.

42 *Ibid*., Ceylon proposal, Vol. III, p. 244, Document A/CONF.13/C.1/L.118 of 1 April 1958; Italy proposal, Vol. III p. 248, Document A/CONF.13/C.1/L.137 of 1 April 1958; Sweden proposal, Vol. III, p. 212, Document A/CONF.13/C.1/L.4 of 10 Marhc 1958.

43 *Ibid*., Colombia proposal, Vol. III, p. 233, Document A/CONF.13/C.1/L.82 and Corr. 1 of 31 March 1958; USSR proposal, Vol. III, p. 233, Document A/CONF.13/C.1/L.80 of 31 March 1958; India and Mexico proposal, Vol. III, p. 233, Document A/CONF.13/C.1/L.79 of 29 March 1958; Burma, Columbia, Indonesia, Mexico, Morrocco, Saudi Arabia, United Arab Republic and Venezuela proposal, Vol. II, P. 128, Document A/CONF.13/C.1/L.34 of 25 April 1958.

to do so in the outer six-mile belt.[45] None of the proposals obtained the necessary two-thirds majority vote.

Unlike the Hague Codification Conference of 1930, which ended without any achievement, the First UN Conference on the Law of the Sea of 1958 adopted four conventions: the Convention on the Territorial Sea and the Contiguous Zone,[46] the Convention on Fishing and Conservation of the Living Resources of the High Seas,[47] the Convention on the High Seas[48] and the Convention on the Continental Shelf.[49] Although the Convention on the Territorial Sea and the Contiguous Zone did not contain an agreed limit on the maximum permissible breadth of the territorial sea, it did contain a comprehensive codification of the rules concerning the right of innocent passage.[50] It also contained an agreed article on the contiguous zone.[51]

The Convention on Fishing and Conservation of the Living Resources of the High Seas did not contain an agreed limit on the coastal state's exclusive fishing rights. The Convention prescribed that conservation programmes should be undertaken on a multilateral basis and should extend over the whole of the fishery. It did permit unilateral conservation action in cases where negotiations were unsuccessful and provided for the settlement of conservation disputes by a special commission.

The Convention on the Continental Shelf provided for the exploitation of the natural resources of the seabed and subsoil and the sedentary species on the seabed beyond the territorial sea... "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources."[52] Article 3 of the Convention ruled out any claims of sovereignty over the shelf's superjacent waters or air space.

G. *Second UN Conference on the Law of the Sea*

Before the 1958 Conference adjourned, it adopted a resolution requesting the General Assembly to study the possibility of calling a second conference to consider the questions left unsettled, i.e. the limits of the territorial sea and fishing zone.[53] The General Assembly decided in 1958 to call a second conference in I960.[54]

The second UN Conference on the Law of the Sea opened in Geneva in March, 1960. The Soviet Union introduced an optional three to twelve-mile limit combined with exclusive fishing rights to twelve miles. Mexico

44 *Ibid*., United Kingdom revised proposal, Vol. III, pp. 247-248, Document A/CONF.13/C.1/L.134 of 1 April 1958.

45 *Ibid*., United States revised proposal, Vol. III, pp. 253-254, Document A/CONF13/C.l/L.159/Rev. 2 of 19 April 1958.

46 *Ibid*., Vol. II, pp. 132, Document A/CONF.13/L.52; 516 U.N.T.S. 205.

47 *Ibid*., Vol. II, pp. 135-139, Document A/CONF.13/L.53; 559 U.N.T.S. 285.

48 *Ibid*., Vol. II, pp. 139-141, Document A/CONF.13/L.54; 450 U.N.T.S. 11.

49 *Ibid*., Vol. II, pp. 142-143, Document A/CONF.13/L.55; 499 U.N.T.S. 311.

50 Convention on the Territorial Sea and Contiguous Zone, supra not 47A, Articles 16-23.

51 *Ibid*., Article 24

52 Convention on the Continental Shelf, *supra* note 47D, Article 1.

53 First United Nations Conference on the Law of the Sea, Off.Rec. (1958) Resolutions adopted by the Conference, Resolution VIII, Vol. I, p. 145.

54 G.A. Res. 1307 of 10 December 1958, UN. Gen.Ass.Off.Rec., 13th Sess. (1958) Supp. No. 18, p. 148.

proposed an optional three-to twelve-mile territorial sea combined with a sliding scale fishery limit. The idea was that if a state chose a narrow territorial sea, it would be rewarded with a greater exclusive fishing zone. The contest at the Conference was between a proposal submitted by eighteen developing countries[55] and a proposal jointly submitted by Canada and USA.[56] The eighteen-power proposal contained two points. First, every state is entitled to fix the breadth of its territorial sea up to a limit of twelve miles. Second, when the breadth of the territorial sea is less than twelve miles, a state is entitled to establish a fishing zone up to a limit of twelve miles. This proposal was rejected by 39 votes to 36 votes with 13 abstentions.

