ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA

R. P. Anand

MARTINUS NIJHOFF PUBLISHERS
To my son Sanjay

With love

Without whose cooperation and long discussions I could not have completed this book.

R. P. Anand

Jan. 11, 1983
ORIGIN AND DEVELOPMENT
OF THE LAW OF THE SEA

History of International Law Revisited

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To
Vivek
Sanjay
Kavita
Dr. R.P. Anand (born June 15, 1933), after his LL.B. with a first division in 1953, received his LL.M. in 1957 from Delhi University (India) with distinction in International Law. He was declared as the best LL.M. student in the University in that year and awarded a special prize. In 1958, he joined the Indian School of International Studies as a Senior Research Fellow in International Law.

In 1960–61, he was recipient of a Rockefeller Foundation Fellowship in International Organization at Columbia University in New York. From 1961 to 1963, he joined the Yale University School of Law as a Sterling Fellow where he received his LL.M. in 1962 and J.S.D. in 1964. In January 1964, Dr. Anand was appointed Research Associate at the World Rule of Law Center, Duke University School of Law.

In 1965, he returned to the Indian School of International Studies (now part of the Jawaharlal Nehru University) where he has been Professor of International Law and also Chairman of the Center for Studies in Diplomacy, International Law and Economics.

In 1969, Dr. Anand was selected National Lecturer in Law by the University Grants Commission of the Government of India, and he delivered lectures at several universities in India on “New States and International Law.”

In 1970–71, Dr. Anand was awarded a fellowship by the Woodrow Wilson International Center for Scholars in Washington, D.C. In 1973 he was appointed Consultant to the United Nations Secretary-General on Law of the Sea.

On leave from his University, from 1978 to 1982, Dr. Anand joined the Culture Learning Institute of the East-West Center Honolulu, as a Research Associate where he was working on a project on “ASEAN and the Law of the Sea.”

Besides nine books, Dr. Anand has published more than fifty articles in Indian, European and American professional journals.
PREFACE

This study was undertaken as part of my project at the East-West Culture Learning Institute on "ASEAN and the Law of the Sea." It is merely a truism to state that geography affects the fate and history of countries and peoples. Geographical environment is the permanent element in the shifting fate of states. Covering far more of the surface of Southeast Asia than land, the sea has always played an important role in the history, life and culture of Southeast Asian peoples. The two largest countries of the region, Indonesia and the Philippines, are archipelagos consisting of thousands of islands with "territories" which contain more sea than land. Indonesia is not a homeland to its people but their tanahair or "homelandwater." In Indonesia it used to be said that "the sea unites and the land divides." The sea was never considered as a dividing factor in Southeast Asia.

In recent years, Southeast Asia has been described as a collection of countries facing outward and turning their backs on one another. The heterogeneity of Southeast Asia has become almost a cliché. But it is important to note that experts on maritime trade, like J.C. van Leur, appreciated the unity and continuity of Southeast Asian history.¹ It is also significant that, despite all differences in languages, religions, customs and legal systems, the five countries of Southeast Asia – Indonesia, Malaysia, the Philippines, Singapore and Thailand – bound together by common bonds of geography, a common pre-colonial history and similar aspirations for the future, have decided to join hands together in the form of the Association of Southeast Asian Nations (ASEAN) for the protection of their common interests.

For at least 2000 years, deltaic, coastal and archipelagic empires have distinguished the Southeast Asian region as a zone of maritime transit and trans-action. Innumerable explorers, emissaries, traders, missionaries, raiders and

refugees have for centuries traced and retraced a dense pattern of maritime traffic and flourishing trade in this important region of the world. Once the port of Malacca, now the island of Singapore, the region has always been an important centre of maritime commerce. But despite these long traditions of maritime navigation and trade, the anthropology of maritime law in Southeast and other parts of Asia remains virtually an unstudied subject.

It is generally assumed that modern law of the sea originated in Europe in the seventeenth century as a result of interactions among European states. Hugo Grotius' *Mare Liberum*, published anonymously in 1609, is supposed to have initiated the doctrine of the “freedom of the seas” and the modern law of the sea. Nobody has cared to note how Grotius and other classical jurists and their doctrines were influenced by the Asian maritime practices.

In any case, ever since the acceptance of the “freedom of the seas” in Europe after a long and acrimonious struggle, this concept has totally coloured Western thinking on law of the sea. It has been accepted as an incontrovertible principle, almost a religious dogma, which could not be questioned. It is rarely realized that with the recent technological developments and phenomenal changes in the uses of the sea, the doctrine of the freedom of the seas will have to be drastically modified, if not abandoned. An attempt has been made in this book to look at the origin and acceptance of the freedom of the seas through the centuries and how its acceptance has come to be changed and modified in recent years.

I am extremely grateful to Dr. Verner C. Bickley, Director of the Culture Learning Institute, for all his help and encouragement in pursuing my rather unorthodox thesis and for permitting me to visit various universities and archives in the United States, Asia and Europe in search of material. I am obliged to Dr. John Walsh, Coordinator of the Project on Social and Cultural Developments in ASEAN, for his lively interest in my research work. My heartfelt thanks are also due to my colleagues, Dr. Choon-ho Park and Dr. J. Philip, who have helped me in numerous ways. I must acknowledge my gratitude to Ms. Charlene Fujishige and Ms. Jenny Ichinotsubo for the tremendous patience with which they have typed and re-typed the whole manuscript.

I am deeply obliged to Honorable Judge Shigeru Oda of the International Court of Justice for taking time out of his busy schedule to read my manuscript and for his encouraging remarks.

Last but not least, I should not fail to mention the cooperation and strength I received from my wife throughout.

R.P. Anand

Honolulu, Hawaii.
May 11, 1981
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1. INTRODUCTION

International Law, Product of European Civilization

It is generally believed and widely accepted that modern law of the sea, like other rules of international law, is a product of the European or Western Christian civilization to which extra-European, especially Asian and African, countries have made little or no contribution. It is said to be the "product of the European mind" and "European beliefs" and is based on European state practices which were developed and consolidated during the last three centuries. Thus, relating the story of the development of international law, Professor Verzijl states:

The body of positive international law once called into being by the concordant practice and agreement of European states, has since the end of the eighteenth century onwards, spread over the rest of the world as a modern ratio scripta, to which extra-European states have contributed extraordinarily little. International law as it now stands is essentially the product of the European mind and has practically been "received"... lock, stock and barrel by American and Asiatic states.²

With rare exceptions,¹ every Western writer on international law affirms or confirms this opinion. As Professor B.V.A. Roling asserts:

There is no doubt about it: the traditional law of nations is a law of European lineage.⁴

Professor Jozef Kunz wholeheartedly agrees: "Our international law is a law of Christian Europe. It has its roots in the Respublica Christiana of Medieval Europe," and "is based on the value system of the Occidental culture, or Christian, and often catholic values."³

Although some of the ancient countries, like China, India, Egypt and As-
Belli Pads (1625), in order to defend his country's right to navigate in the Indian Ocean Liberum to the general tribute he has received in modern times as 'father of International Law.' "9 It is interesting to note that Grotius wrote and published his law of the sea ever since its origin. In this remarkable book, which became part of the family of nations under the impact of colonialism. They could not, therefore, play any role in its formulation in the most creative period of its history during the last two or three centuries.7

Grotius' Mare Liberum

The modern system of international law, we are told, emerged only after the disintegration of the Roman Empire and the emergence of independent states in Europe in medieval times. Practically every history of modern international law, while giving a passing reference to some rules of inter-state conduct in the ancient Orient, or Greek and Roman times, or to "scanty and vague" Islamic law of international relations, points out that the present system of international law originated only in the sixteenth and seventeenth centuries after the discovery of America in 1492 and the sea route to India in 1498, in the relations amongst European states. Besides the writings of a few Spanish theologians and scholars, like Francisco Vitoria, Fransisco Suarez, Pierino Belli, Bathasar Ayala and, the Italian jurist, Gentili, the first book on international law and law of the sea was written by a Dutch jurist, Hugo Grotius, and published anonymously in 1609 under the title Mare Liberum, or "The Free Sea." Few works of such small size have gained such great reputation as the Mare Liberum. It is said to be "the first, and classic, exposition of the doctrine of the freedom of the seas" which has been the essence and backbone of the modern law of the sea ever since its origin. In this remarkable book, which became part of his later and more authoritative work, De Jure Belli ac Pacis (1625), "Grotius is so especially associated with international law as to become entitled to the general tribute he has received in modern times as 'father of International Law.'" 9 It is interesting to note that Grotius wrote and published his Mare Liberum in order to defend his country's right to navigate in the Indian Ocean and other Eastern seas and to trade with India and the East Indies (Southeast Asian islands), over which Spain and Portugal (which was then part of the Spanish Empire) asserted a commercial monopoly as well as political domination. In fact, Mare Liberum was merely one chapter (Chapter XII) of a bigger work which Grotius, as advocate of the Dutch East India Company, had prepared in 1604–5 as a legal brief. In 1601, while the Netherlands was at war with Spain, a Dutch naval commander captured a Portuguese galleon in the Strait of Malacca loaded with a valuable cargo of spices; Portugal, at the time, was under Spanish domination. The ship, Santa Catharina, was brought to Amsterdam and its sale was sought there as a prize. Objections having been raised to this action by the shareholders of the Dutch East India Company itself on the ground, inter alia, that Christians must not wage wars against each other, Grotius, a young brilliant attorney practising in Amsterdam, was asked by the Company to express an opinion on the objections, which he prepared in the form of a book, De Jure Praedae (On the Law of Spoils). While he refrained from publishing this work, one chapter of this book was published with necessary changes to stand by itself under the title Mare Liberum.

It is almost universally agreed that Grotius "was the first to proclaim the freedom of the seas by elaborate argument" which later came to be accepted as an unchallenged doctrine of international law, and it is asserted that this doctrine "alone would have been sufficient to ensure him (Grotius) lasting fame." 10 Although accepted as a binding principle under Roman law, freedom of the seas had been lost and forgotten in Europe after the disintegration of the Roman Empire and was said to have been enunciated for the first time during the modern period by this seventeenth century Dutch scholar and jurist in this famous book. "The freedom of the seas slumbered the sleep of the Sleeping Beauty," it is suggested, until this gallant knight from Holland appeared "whose kiss awakened her once more." 11

Whether Grotius was indeed the originator or inventor of this doctrine in the modern period, or "founder" or "father" of international law, or whether he "plucked the ripe fruit" of the Spanish theologians and publicists of the sixteenth and seventeenth centuries, who also argued for the freedom of the seas based upon the tenets of Roman law, 12 as suggested by a few scholars, 13 may be debatable and a matter of opinion. But modern writers on international law have no doubt that the doctrine of the freedom of the seas, which forms the bulk and essence of the law of the sea, originated in Europe and is based on European beliefs and concepts, and derived from European state practices.

Eurocentrism in Law and Thinking

This Eurocentrism in law and thinking was not only predominant in the colonial period during the nineteenth and the first half of the twentieth centuries, but can be found even to this day. Thus it is noted "with a certain amount of amusement" how the Asian states grasp "as the highest and, indeed, as universal values certain fundamental ideas created and elaborated by the West." 14 According to this view, there is clear
evidence of the lasting dependence of non-Western nations in the con-
duct of their international affairs upon fundamental concepts of the
Western world from which their political leaders nevertheless so ardently
crave to liberate their states without, however, being able either to derive
any different workable principle of international law from the data of
their own national history or to develop independent legal principles sus-
cceptible of replacing the traditional standard principles of existing inter-
national law. ¹⁷

International law as understood in Occidental regions and even international
peace, it is sometimes asserted, are concepts alien to Asia and Africa. Although
peace is being stressed today by the newly independent countries in “borrowed
contexts of international rhetoric and ideology and in such formulations as
‘non-alignment’,” it is felt that “it does not seem to be an attainable condi-
tion” in the regional affairs of Southeast Asia, Negro Africa or the Middle
East. Analogue cannot be found in the non-Western tradition (except in Is-
lamic Middle East), it is suggested, “either for long-range moral or political
commitments to collective security and mutual aid, or for consistent efforts to
develop international organizations and international law.” ¹⁶ Indeed, because
of their past traditions and history, Asians and Africans, it is pointed out,
incline to a “refutation of international law and international constitutional-
ism...on the ground that they are Western inventions not meeting African
and Asian needs.” ¹⁷ Distrust in treaties amongst the Oriental countries, for in-
cidence, it is pointed out, is only to be expected because trust in treaties stems
from the Western disposition to identify meaningful accords more or less inclusively with firm contractual commitments. But unfortunately this is said to be
“not a transculturally valid norm.” ¹⁸

**International Relations and History of Eastern Countries Ignored**

There is no doubt that peoples or countries in their outlook and behaviour in
international relations are affected by their cultures or cultural traditions
which reflect their history, values, habits and accumulated social and political
mores of their societies. But when different peoples with divergent cultures
come in contact with one another, they cannot but influence each other’s views
and behaviour. These contacts have been going on for ages. In this sense, there-
fore, the East is no longer only East, any more than the West is purely West,
except of course geographically. The twain had met long ago, despite denials to
the contrary. In order to understand and appreciate the conduct of states in
their international relations, an understanding of their history and culture can
be of immense help because it indicates their outlooks, intentions, interests and
historical hopes and fears. By the same token, unless these historical, cultural
and other differences are understood and appreciated, there is a possibility of
misconceptions, misinterpretations and misunderstandings on all sides.” It is
impossible to understand the attitude and behaviour of states without under-
standing the conditions which led to these attitudes.

It is submitted that the contribution of Asian and African countries toward
the development of modern international law, or their attitude, outlook and
behaviour toward its rules in their international relations, is more often than
not based on ignorance of their history and lack of understanding of their cul-
tures and cultural traditions. Conditioned by the still prevailing Eurocentrism
in international law and thinking, the traditions, customs, laws and histories of
these countries have been either altogether ignored or underplayed.

It is significant to note that, while Asian states are said to have had no in-
fluence on the development of international law, it cannot be denied that this
law emerged in response to the need of the European countries to trade with
Asian states. It is all too well known to any serious student of history that when
European adventurers arrived in Asia “they found themselves in the middle of
a network of states and inter-state relations based on traditions which were
more ancient than their own and in no way inferior to notions of European
civilization.” The rules of inter-state conduct, or what is today called the law
of nations, might have differed and did differ from the European state practice,
but there can be no doubt about their widespread acceptance amongst Asian
states. Thanks to their liberal traditions of freedoms of peaceful navigation and
trade, and permission to foreign merchants to establish themselves by their own
laws, the Europeans got an easy foothold in Asia. European sovereign or semi-
sovereign agencies which appeared on the Asian scene were automatically
drawn into the Asian legal system and affected by its rules. The confrontation of
the Asian and European states “took place on a footing of equality and the en-
suing commercial and political transactions, far from being in a legal vacuum,
were governed by the law of nations as adjusted to local inter-state custom.”¹²¹

The East Indies constituted the meeting ground of the Portuguese and the
Dutch, the English and the French East Indian Companies, on the one hand,
and Asian sovereigns, on the other. The more these contacts became intensified,
the more they affected each other’s practices with a common framework of
diplomatic exchanges and treaty making. Grotius, Spanish theologians, and
other classical jurists, writing in the sixteenth and early seventeenth centuries,
were not ignorant of these exchanges and Asian state practices, and were well
aware of the newly emerging contacts between Europeans and Asians. Indeed,
they actively participated in the process of formulating rules and procedures
facilitating these contacts. The influence of the Asian practices of inter-state
conduct on the early development of European international law by classical
jurists has been lost in the pages of political history written during the colonial
period, or ignored because of later political developments when practically all the Asian states lost their international personality and identity.

It is important to mention, however, that the rules of maritime law, as practised by Asian states and explained and recommended in a European context by Grotius and other classical jurists, were not immediately accepted or acceptable to the European states who were too busy vying with each other to grab as much of the Asian spice trade as they could to the exclusion of others. It was only after two hundred years of bickering and fighting that the need and usefulness of the freedoms of navigation and trade came to be realized and appreciated in Europe. But the law as it developed since the late eighteenth century was geared to the furtherance of European interests and to the protection of European rights. Law of the sea, as other rules of international law, developed in response to the needs of the European industrial Powers for wider markets in Asia and Africa.

It was not until the end of the Second World War that Europe lost its hegemony and Asian states revived again to become full-fledged members of the international society. Apart from this change in the geography of international law, tremendous scientific and technological developments have transformed man’s relation to the sea. The sea is no longer a vast, barren area of limited use. Although it still remains largely an unknown, unexplored and uncharted frontier, science has already revealed untold riches and abundant resources of food and minerals in the sea, and technology has made it feasible to exploit them. This still largely unknown frontier, the sea with its inexhaustible resources, is beginning to become the scene of the next great adventure of man. The old so-called traditional law, developed at a time when uses of the sea were few and intended to protect the interests of only a few maritime Powers, has come to be found utterly inadequate and is in the process of tremendous, almost revolutionary, changes. In fact, the law of the sea seems to have changed more in our time than throughout the previous recorded history and the process continues.

New law is needed for the expanded international society in an entirely new age. Suppressed and neglected for a long time, the Asian and African states, along with other equally ignored Latin American states, have begun to play an active and assertive role in the development and formulation of a new maritime law. We shall try to see in the following pages the origin and development of the law of the sea not from the seventeenth century in Europe, as is usually done, but from the thus far neglected period of Asian maritime history which, we believe, had a lot of influence on classical jurists of Europe. We shall see how this law came to be revived and accepted by eighteenth and nineteenth century Europe, and how it is beginning to be found inappropriate in the present age and is being changed, modified and codified according to the new needs of the new international society.

Plan of Work

Convinced that we must begin the story from the beginning, in Chapter 2 we shall look at the maritime law in ancient Rhodes and the Mediterranean, at practices and customs relating to navigation and trade of ancient Asian states in the Indian Ocean, and at contacts between the East and the West, and see how the freedom of navigation and of trade came to be accepted as the universal rule. But while these wholesome practices, clearly enunciated in Roman law, withered away in Europe, they continued to flourish unabated in Asia. We shall examine in this chapter the maritime customs of free navigation and trade in Asia until the European penetration into the Indian Ocean.

In Chapter 3, we shall examine the conditions which led Europeans to go to Asia in search for its spices, how the Portuguese came to find a sea route to India, and how Portugal sought to control freedom of navigation and of trade in the Indian Ocean and to create monopoly of the rich spices for itself.

The Portuguese monopoly of the lucrative spice trade of the East Indies aroused the lust of other countries and created jealousy and dissension in Europe. In Chapter 4, we shall examine how the Portuguese monopoly came to be challenged and led to the demands for freedom of the seas. We shall look at the “battle” of books and wits on Mare Liberum vs. Mare Clausum, in the din of bloody wars amongst European states, which continued unabated until Great Britain emerged as the strongest naval Power in Europe and Asia.