The joint Canada-US proposal contained three points. First, a state is entitled to fix the breadth of its territorial sea up to a maximum of six miles. Second, a state is entitled to establish a fishing zone contiguous to its territorial sea extending to a maximum limit of twelve miles. Third, any state whose vessels have made a practice of fishing in the outer six miles of the fishing zone for five years may continue to do so for ten years. This proposal was adopted at the committee level of the conference by a vote of 43 to 33 with 12 abstentions. Under the rules of procedure of the conference, substantive decisions required a two-thirds majority of the representatives present and voting in the plenary of the Conference In order to gain the additional support needed, Canada and USA accepted an amendment proposed by Brazil, Cuba and Uruguay which provided that:

> "the coastal state has the faculty of claiming preferential fishing rights in any area of the high seas adjacent to its exclusive fishing zone when it is scientifically established that a special situation or condition makes the exploitation of the living resources of the high seas in that area of fundamental importance to the economic development of the coastal state or the feeding of its population."[57]

When the joint Canada-US proposal, as amended, was put to the vote in the plenary it received 54 votes in favour, 28 against with 5 abstentions, one vote short of the required majority. According to the leader of the US delegation, Arthur Dean,[58] the failure was due to a last-minute withdrawal of support by Chile, Ecuador and Japan. Thus, for the third time in thirty years, the representatives of the international community had been unable to agree on the maximum permissible breadth of the territorial sea.

II. THE DEATH OF THE OLD LEGAL ORDER

What led to the breakdown of the old legal order governing the seas? The old legal order collapsed under the weight of three causes: first, the progress of technology; second, the failure of the traditional law to deal adequately with the concerns of coastal states regarding the utilisation of oceanic resources; and third, the emergence of the developing countries.

The combination of a narrow territorial sea and the freedom to fish in the high sea served the interests of the world community as long as there

55 Second United Nations Conference on the Law of the Sea, Off.Rec. (1960) pp. 165-166, Document A/CONF.19/C.l/L.2/Rev.l of 11 April 1960.

56 *Ibid*., p. 169, Document A/CONF.19/C.1/L.10 of 8 April 1960.

57 *Ibid*., p. 173, Document A/CONF.19/L.12 of 22 April 1960.

58 A. Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas", (1960) 54 Amer. J. lnt'l L. 751.

were plenty of fish for all. The progress in ship-building technology and fishing gear technology and in electronics produced factory fishing vessels and vessels equipped with electronic tracking gear. This had, in turn, led to over-fishing and to the depletion of certain fish stocks. The possession of such advanced technology by a few distant-water fishing states had naturally led the developing coastal states, dependent on coastal fisheries, to perceive the situation as being inequitable. Developing coastal states, which depend upon coastal fisheries for their economic survival and welfare, claim that they have a greater equity to such resources than the developed distant-water fishing states.

The statistics showing the impact of technology on the harvest of fish are revealing. In 1950, the world harvested a total of 16 million tonnes of fish. In 1979, the world's harvest of fish had increased to 71 million tonnes.

Progress in the field of ship-building technology had also had an impact on navigation and on the marine environment. The very large crude carriers or super-tankers, nuclear-powered and nuclear-armed submarines are some examples of recent ship-building technology. There has been a vast increase in both the number and tonnage of vessels. In 1950, the world merchant tonnage was 76 million tonnes. By 1974, it had increased to 306 million tonnes. This vast increase had posed serious problems of congestion and navigational safety in important shipping lines.

The progress of technology has also led to new uses of the ocean. The exploitation of oil and gas in the continental shelf, at progressively greater depths, is such an example. Another is the development of technology to mine the polymetallic nodules which lie on the deep seabed and ocean floor between 3,000 to 5,000 metres of water.

In the period since 1945, especially in the decades of the fifties and sixties, most of the colonial empires were liquidated and a great number of the former colonies acceded to independence. The developing countries generally felt that they had no part in the moulding of the traditional law and that it did not serve their interests. They, therefore, demanded that the traditional law of the sea should be remoulded in order to take their interests into account. A member of the small and middle-sized developed coastal states such as Canada, Norway, Australia, New Zealand, Iceland sought common cause with the developing coastal states. This coalition of forces brought about a historic movement for the expansion of the jurisdiction and resource rights of coastal states which one American expert on the law of the sea, Leigh Ratiner, has described as a "revolution".

Why didn't the major maritime powers oppose the expansionism of the coastal states? Why were the great maritime powers reluctant to use force in order to check the unilateral claims of the coastal states?

Initially, the great maritime powers of the West protested, by diplomatic means, all unilateral claims by coastal states. When these diplomatic protests failed to stem the tide of coastal states expansion, the great powers did not resort to force to check the tide. For example, the United Kingdom did not use its superior fire-power against Iceland during the famous cod

war.[59] The United States did not send its navy to protect its tuna boats against seizure by Chile, Ecuador and Peru. Why didn't they do so?