In Chapter 5, we shall see how British maritime superiority encouraged revival of the freedom of the seas which became essential to meet the needs of the Industrial Revolution. We shall examine how this freedom became an incontrovertible principle and came to be moulded and developed, like other rules of modern international law, to suit the interest of a few European maritime Powers.

In Chapter 6, we shall look at the political upheaval after the Second World War, the decline of Europe and the tremendous changes in the uses of the sea that were brought about by the developments in science and technology. Freedom of the seas came to be seriously challenged and met with increasing claims of wider jurisdictions by coastal states. We shall see how these wide claims made the law imprecise, uncertain and confusing.

Chapter 7 is a review of the efforts of the United Nations to bring some uniformity in the law and to codify it. We shall see, however, how the two United Nations Conferences in 1958 and 1960 failed to reach agreement on some of the vital issues and adopted solutions on others which were at best vague and uncertain. In any case, the four conventions concluded in 1958 merely codified the traditional law which could not meet the challenges of the future.

In Chapter 8 we shall see how the discovery of huge mineral resources in the
seabed and the development of technology to retrieve them made the traditional freedom of the seas absolutely intolerable. To meet the new challenge, the United Nations has organized a Third Conference on the Law of the Sea which has been struggling not only to formulate a new law for the exploitation of deep seabed mineral resources, but also to review the old traditional law to modify it to serve the needs of the newly expanded international society. Although this process of formulation, revision and codification of the law of the sea is still continuing, the old law has changed almost beyond recognition and a new law is emerging. The sea is no longer a legal vacuum, as it has been for centuries, but has become a “common heritage of mankind” which, it is hoped, will be exploited for the benefit of all. We shall examine in this chapter the focus and direction of these changes in the law to conquer the new frontier.

Chapter 9 is a recapitulation of the various stages in the development of the law of the sea, vicissitudes through which the freedom of the seas passed through the centuries and a brief look at the role that this evergreen principle is still expected to play in the future.

Notes

2. Ibid., p. 442.
2. FREEDOM OF THE SEA AND COMMERCIAL SHIPPING IN THE INDIAN OCEAN

Ancient Rhodes and its Maritime Law in the Mediterranean

Centuries before history was ever recorded we already find Asians engaged in free navigation and maritime trade in the Indian Ocean. According to some historians, the commerce between India and Babylon must have been carried on as early as 3000 B.C. Apart from land routes, one of the most important trade routes joining India and the West was that which ran from India to the Red Sea up the Arabian coast. It linked India not only to the gold fields and wealthy incense country of southern Arabia, but to Egypt and Judea. From Judea, Indian goods found their way to the Mediterranean through the adjacent ports of Tyre and Sidon.

There is also some archaeological evidence about maritime trade in the Mediterranean in a period which runs back into darkness. It is suggested by historians that Indians and Phoenicians probably traded on the shores of Arabia. During their heyday, Phoenicians were everywhere in the Mediterranean and founded several colonies around 1500 B.C. Among such overseas colonies was a small Aegean island, Rhodes, at the crossroads of traffic in the eastern Mediterranean. It became part of the Persian Empire (397-88 B.C.), but was restored as an independent state by Alexander the Great. Because of its strategic position between Egypt, Cyprus, the Syrian and Phoenician coasts and the world of the Greek cities, it emerged as an important intermediary point between Greece and the Orient and the foremost commercial centre in the Mediterranean. Describing the Rhodesian power and prestige, the Roman historian Strabo said:

The State of Rhodes, favoured as it was by a most fortunate geographical position, had become extremely flourishing even in Alexander’s lifetime, and still more so during the war of the successors. Almost all the trade between Europe and Asia concentrated on the island. The Rhodians were distinguished seamen with a reputation for honesty and skill. Their strong, constant, law-abiding character, their knowledge of business, and their admirable marine and commercial laws made Rhodes a model among all the trading cities of the Mediterranean. By her continental and successful wars with the pirates, who at that time disturbed the peace of the seas in great bands, Rhodes had become the protectress and refuge of merchant shipping in “Eastern Waters.”

Rhodes not only believed in the practice of the freedom of the seas but acted as the “protector of those who follow the sea.” It acted as a policeman of both the Mediterranean and of international trade, which implied a constant battle against pirates. In the third or second century B.C., Rhodes codified the commercial practices of the time in the form of Rhodian sea law which, it is sometimes said, laid the foundation of the modern maritime jurisprudence. Because of its intellectual eminence, Rhodian sea law, which gave rise to several maritime codes and assumed a binding character freely recognized by the seafaring states of the Mediterranean, is said to have taken precedence in the Mediterranean. It later influenced the Byzantine Empire and even Roman law. Thus, accepting the petition of a merchant who had been “plundered by tax gatherers” on his way home through the Grecian Islands, Emperor Antonius is reported to have said: “I am the lord of the world, but the law is the master of the sea. Let thy plaint and controversy...be decided by law of the Rhodians.” The Rhodian code seems to have included regulations regarding the partnership, joint adventures, charter parties and bills of lading. It established standards of behaviour of the passengers on ship and the liability of commander or seaman in cases of carelessness or dereliction of duty. This sea law was copied and handed down through the centuries in this form. Even in the Middle Ages it guided the nautical and commercial adventures of European merchants.

During the Middle Ages, several maritime codes emerged in the Mediterranean, the Atlantic and in the Baltic Sea, which had much in common and they borrowed from the Rhodian law and from each other. They were practical seamen’s and merchants’ understandings based on long histories of coastal trade between cities at a time when cities rather than nations were the chief sources of authority. Thus, in the Mediterranean, a maritime code, known as the “Consulate of the Sea,” forming a collection of decisions by magistrates in the city of Barcelona, which had become a foremost trading centre by the eighth century, came to be accepted and enforced by local officials in port cities. In the Atlantic, another code, called Judgments d’Ole’ron, named after the island in the Bay of Biscay where it originated, was used by seagoing communities of England and the Netherlands. In the Baltic Sea, merchants accepted the Laws of Wisby or the Laws of Lübeck. But in the course of time this Western “ancient world died and maritime commerce died too, apart from purely local traf-
fic among the Adriatic, the Aegean and Levantine ports.” Even the memory of Rhodian code did not last beyond the thirteenth century. In the Indian Ocean, however, it was an entirely different story.

Antiquity of Navigation in the Indian Ocean

There is said to be some convincing evidence of maritime trade existing in 600 B.C. between the ports of Gujarat in India and Babylon. The regularity of monsoon winds in the Indian Ocean, as a reliable and pleasant source of power, came to be known to Indians and Arabs from time immemorial. The north-east monsoons, used properly by mariners who understood the art of sailing, simplified voyages up and down the coast of Arabia, up the Persian Gulf and as far as the mouth of the Red Sea. The same monsoons enabled voyages to be made with large ships from the Indian coasts to Burma, Malaya and all the East Indies. Beyond these, other good seasonal winds could be used to go to Indo-China, the Philippines and China. India, moreover, was the source of the best shipbuilding timbers, Malabar teak. It was the home of coconut, which provided the cordage to tie the planks. It produced flax and cotton for the sails. It had metal for fastenings. At the time of Alexander’s Indian campaigns, about 325 B.C., it is recorded by several Greek writers that shipbuilding had already become a very flourishing industry giving employment to many. The stimulus to its development must have come from the demands of both river and ocean traffic. Alexander himself is said to have been provided in India with a huge fleet of about 800 vessels or more for his passage through India and for part of his forces which went back through the sea. Indian ships voyaged regularly to the Burmese coast and the Malay Peninsula and Indonesia to the East and to Persia and Ceylon in the West.

It is interesting to note that during the time of Emperor Chandragupta Maurya (321–291 B.C.), one of the greatest kings of India, it became necessary to create and organize a Board of Admiralty, as one of the six boards which made up the war office of the emperor. In the most important book on Hindu polity, the Arthasastra of Kautilya, written during this period, the author devotes an entire chapter to shipping and other matters connected with it. A well-organized Naval Department was headed by “the Superintendent of Ships” who was entrusted with the duty to “examine the accounts relating to navigation, not only of the oceans and mouths of rivers but also of lakes, natural or artificial.”

The superintendent of ships had control over sea-going ships within the area to which his jurisdiction extended. According to Alexandrowicz, this included the harbour as well as a certain maritime zone outside the inland waters. He supports this interpretation from the reference to fisheries and particularly pearl fisheries found at a considerable distance from the land.” The superintendent was also entrusted with the duty of enforcing some humane harbour regulations. Thus, “whenever a weather-beaten ship arrives at a port town, he shall show fatherly kindness to it.” He was also empowered to exempt or reduce tolls for “vessels carrying on merchandise spoiled by water.” It was provided that “foreign merchants who have often been visiting the country as well as those who are well known to local merchants shall be allowed to land in port towns.”

Piracy was sought to be suppressed. It was laid down that “pirate ships, vessels which are bound for the country of an enemy” (and not arriving from it), “as well as those which have violated the customs and rules in force in port towns shall be destroyed.”

On the assumption that Kautilya extended coastal maritime jurisdiction from the shore to some distance into high seas, as would be necessary to deal with pirate ships and contraband vessels, according to Alexandrowicz, the maritime regime described in Arthasastra would point to a distinction between inland waters, like harbours and rivers, maritime belts, zones outside these waters (in which the territorial sovereign had certain rights) and the high seas beyond the reach of any sovereign. Be that as it may, the existence of these elaborate regulations, it has been rightly pointed out, “is conclusive proof that the Maurya Empire in the third century B.C. was in constant intercourse with foreign states, and that large numbers of strangers visited the capital on business.”

During the reign of Asoka (third century B.C.), whose empire embraced a much wider area than that of his grandfather, Chandragupta Maurya, India had developed systematic maritime connections with the distant Hellenistic monarchies of Syria, Egypt, Cyrene, Macedonia and Epirus in the West, and Ceylon, Burma, the Southeast Asian islands and perhaps even China in the East. Manu, the great Hindu law giver, provided in his code (prepared soon after the age of Asoka) for shipping and port dues.

The age of Mauryas was followed by the ages of Andhras in the South and Kushanas in the North which witnessed further development of foreign trade and intercourse in India. R. Sewell, the famous authority on the early history of South India, records:

The Andhra period seems to have been one of considerable prosperity. There was trade, both over land and by sea with Western Asia, Greece, Rome, and Egypt, as well as with China and the East. Embassies are said to be sent from India to Rome. Indian elephants were used for Syrian warfare... Roman coins have been found in profusion in the Peninsula, and especially in the South. In A.D. 68 a number of Jews, fleeing from Roman persecution, seem to have taken refuge among the friendly coast-people of South India, and to have settled in Malabar.
Rome's Trade with India

The Roman conquest of Egypt (30 B.C.) gave new stimulus to direct maritime relations with India. The union of the Western World under the authority of one man in the person of Julius Caesar and, later, Augustus, and frequent meetings of Greeks and Indians in the newly established direct sea trade, notes Warmington, led to the first Indian embassies sent to Rome. Hitherto, such official communications had been rare between East and West. Seleucos Nicotar, the Greek King, had sent Megasthenes to Chandragupta Maurya near the end of the fourth century B.C., and Demnachos to Vindusara, son and successor of Chandragupta. Asoka had sent missionaries and ambassadors to Antiochos II of Syria, Ptolemy II of Egypt, Antigonos Gonatas of Macedonia, Mergas of Cyrene, and Alexander II of Epiros. But no Indian embassy reached the Romans until Augustus became Emperor. But after that several embassies from various Indian states visited Rome "frequently." Augustus built new and especially large ships for the Indian spice trade which he financed with the best gold and silver currency available, inaugurating a direct service between Egypt and India. He also instituted a form of Roman — Arab partnership or understanding for trade with India and established diplomatic relations with the Arab ports and sent presents to the rulers and chiefs there. Aden, known to the Romans as Arabia Felix and Atlanæa, was even at that time a great emporium and meeting ground of merchants from East and West.

The effect of Pax Romana upon trade was very marked. Piracy was put down, trade routes secured, and the fashionable world of Rome, undistracted by conflict, began to demand oriental luxuries of every kind on an unprecedented scale. Silk from China, fine muslin from India, and jewels — diamonds, onyx, sardonyx, agate, sari, carmelian, crystal, amethyst and especially beryls and pearls — were exported from Indian ports for personal adornment. Drugs, Indian spices like pepper, cinnamon, ginger, cloves, cardamom and condiments, as well as costus, lycom and other cosmetics fetched high prices. Pepper was sold in the days of Pliny (about 80–90 A.D.), the great Roman historian, at the price of 15 denarii (about $2.55) a pound. Pliny lamented and condemned the wasteful extravagance of the richer classes and their reckless expenditures on perfumes, unguents and personal ornaments, saying that there was "no year in which India did not drain the Roman Empire of a hundred million sesterces" sending in return goods sold for a hundred times their original value. Rome had almost nothing else to offer to Indians in return for their products. Pepper and ginger of India, in great demand in Rome, were sold by weight like gold and silver. In the reign of Aurelian, silk was worth fully its weight in gold. Tiberius Caesar passed a law forbidding transparent silk as an indecent dress. Judging from the Roman coins unearthed in India, the trade in Indian luxuries reached its height in the reign of Nero, the fifth Roman Emperor, after which it began to decline.

It may be mentioned, however, that luxury goods were the most important but not the only items transported along the maritime routes. Raw materials for Roman industry were also purchased in India: silk and cotton yarn for weaving, wools and dyes, and uncut precious stones. "The manufactured goods from imported raw materials formed a considerable part of the export trade which paid for the imported luxuries." The bulk of merchandise from the south coast ports of India was carried to the Arabian marts and Alexandria by the sea. An epoch-making discovery made by a pilot named Hippalus around 45 A.D. in the reign of Claudius, namely, the existence of the monsoon winds blowing regularly across the Indian Ocean, changed the whole aspect of the seaborne trade and added immensely to the security of the cargoes. Traders no longer had to fear the attack of pirates on vessels hugging the coasts. Alexandria was now brought within two months of the Indian coast. The Roman historian, Strabo, points out that, while earlier hardly 30 ships sailed to India every year, after the discovery of monsoons, "large fleets of hundreds of vessels were sent out for Indian cargoes as far as the Coromandel coast." It is pointed out by historians that several colonies of Roman subjects engaged in trade were settled in southern India during the first two centuries of our era and Roman soldiers, clad in complete armour, acted as bodyguards to the Indian kings.

About the time of Pliny's great work, an anonymous writer published, probably at Alexandria, a small book entitled *Periplus of the Erythraean Sea,* which is a merchant's practical guide book for Indian seas and first-hand account describing the coast along the Red Sea, East Africa, Arabja and the eastern coast of India, giving details of the harbours, marts, anchorages, tides, prevailing winds, local tribes and rulers, exports, imports and so on, compiled after several years of travel from his own experience. This plain and painstaking log of an anonymous merchant, a Greek sea captain based in Alexandria, who steered his vessel into the waters of the Indian Ocean and brought back to the Western people the first detailed record of the imports and exports of its markets, its ports and towns, and of the customs and conditions of its peoples, is a book of tremendous importance. According to Miller, *Periplus* was probably "a semi-official or 'restricted' document, concerned with foreign affairs and a highly profitable trade and thus also with the public revenue. It was in a sense a treasury document. Anonymity may therefore have been deliberate."

More important from our point of view is the report of the flourishing maritime trade and freedom of navigation without any hindrance for all ships in the Indian Ocean, the advanced state of Indian shipping with numerous Indian ports where tradesmen from various countries sold and bought their merchandise peacefully protected under the local laws. In addition to Greek shipping, the author mentions those of Arabs and Indians in the Arabian Sea and of Malays
and Indonesians in the Bay of Bengal. The book "shows how well the routes were known, and how business-like and amicable were the relations between" traders from different countries.\textsuperscript{37} Along the South Indian coasts of the Chola Kingdom there were lighthouses built by brick and mortar which exhibited lights at night to guide ships to ports.\textsuperscript{38}

The Tamil Kingdoms of southern India were the headquarters of Roman commercial interests in the Indian subcontinent, where the Greek merchants (Yavanas as they were called) spent three months annually pending the turn of the monsoons. The \textit{Periplus} named twenty-seven ports and "market towns" in the Red Sea and the Indian Ocean where Roman ships called, or which were of interest to Roman trade. He classified the ports in three categories, the "designated," the "lawful" and the "authorized," but did not make the distinction between them clear. There is no doubt, however, about some degree of guaranteed supervision by government officials in these ports who levied duties.\textsuperscript{39}

The Tamil geographer Ptolemy in the second century A.D. described an emporion as "an authorized sea-coast (not inland) mart in the Orient where non-Roman dues were levied by non-Roman authorities."\textsuperscript{40} Such ports existed from the Red Sea to India and beyond, somewhere in Southeast Asia. There are instances where some ports lost their status as emporion and legal mart.\textsuperscript{41} The spices and other commodities of trade travelled over long distances, but individual ships normally covered a part of the sea route between eastern Indonesia and the West Asian ports.\textsuperscript{42} Certain ports along the routes were transfer points at which merchants from the East could meet merchants from the West. But the Greek authors were mainly familiar with ports in India, and although they knew some places further east, they seem seldom to have gone beyond India. The southeastern, or Coromandel, coast of India was the busiest coast with several emporia where large ships from the East came with huge quantities of pepper and other commodities. These goods were stored in warehouses in the ports and later re-exported to the West, while Western goods received here were re-exported "to the market towns on the east coast, for redistribution to the Ganges, to China and to Chryse, the land of gold in Southeast Asia."\textsuperscript{43} The Roman-financed Greeks are said to have established permanent agents in several South Indian ports, including Poduke (modern Arikamedu), mentioned both by Ptolemy and \textit{Periplus}. These settlements, compared sometimes to seventeenth-century European factories, included temples to Roman deities.\textsuperscript{44}

Indian Extension to Southeast Asia

Although the bonanza of expanding commerce between India and Rome faded somewhat after Emperor Vespasian (67–79 A.D.), who, alarmed by the rapid depletion of Roman gold supply, prohibited the further export of bullion, Ori-
through "pirate-infested sea," he reached Java and then took another Indian or Southeast Asian ship which took him to China. 44

Not all the ships travelling from Ceylon or South India to China, it may be mentioned, encountered these harrowing problems. In fact most vessels used late summer winds for eastward passage to some port on the Maylay coast and waited at that trading centre for favourable monsoons to proceed southward through the straits. To avoid the danger of pirates they generally sailed in convoy groups and carried soldiers. 45 At some additional point in Borneo or South Sumatran port, ships again waited for the second summer monsoon to cover the remaining journey to China using the interim period for local trading. Similar delays were faced on the return journey. Thus a round trip from India to China usually consumed about a year and a half, but it was much safer than Fa-hsien's unusually difficult voyage. 46 It is interesting to note that these merchant ships during those days and until much later did not use iron nails: "their (board) are strapped together with the fibers of coir-palms. All seams are caulked with an olive paste which is very hard when dry and acts like paint when mixed with waters." 47 Flourishing trade, it is suggested, would have encouraged piracy at sea and exactions by officials in the ports. But local rulers always sought to suppress them in the interest of free trade. Thus, as early as 446 A.D., the Liu Sung Government of China punished the Chams off the coast of Annam to protect shipping in the waters approaching southern China. 48