They did not do so for four reasons. First, the United States had itself been the first to make a unilateral claim in 1945 to the resources of the continental shelf. Its moral authority was therefore not impeccable. Secondly, most of the coastal states which had made unilateral claims were friends and allies of the great powers. Iceland and the United Kingdom are members of NATO. Chile, Ecuador, Peru and United States are members of the Organisation of American States. It is easier to use military force against an adversary than against a country which is an ally or friend. The use of force by a great power against an ally or friend would have serious repercussions on its alliance interests and its foreign policy. Thirdly, the use of force is arguably unlawful under the United Nations' Charter and is, in any case, impolitic. Great powers would be condemned by world public opinion for bullying small or militarily weak coastal states irrespective of the merit or demerit of the unilateral claims of the coastal states. Fourthly, the developing states were often perceived to be claiming the resources of the sea in order to feed their hungry peoples and to augment their developing economies.

By the mid-1960's, the great powers and the coastal states both felt a need for a new legal order for the oceans. The four Geneva Conventions of 1958 had been ratified by very few states and were being rapidly overtaken by state practice.[60] The great powers needed "a new consensus regarding the rules of ocean law that is compatible with the mobility, flexibility and credibility of a routine global deployment of forces." The coastal states wanted a new legal order to ratify the unilateral claims which they have made for oceanic jurisdiction, oceanic resources, for the protection of the marine environment, and for their security. The opportunity to build a new consensus on oceanic law was first presented in 1967 when the then Ambassador of Malta to the United Nations, Dr Arvid Pardo, drew the attention of the world to the immense resources of the Seabed and ocean floor, beyond the limits of national jurisdiction and proposed that such resources be considered the common heritage of mankind.[61]

The coastal states immediately saw the advantage of broadening Dr Pardo's proposal to include all aspects of the uses and resources of the sea.

59 In 1958, Iceland extended its fishing limit to 12 miles together with a set of 47 baselines surrounding the entire country and its fringe islands. British fishermen were the foreigners most affected, having fished those waters up to the four-mile limit since 1836. As a result, there began the Anglo-Icelandic Fish War of eighteen and a half months during which British trawlers fished in groups under the protection of the British navy. In March; 1960, the British declared a three month truce and withdrew its forces in order not to spoil the atmosphere of the Second United Nations Conference on the Law of the Sea. The Conference failed to agree on the limit of a coastal state's exclusive fishing right but the British in practice observed the Icelandic claim. Another dispute arose in 1971 following Iceland's notice of its intention to claim a 50 mile exclusive fishing zone.

60 The Convention on the Territorial Sea and Contiguous Zones, *supra* note 46, came into force on 10 September 1964 and has 46 parties as of 31 December 1985. The Convention on the High Seas, *supra* note 48, came into force on 30 September 1962 and has 57 parties as of 31 December 1985. The Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 47, came into force on 20 March 1966 and has 36 parties as of 31 December 1985. The Convention on the Continental Shelf, *supra* note 49, came into force on 10 June 1964 and has 54 parties as of 31 December 1985. United Nations, *Multilateral Treaties Deposited with the Secretary-General,* Status as of 31 December 1985 (1986).

61 UN. Gen.Ass.Off.Rec., 22nd Sess. (1967) First Committee, 1515th and 1516th meetings on 1st November 1967.

Their basic thought was that trade-offs could be made between the demand of the great powers for navigational and overflight rights and the demand of the coastal states for expanded resource rights.

In 1967, the Soviet Union approached the United States and other countries on the idea of recognising a twelve-mile territorial sea provided that a high seas corridor was preserved in international straits. In 1968 and 1969, the United States started sounding out the views of some NATO countries, the Soviet Union and others, on the idea of conceding twelve miles as the maximum permissible breadth of the territorial sea in return for free navigation of warship and overflight of military aircraft in straits used for international navigation.

The confluence of these three streams of thought led, in 1970, to the decision to convene the Third United Nations Conference on the Law of the Sea in December, 1973.[62] The conference would attempt to reach agreement on the two questions left unresolved by the Hague Codification Conference of 1930 and the First and Second UN Conferences on the Law of the Sea, ie the limits of the territorial sea and exclusive fishing right. In addition, the Conference would attempt a more precise definition of the continental shelf than the definition in the 1958 Convention on the Continental Shelf. The Conference would also deal with the contiguous zone, straits used for international navigation, archipelagos, resources of the high seas, the protection and preservation of the marine environment from pollution, marine scientific research and the regime and institutions for the exploration and exploitation of the resources of the international area of the seabed and ocean floor. In accordance with the exhortation of Dr Arvid Pardo, the Conference would attempt to deal with the various subjects and issues as forming an integral whole and recognise that ocean space forms an ecological unity.

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62 G.A. Res. 2650C of 17 December 1970, UN Gen.Ass.Off.Rec., 25th Sess. (1970) Supp. No. 28, p. 242.

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