Be that as it may, there is no doubt about freedom of navigation and commercial shipping by various countries and peoples in the Eastern waters which led to the development of a number of entrepôts and trade centres. Cosmas Indicopleustes in the sixth century described the trade mart of Ceylon as follows:

The Island being, as it is, in a central position, is much frequented by ships from all parts of India and from Persia and Ethiopia and it likewise sends out many of its own. And from the remotest countries, I mean Tzinista [China] and other trading places, it receives silk, aloes, cloves, sandalwood and other products, and these again are passed on to marts on this side, such as Male [Malabar], where pepper grows, and to Calliana, which exports copper and sesame logs and cloth for making dresses for it also is a great place for business. And to Sindu [Sindhu] also where musk and castor is procured...and to Persia and, the Heme-rite country [Yemen] and to Adule [Zula on the African coast of the Red Sea]. And the island receives imports from all these marts which we have mentioned, and passes them to the remoter ports, while, at the same time, exporting its own produce in both directions. 49

While Indians, and later Persians and Arabs, had been having trade and commercial relations with China ever since the beginning of the Christian era, the Chinese maritime enterprise began to appear only in the seventh century. 50 In the third year of his reign in 607 A.D., Sui Yang-ti sent a mission by sea to Siam to open commercial relations with it. Several Buddhist pilgrims from China to India began to use the sea route in the latter part of the seventh century from Canton to western Java or Palemban in Sumatra. From there they would change ships for Ceylon along the northern coast of Sumatra and Nicobar Islands, and then again took new ships for Tamluk at the mouth of Ganges in Bengal, the whole voyage taking about three months. 51

Rise of Sri Vijaya Empire

In the late seventh century, maritime trade via the Strait of Malacca became increasingly important. This development contributed much to the rise of the Sri Vijaya Empire from its early status as a port of call on the Palembang River in southern Sumatra. Controlling the Strait of Malacca, Sri Vijaya kings extended their authority over Malaya, Sumatra and Java and warred against Champa and Annam. They maintained a powerful navy which swept the sea of pirates and corsairs. With the construction and improvement of more seaworthy ships and better navigational skills, and the establishment of unified control over access corridors to the South China and Java Seas by Sri Vijaya which assured safe passage, there was a marked increase in the seaborne trade. Commerce converged from all parts of Southern Asia and China. 52 Sri Vijaya's market place was undoubtedly crowded with scores of money changers and thousands of traders, largely itinerant, drawn from many lands, each competing with the others. The government realized substantial income from services rendered in refitting ships, providing supplies and affording a safe haven where traders could wait for the shift of monsoon winds. The state authorities devoted all their attention and resources to classifying merchandise, dominating trade, making war and amassing personal wealth. Thus, the Sri Vijaya Empire remained a major power for nearly six centuries even though it produced very little locally other than forest products. This long continued importance of Sri Vijaya, like that of the Chams of Annam or Buginese of Java, provides irrefutable testimony to the importance of the Southeast Asian trade route which passed by its front door, 53 although there were several other routes to travel to India. 54

Increased use of the straits by north Indian ships in particular also greatly intensified cultural contacts between India and Southeast Asia. By the 670s, Sri Vijaya had become an important centre of Buddhist learning. The famous Chinese pilgrim-scholar, I-Ching, on his journey to India by sea and back in
the 670s and 680s, testified to the Sri Vijaya being a thriving centre of Buddhist studies, next only to Buddhist University of Nalanda in Bihar, India, and a great trading centre. During the eighth century, the control of central Java fell to the Buddhist Sailendra Dynasty, which exerted a measure of external control extending into Malaya and Cambodia.

**Freedom of Navigation and Commerce**

But although Sri Vijaya kings remained the strongest power in the area and more or less lords of the ocean, freedom of the seas and navigation of all ships were never interfered, controlled, or monopolized by anybody. Persians and Arabs, Indians and Ceylonese, Chinese and peoples of Southeast Asian states all used the seas for trade and enjoyed its bounties in perfect peace, disturbed only casually by pirates who were considered enemies of all and sought to be suppressed by the powerful kings near their coasts. Several trade centres and entrepôts had developed where foreign traders engaged in peaceful business according to well-recognized customs protected by local laws.

**Regulation of Foreign Trade in China**

Thus, according to the Chinese sources, in the seventh century Persian and Arab traders had their own colonies in Canton and other Chinese ports. The T'ang Government welcomed trade because it provided a much needed source of revenue from ship taxes, duties on goods and monopolistic handling of selected items which were in great demand. By 713, an official inspector of customs began registering the captains of all visiting ships and subjecting them to prescribed regulations. Arab maritime accounts dating from the ninth century reveal that regular sailings were made for China via India's Malabar Coast, Nicobar Islands, Malaya's Kalah, down the straits, and thence through Cochin-China and Champa; some Arab knowledge of Oriental ports as far as Korea was indicated. According to Soleyman, an Arab trader who made a voyage to China in the first half of the ninth century, on arriving at Canton each ship handed over its cargo to the agents of the Chinese Government, and it was stored until the last ship of the season's fleet arrived, when thirty per cent of the merchandise was retained as import duty and the balance handed back to the owners. The principal imports into China were ivory, frank incense, copper, tortoise shell, camphor and rhinoceros horns.

A Chinese historian, Li Chan, describing the Chinese maritime activities in the early ninth century, recorded:

When (the laden Nanhai ships) arrive, a report is sent to the Court and announcements are made in all the cities. The captains who commanded them (or chief merchants) are made to register with the Superintendent of Shipping Trade their names and their cargo (or submit their manifests). (The Superintendent) collects the duties on the goods and sees that there are no (prohibited) precious and rare goods (of which the government had a monopoly). There were some foreign merchants who were imprisoned for trying to deceive (him).

In the ninth century, a portion of southern sea trade from China was diverted to Ts'uan-Chou, near Amoy, which had had commercial relations with Japan and Korea for centuries past, and where the Arab merchants found products of those countries and of remote parts of China not easily reached from Canton. In the next two centuries, this port became as important as Canton and had an even larger Arab settlement.

In the latter part of the ninth century, during the declining years of the T'ang rule, the rebel troops of Emperor Hi-tsung (874-89) sacked several ports and looted, murdered and oppressed resident foreigners. This interrupted for some time established trade relations with China and forced foreign traders to seek refuge at Kalah (Kedah) on the west coast of Malaya and Palembang. During most of the tenth century, direct voyages from Persia to China seem to have been abandoned and Arab and Chinese traders met at Kalah (Kedah) or in Sumatra or Java.

By the end of the tenth century, however, Canton and Ts'uan-Chou revived and continued direct trade, among others, with the Arabs, the Malay Peninsula, Tongking, Siam, Java, western Sumatra, western Borneo and certain of the Philippine islands. So valuable had this trade become that not only was it made a government monopoly and was private trading with foreigners prohibited, but the Emperor sent abroad an official trade mission with provisions of gold and piece-goods to induce the foreign traders of the South Sea and others to come to China and promised them special licences to import goods. The result of these efforts was very encouraging and the government took further administrative steps to regulate the foreign trade. A maritime customs service had existed in China since the eighth century. In 971, the Canton Inspectorate of Maritime Trade was reorganized to meet the requirements of increasing trade and to secure for the government a larger share of the profits. By 998, a General Customs Collectorate was established at the capital and orders were issued that all foreign aromatics and goods of value arriving in Chinese ports were to be deposited in government warehouses. In 999 Inspectorates for Maritime Trade were established at Hang-Chou and Ming-Chou (the present Ning-po) "at the request and for the convenience of the foreign officials. In the beginning of the twelfth century, the Chinese ports had "Superintendent of
Decline of Sri Vijaya Empire

As a result of the disorder developing along the China coast with the collapse of T'ang rule, not only was Arab and Persian trade with China disrupted, as we have seen, but the Sri Vijaya Empire’s fortune was deeply affected. Although it continued to control most of the commerce through the straits and via the portage routes of northern Malaya, its trade and income began to decline sharply in the ninth and early tenth centuries. By 925 all foreign merchant communities in China came to be excluded. Disorder and piracy prevailed for several decades thereafter along China’s southern coast. As profitable Chinese trade with South and Southeast Asia revived under vigorous Sung encouragement in the late tenth century, it created new and serious rivalries for Sri Vijaya with eastern Java’s Mataram state and with the Chola Tamil state of South India. The controversies involved dynastic rivalry as well as claims by the two outside Powers of denial of a fair share in the use of the straits and in the reviving China trade. Sri Vijaya sent seven tributary missions to China between 1003 and 1018 advertising the availability of South Asian products as well as perfumed goods, spices and pepper. Eastern Java was itself trying to cultivate direct trade relations with China and the Cholas also sent a mission to that country in 1015. In this tripartite struggle, the Sri Vijaya King defeated and badly mutilated the Mataram Kingdom in 1006-7, but was attacked by a powerful naval force under the Chola Emperor Rajendra and defeated in 1025. But these seemingly disastrous raids were not followed up by effective Chola occupation. The Chola power carried on a war against the Sri Vijaya kings in their own home waters and this naval rivalry continued for nearly one hundred years. Though the Sri Vijaya kings were forced to fight on the defensive for long periods, their power, based on the islands and controlling the straits, could not be destroyed even by the powerful Chola Navy. But this fruitless naval war lasting one hundred years, from which the Cholas withdrew only by the end of the thirteenth century, weakened not only the Sri Vijaya power but also the Cholas and opened the way for Muslim supremacy in the Indian Ocean.

Although the Sri Vijaya Empire could not regain its one time commercial and naval dominance, by clever diplomacy and by virtue of its strategic position in the expanding Chinese trading operations, it did manage to survive until the end of the thirteenth century. Chau Ju-Kua, the Imperial Chinese Inspector of Foreign Trade, in his work entitled Chau Fau Chi (Records of Foreign Nations), written in 1225, states that Sri Vijaya lying in the ocean controlled the straits “through which the foreigners’ sea and land traffic in either direction must pass.” All ships passing through the straits had to enter the capital and pay toll on pain of outright destruction by native craft. “This is the reason,” said Chau Ju-Kua, “why the country is a great shipping centre.”

But it was not long before Sri Vijaya got disintegrated into petty states with no policing authority capable of restoring order and safe passage. When Marco Polo passed through the straits in 1292, Sri Vijaya was gone. He touched in Eastern Borneo and described a number of separate Sumatran city-states. The former Sri Vijayan port of Palembang became infested by a band of pirates led by some Chinese brigands who retained control of the place for more than a century.

Revival of Trade by Sung Dynasty in China

The active solicitation of trade by Sung China with the South seas had helped in Sri Vijaya’s economic revival in the eleventh century. During the twelfth century, as we have mentioned earlier, with the weakening of the Hindu empires in suicidal naval wars, the Arab ships succeeded in re-entering the direct China trade. Eastern Javanese and Palembang vessels also frequently appeared in the Chinese ports. But the bulk of diversified trade of South China ports was carried in Sung times in the Chinese vessels. South Asian countries were primarily producers for the trade, with Palembang and Malaya acting as important entrepôts collecting goods for the seemingly insatiable Chinese market. Although in the last quarter of the eleventh century, South Asian trade began to prove an intolerable drain on the cash and precious metals of China, and official corruption in ports and smuggling began to get completely out of hand, the Sungs’ attempt to halt this trade proved futile. However, the potentialities of Chinese market and its profitability eroded away in time. It may be pertinent to mention here that the Sung period was also notable for considerable progress in shipbuilding and for the use of the compass, invented by the Chinese, which began about the end of the eleventh century. It did not revolutionize the art of navigation, however, and for a long time sailors continued to put their trust instead in the sun and the stars.

Yuan Dynasty and Kublai Khan

Kublai Khan, the great Mongol Emperor of the Yuan Dynasty (1279-1368), which replaced the Sung Dynasty in China, was not only concerned with re-unifying the Middle Kingdom, but determined to re-establish China’s tradi-
tional sovereignty over all states of Southeast Asia which had previously been sending tribute missions to its emperors. Since his policy would require real complete subservience rather than the customary nominal payment of deference, Kublai Khan’s demands for submission brought negative responses. His armed interventions in Southeast Asia also met only with defeat or limited and short-lived success. But these defeats did not keep him from considerably increasing Chinese trade in the Indian Ocean. As Toussaint points out:

Between Zayton (Tsinkiang), Ceylon, Quilon on the Malabar coast, and Ormuz on the Persian Gulf, regular maritime “lines” soon entered into competition with the Arab “lines.” Numerous Chinese merchants settled in various parts of the Indian coast, namely, Kavirippadinnam, Quilon, Cail, and Calicut. The Chinese ships had become the largest (they could transport up to a thousand persons) and best equipped in the Indian Ocean.97

Marco Polo and Ibn Battuta’s Testimony about Free Trade and Navigation

Deteriorating conditions in the Malacca strait had also attracted Kublai’s attention and in 1292 he sent a naval expedition to the South seas to examine the conditions affecting the navigation in the Malacca strait en route to Ceylon and India. The fleet of fourteen ships, with its most celebrated passenger, Marco Polo, on his way back to Venice after spending thirty years in East Asia, was also charged with the task of escorting to Persia a Mongol princess who was espoused to a nephew of the Great Khan, the King of Persia. In the famous record of his travels, Marco Polo described in detail the various ports and peoples of Southeast Asia, Ceylon, India and West Asia, their customs and ways of living, and the peaceful trade conducted in these entrepôts by merchants from all parts of the known world.98 It is a rich source of extremely useful information about these countries and, most important for our purposes, direct evidence of peaceful commercial navigation and trade in the Eastern waters. Describing the huge merchant ships of his times, Marco Polo points out that they were built of fir timber, had a single deck, below which it was divided into sixty (more or less) cabins accommodating one merchant each, and some ships of large class had, furthermore, thirteen divisions in the hold to guard against accidents. They had four masts with as many sails, which required a crew of 300, 200 or 150 men depending on their bulk, and could carry five to six thousand baskets of pepper.99

Kublai Khan sent numerous missions abroad to learn more about them and to bring to him their strange birds and beasts, their jewels and their learned men.100 He maintained the Sung organization of merchant shipping offices which were established at various Chinese ports. As the drain on China’s metallic currency increased, Kublai Khan began issuing paper money. The use of gold and silver as mediums of exchange began to be prohibited. Private trade abroad in gold, silver, copper cash, iron ware, male and female slaves, silk-thread, satins, gold brocades and military equipment came to be strictly prohibited. In 1324, to restrict the outflow of Chinese money, the purchase, import and even presenting for transmission to court of “expensive and useless” objects was forbidden. The Great Khan also published in 1293 regulations for levying of duties on merchant shipping, and import duty was made uniform at all ports.101

In the fourteenth century, fifty years after Marco Polo, Ibn Battuta, a Muslim traveller from Morocco, in his memoirs about his travels in Asia and Africa, confirmed Marco Polo’s account of maritime navigation and commerce in Asian waters. He found numerous Chinese traders in bustling Indian ports. At Calicut, which he called “one of the largest harbours of the world,” where merchants from China, Sumatra, Ceylon, the Maldives, Yemen, Fars and other quarters gathered, he found thirteen Chinese ships and marvelled at the maritime activities of the Chinese who, he said, were the wealthiest people in the world.102 He saw three sizes of Chinese vessels which had been built in Canton. A large Chinese vessel, with four decks and containing rooms, private cabins and saloons for merchants fitted with lavatory, carried a complement of a thousand men, six hundred of whom were sailors and four thousand men-at-arms.103 After visiting various ports on the coast of India, Ibn Battuta travelled to China in a Chinese ship through various Southeast Asian ports and he described these trade marts in detail and the attacks they had to encounter from pirates through their long journey.104

Ming Dynasty and Reinvigoration of Chinese Trade

The Ming Dynasty, which succeeded Yuan Dynasty in China in 1368, continued Kublai Khan’s policy to demand tributes from countries of the Eastern region and to increase the maritime trade with Southeast Asia, Ceylon, India and West Asia. These objectives became all the more urgent in the early fifteenth century because the Central Asian Emperor Tamerlane (Timur) had invaded North India in 1398 and closed off the land caravan route to China.

To re-open sea trade with Ceylon, India and beyond, Ming China sent seven large naval expeditions between 1405 and 1431 under the command of Chang-Ho, a high eunuch official of the imperial palace. The first expedition (1405—7) comprised of 63 vessels and 27,870 men and its objectives were to visit and open Java, Ceylon and Calicut. On its return route, it totally annihilated Sumatran pirates which tried to block its way in Palembang waters. The
and the east coast of Africa, the supremacy of the ocean routes had passed definitely to the Arabs. They were the great carriers of Indian and Southeast Asian trade in the fourteenth and fifteenth centuries and their activities extended from the Red Sea ports to Canton and the marts of China. With the Indian rulers on the coast and Indian traders in the ports, they maintained the happiest relations. Nor, it is important to note, did they ever try to exercise a naval control in the ocean because Arab navigation had been developed by merchant adventurers and was not the result of any state policy.

The rise of North Sumatran ports in the fifteenth century in Southeast Asia was directly related to the introduction of Islam, which followed the conquest of North India by Turkish Muslims during the eleventh and twelfth centuries and the spread of Islam throughout the mainland and the coasts of India. At the beginning of the fourteenth century, the Sultanate of Delhi expanded as far as Gujarat, the important commercial region on the west coast, and the land was conquered and partly Islamized. Afterwards Gujarati shipping fell largely into Arab hands. Although Hindus still remained very important in maritime trade as such, they stopped undertaking trading voyages in Muslim ships. Gujarati traders are said to have played an important part in converting north Sumatran ports and the rest of Indonesian archipelago to Islam. According to Suma Oriental of Tomé Pires, the Portuguese Scribe, Kingdom of Sumedrapasé had been Islamized by people from Bengal, where Islam had come earlier by the end of the twelfth century.

While Islam was spreading through Sumatra from the fourteenth century onwards, Hinduism was experiencing a final revival in Java in the Kingdom of Majapahit with large-scale maritime expansion. Majapahit is said to have established supreme authority in a large part of the Indonesian archipelago. Even the north Sumatran ports, it is said, recognized Javanese authority which had effective control over the seas and were able to suppress Malay and Chinese pirates in Palembang and south coast of Malaya. With sea route rendered safe by Majapahit forces, brisk trade developed between the spice ports of North Sumatra and the sea ports of northern Java. The spices also attracted numerous foreigners which included Arabs, Indians and Chinese to the Javanese seaports. The growing commercial traffic also brought Islam to the country by the predominant Muslim traders from Bengal, Gujarat and Arabia. The process of Islamization was accelerated still more by the close economic ties which developed between the Javanese sea ports and the new commercial centre of Malacca, which was converted to Islam and was in the process of expansion. The change of faith and shifts in power to Muslim traders in the Javanese ports had a marked effect on the disintegration of the Hindu Kingdom which was already on the decline because of internal disputes. By the beginning of the fifteenth century, Javanese coastal districts and their Muslim rulers had already declared themselves independent and Chinese foreign policy was no longer

Naval Supremacy of Arabs and the Spread of Islam

As we have already seen, with the downfall of Sri Vijaya and the disappearance of the Cholas from the stage of Indian history, oceanic trade in the Indian seas passed almost exclusively to Arab hands. Although powerful kings of the west coast of India, especially rulers of Gujarat and Calicut maintained large merchant marines and their ships sailed with cargoes to the West, the Persian Gulf, Arabia and the east coast of Africa, the supremacy of the ocean routes had passed definitely to the Arabs. They were the great carriers of Indian and Southeast Asian trade in the fourteenth and fifteenth centuries and their activities extended from the Red Sea ports to Canton and the marts of China. With the Indian rulers on the coast and Indian traders in the ports, they maintained the happiest relations. Nor, it is important to note, did they ever try to exercise a naval control in the ocean because Arab navigation had been developed by merchant adventurers and was not the result of any state policy.101

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The Founding and Development of Malacca

One of the most impressive events in the fifteenth century in Southeast Asia, which led to a tremendous increase in maritime trade in the Indian Ocean, was the founding and development of Malacca as an important entrepôt and commercial town for ships and traders travelling between Ceylon and Indian ports to China and other Southeast Asian ports. Malacca is said to have been founded around 1401 by a fugitive prince from Palembang, named Parameswara, possibly of Javanese descent, who fled his country because of Majapahit's attack on Sumatra and settled in the minor port of Malacca after murdering the Siamese ruler who was in authority there. If the fledgling state, with meagre agricultural resources, was to survive in the face of open hostility of powerful neighbours, Siam and Majapahit, it had to have some influential friends and supporters. These it found in 1403 with the visit of the Ming Chinese fleet under Chang-Ho with responsibility to re-open seaborne trade with India, Ceylon and West Asia. Parameswara and Malacca were selected as the most promising agencies available to accomplish the Chinese ends. Parameswara sent envoys to China in 1405 and later paid four personal visits. With powerful protection provided by China for more than thirty years as its vassal, it had to have some influential friends and supporters. These it found in 1403 with the visit of the Ming Chinese fleet under Chang-Ho with responsibility to re-open seaborne trade with India, Ceylon and West Asia. Parameswara and Malacca were selected as the most promising agencies available to accomplish the Chinese ends. Parameswara sent envoys to China in 1405 and later paid four personal visits. With powerful protection provided by China for more than thirty years as its vassal, Parameswara and Malacca were selected as the most promising agencies available to accomplish the Chinese ends. Parameswara sent envoys to China in 1405 and later paid four personal visits. With powerful protection provided by China for more than thirty years as its vassal, Parameswara and Malacca were selected as the most promising agencies available to accomplish the Chinese ends.

The tax on domestic trade was three per cent, with an additional levy on food sales in the local market. The Sultan collected dues on sales of land and ships and claimed half of the property of deceased persons and all of the estate if no will was provided. The income of the Malaccan Sultan was derived from a basic six per cent duty on foreign trade plus an additional one per cent in the form of "presents." He was also active personally in both shipbuilding and trade. The tax on domestic trade was three per cent, with an additional levy on food sales in the local market. The Sultan collected dues on sales of land and ships and claimed half of the property of deceased persons and all of the estate if no will was provided.

The requirements of foreign merchants were met by looking after the port and by building warehouses which, because of the danger of fire, were underground cellars. Fixed custom duties, standard weights and measures, coinage and codification of Malaccan port regulations all served the purpose of smooth trade activities of the port. Apart from Bendahara, who was chief minister-treasurer, the Sultan’s high officials included the Temenggong as head of the police and courts, the Laksmana, or commander of the fleet, and four harbour-masters, or Shahbanders, who were selected from different trading communities. The Shahbanders presented arriving merchants to the Bendahara, allotted necessary harbourage and warehouse facilities, and supervised both the receipt of presents for the officials and the handling of regular merchandise. He kept a check on weights, measures and coinage, and adjudicated in disputes between the ships’ captains and merchants in any ship of the nation he represented. Custom duties were charged on merchandise under his supervision according to fixed rules and fixed rates. No duties were imposed on exports from Malacca by ships either from the East or the West. But one per cent weightage had to be paid on all imports and exports, and the King had appointed special officials to collect the money. It was an established custom that the first ship to arrive was also first to be discharged. Business was transacted quickly and since prices were generally well known, the merchants were not underpaid either.
It is important to note that the institution of harbour-master, or Shahbander, was quite old and common throughout Southeast Asia, and even other parts of Asia. A compound word of Persian origin, it was explained as “the title of an officer at native ports all over the Indian seas, who was the chief authority with whom foreign traders and ship-masters had to transact. He was often also head of the customs.” His duties of receiving foreign traders, escorting them to the ruler, protecting their interests, as well as collecting tolls from them were well recognized in all the trade centres and were adopted by the Dutch East India Company when it took over the administration of some of these ports and centres. The Shahbander also, as we have referred to earlier, settled disputes between foreign traders.

It is interesting to note the existence of written Maritime Codes of Macassar and Malacca, compiled during the reign of Sultan Mahamud Shah, codifying commercial and maritime usages. Based on customary rules as well as provisions borrowed from Indian law and compiled at the end of the thirteenth century, the Code of Malacca contains interesting rules of the time about the rights of the captain of the ship, who was considered “the sovereign at sea,” and sailors, about maintenance of law and order on the high seas, and other rules relating to organization of trade on the ship. While it was the task of the ship’s captain to settle disputes on the ship and to punish offenders, the Ma’lim (pilot officer) was charged with the management of the vessel and with all the technical details of navigation. Other rules related to fishing, ships in distress and shipwreck. The legal status of the ship changed as soon as it entered the harbour. The captain’s exclusive jurisdiction was replaced by the jurisdiction exercised by the Shahbander. The Maritime Code of Macassar, edited by a local jurist, Aman Gapa, and promulgated at approximately the same time, was similar to the Malacca Code, but contained extra provisions relating to charter parties. It is interesting to note that a ship was treated by maritime custom as a piece of quasi-territory sailing in the undefined, but obviously free “vastness of the sea.” On the high seas a ship was beyond any sovereign’s control, but the activities on the ship were controlled by the captain according to the regulations laid down by the state to which the ship belonged, or in modern terms, whose “nationality” it possessed. The specific character of these rules relating to ships when they were outside a harbour or inland waters clearly shows that the high sea was accepted as free. Freedom of the seas is further “corroborated by the law relating to piracy which authorized common action of all maritime Powers in the vast expanse of the oceanic waters for the purpose of maintaining maritime safety.” An early European traveller, Ludovico de Varthema, testified to this state of affairs. According to Professor Alexandrowicz, negotiations between the Ruler of Macassar and the European companies “also showed that the Ruler had a general concept of ’mare liberum’ and claimed a right for his ships not to be interfered with on the high sea.”

In fact he resisted the Dutch attempts to monopolize the trade of the Spice Islands, as we shall see later, on the ground that the sea was common to all and that “it is a thing unheard of that anyone should be forbidden to sail the seas.”

Although the concept of “territorial waters” was not clear to the ruler of Macassar in the exact sense it developed later, in a treaty of 1637 with the Dutch Company, he insisted and the Dutch agreed that the roadsteads of Macassar would be left “inviolate in the sense that the Dutch may attack there no one of their enemies and also enjoy equal liberty.” It is also pointed out by historians that several other island states in Southeast Asia had their own “maritime belts.”

There were lots of attractions to Malacca for foreign traders. It provided a safe, quiet anchorage at a place where the monsoons met. The Malay port was well policed and Malacca was a centre of shipbuilding and repair and a market for ships constructed elsewhere. The toll and custom charges were low and traders generally dealt with Shahbanders of their own nationalities. Even more than Shri Vijaya, Malacca became the crossroads of the commerce of Asia. At one single entrepôt, vast qualities and quantities of products of the vast Asian continent and East Indies islands were available. Thus, Pires noted that more than three score countries were represented at Malacca and some four score dialects were spoken there.

**Other Principal Entrepôts in Asia and Freedom of Trade.**

Navigation during the fifteenth century or earlier in the Indian Ocean, as we have noted, was wholly dependent on the monsoons. It was impossible to traverse the entire Indian Ocean in a single monsoon. As traffic increased and became better organized, the sea route was divided into “stages” and several trans-shipment centres and markets came to develop. The main junctions on the old trade route were Aden on the Arabian coast, near the entrance to the Red Sea, Hormuz on the Persian coast, ports in Gujarat, especially Surat, Randar, Diu and Daman, some ports on the Malabar coast, most important of which was Calicut, and Ceylon. All these ports served as important markets as well as important trans-shipment centres and intermediate stations on the long sea route from West to East Asia and back. But in China foreign trade came to be permitted in only a few places, although there was never a prohibition there on the foreign ships bringing tributes to the celestial court. As the hegemony of trade in the ocean passed into the hands of the Muslims, the Chinese ships began to disappear. But in Canton, among other places, there were special departments for the inspection of incoming merchant shipping. For fear of foreign enemy attacks, the merchants had to anchor off some islands 20
to 30 miles away from Canton where each foreign nation had its permanent anchorage. When the junks arrived, the Cantonese valuers came to appraise the goods and levy duties, which were high. There was a fixed scale of weights, and payment for goods might be made in money as well as in kind. The inhabitants of the Philippines traded in Malacca with gold, forest products and foodstuffs.133

Aden was the great commercial centre in the northern half of the Indian Ocean and the meeting place of Asian merchants. From the West via Aden came the European goods — precious metals, arms, glass and glassware, beads, coral, quicksilver, vermilion and other dyes, copper nails and coloured woolen cloths — carried in Venetian galleons and taken on from there by merchants of Cairo. Durate Barbosa, the Portuguese linguist-writer who visited most of the Eastern ports in the early years of the sixteenth century, said about Aden:

To the harbour of this city come ships from all parts, more especially from the Judae... From Zeilla and Barbora too come many ships with food stuffs in abundance; ...and those of Cambaya come laden with cloth of many kinds; so great is the number of them that it seems an astonishing thing...and it seems impossible thing that they should use so much cotton cloth as these ships bring from Cambaya. They come to this city from Ormuz, from Chaul, Dabul, Baticala (ports on the West Coast of India) and Calicut (whence most of the spices are wont to come) with great store of rice, sugar and cocoa-nuts; and many ships come from Bengal, Sumatra and Malacca which bring as well abundance of spices, drugs, silk, benzoin, lac, sanderswood, aloes wood, rhubarb in plenty, musk, thin Bengal cloths, and sugar (great store); so much so that this place has a greater and richer trade than any other in the world and also this trade is in the most valuable commodities.134

The merchants from Hormuz, the export port of Persia, which had a mixed Persian-Arab community, brought horses, pearls, gold, silver, copper, silk and alum to Gujarat.135

The Gujarati ports on the Bay of Cambay had in the fifteenth century an extensive fleet of merchant ships. The sea route between the Red Sea and Gujarat was used both by Arab and Indian ships, and it was by this route, via Egypt, that European goods reached Indian ports, and in the other direction, spices were carried to Europe. Gujarat, therefore, became very important as a trans-shipment centre for the goods traffic. As Tomé Pires wrote: "The Gujaratees were better seamen than the other people of these parts, and so they have larger ships and more men to man them. They have great pilots and do a great deal of navigation."136 The most important products of Gujarat were textiles of different qualities and varieties. Other exports included cornelian beads, indigo, opium, soap, earthenware and foodstuffs. Parts of the merchandise brought to Gujarat from the West found a market there, but a large part of it and Gujarat's own products, particularly textiles, went further East to be used in barter for obtaining the spices more cheaply nearer the source of production. While shipping in the western half of the Indian Ocean was conducted by both Arabs and Gujaratis, the traffic between Gujarat and Malacca was exclusively controlled by the traders of Gujarat. As Tomé Pires noted: "Cambay chiefly stretches out two arms, with her right arm she reaches out towards Aden and with the other toward Malacca as the most important places to sail to, and the other places are held to be of less importance."137 How these ports came to depend upon each other was further stressed by Pires. He said: "Malacca cannot live without Cambay, nor Cambay without Malacca, if they are to be very rich and very prosperous...if Cambay were cut off from trading with Malacca, it could not live, for it would have no outlet for its merchandise."138

Among numerous other important ports on the coast of India, engaged in maritime trade during the fifteenth century which developed into busy trading centres, were Bengal, Pegu, Pulicat, and Negore (on Kalinga coast); Goa, Cut, Cochin, and Quilon (on the Malabar Coast).139 Without going into the details of the goods imported and exported from these ports, which have been described by several contemporary writers139 and confirmed by historians,140 it may generally be said that traders from various countries came to these centres without restrictions and did their business of selling, buying or bartering their goods peacefully. Merchants from various lands, speaking diverse tongues, met together and traded under the general protection of the well-recognized rules of inter-state conduct. Local rulers exercised authority in their ports and lands, but claimed no control over the sea which was accepted as free for all for peaceful navigation. Indeed, most of the states welcomed foreign traders coming to their lands which helped them in their economies. Some of them in fact lived and prospered on maritime commerce. There were well-recognized port rules and regulations and well-publicized custom dues and other port charges and they were applied peacefully. Generally there were colonies of foreign merchants in various important ports and trade centres. They were left free to apply their own laws in their civil matters. Local state authorities rarely interfered in their affairs and left them to settle their own disputes unless their actions affected peace and order of the state.142 It is generally accepted by historians that the commercial pattern and institutions of sixteenth century Asia — India, Southeast Asia and China — had been in existence for "at least 1500 years" to 2000 years.143 This uninterrupted commercial traffic was like "a thin but golden thread binding the Asian world across great distances."144

The major, if not the only, impediments and dangers to the freedom of navi-
gation on the open seas were storms and other natural disasters that befell many a ship. Hundreds of ships and thousands of lives were lost in shipwrecks before the invention of the steam engine. In the Indian Ocean, however, the knowledge of regular winds and monsoons had helped immensely in making navigation comparatively safe and fast. There was also an ever-present danger of pirates and the ships were generally equipped with soldiers to handle them. In any case, piracy was always considered as illegal and sought to be suppressed by states. There was, however, a strange custom that if a ship was wrecked, the coastal state considered it its right to take the wrecked ship and its cargo as a good prize.133 There were some important states, however, which did not accept this custom as valid. Thus, Ibn Battuta said about Calicut:

In all the lands of Mulaybar, except in this one land above, it is the custom that whenever a ship is wrecked all that is taken from it belongs to the treasury. At Calicut however it is retained by owners and for that reason Calicut has become a flourishing city and attracts large numbers of merchants.134

Long Tradition of Freedom of Navigation in the East

Thus even cursory look at the history of the Indian Ocean makes it clear that "ages before the races of Europe had emerged from primitive barbarism in their cloudy climate,"135 the Indians and the Chinese were sailing their ships guided by the sun and the stars. The "Orientals knew quite enough about these finger posts of nature to use them with confidence for crossing the sea."136

From time immemorial Indians came to understand the secret of monsoons in the Indian Ocean which provided at regular intervals reliable and important source of power. Although both India and China remained basically land powers, their maritime knowledge and enterprise in ancient days cannot be denied. A fairly regular sea intercourse between India and Arabia had sprung up at a remote epoch of history. Later, demands for Indian products led to active trading between India and Rome. In the third century, as Roman trade declined, Indian adventures pushed toward the East. By the fifth century, several Indianized states were flourishing in Southeast Asia with uninterrupted sea traffic with the Indian ports. Several entrepôts and trade centres had been established and freedom of navigation and commerce was a recognized rule. This uninterrupted freedom and recognition of seas as open and free for all continued without any challenge until the end of the fifteenth century when Portuguese arrived in Asia.

Notes

2. Ibid., p. 12.
4. Ibid., p. 392, quotes Polybius.
5. See quoted in William McFee, *The Law of the Sea* (New York, 1950), p. 44. It may be noted that Rhodes was annexed by Rome in 164 B.C. The progressive rise of Rome in the Mediterranean put an end to Rhodian ascendency. When the Roman Empire was divided in 395 A.D., Rhodes was assigned to the Eastern Roman (Byzantine) Empire. See Wilkinson, op. cit., p. 392.
7. Ibid., p. 60. See how European seas and waters were infested with pirates through the "Dark Ages," ibid., pp. 78-89.
11. See Dr. Vincent and Dr. Robertson, quoted in Mookerji, op. cit., p. 71.
13. V.A. Smith, *Early History of India*, quoted by Mookerji, op. cit., p. 73.
18. Vincent Smith, quoted in Mookerji, op. cit., p. 79.
21. Quoted in Mookerji, op. cit., p. 82.
23. Ibid., pp. 35-37; see also H.G. Rawlinson, op. cit., p. 107.
26. Quoted by Mookerji, op. cit., p. 86; see also Miller, op. cit., p. 176.
27. Toussaint, op. cit., p. 35
28. Mookerji, op. cit., p. 87; see also Warington, op. cit., p. 41.
29. Rawlinson, op. cit., p. 103.
32. See quoted in O.K. Nambiar, op. cit., p. 31.
33. "The habit of residing in India had become a widespread one." Warington, op. cit., pp. 68–69; see also Mookerji, op. cit., pp. 89 ff.
34. "Periplus" meant in Roman times sailing chart and traveller’s handbook. "The Erythraean Sea" was the term applied by Greek and Roman geographers to the Indian Ocean including its adjuncts, the Red Sea and Persian Gulf. See Schoff, op. cit., p. 50.
35. It is said to be the work of a Greco-Egyptian and a Roman subject written about 60 A.D. See Periplus of the Erythraean Sea (trans. by Wilfrid H. Schoff), op. cit., pp. 6–7; Toussaint, op. cit., p. 35; Warington, op. cit., p. 52; Rawlinson, op. cit., p. 106. As Schoff says: "Not Strabo or Pliny or Ptolemy, however great the store of knowledge they gathered together, can equal in human interest this unknown merchant who wrote merely of things he dealt in and the peoples he met — those peoples of whom our civilization still knows so little and to whom it owes so much; who brought to the restless West the surplus from the ordered and industrious East, and in so doing, ruled the waters of the 'Erythraen Sea.'" Schoff, op. cit., p. 7.
36. See Miller, op. cit., p. 18.
37. Ibid., p. 19.
38. See Mookerji, op. cit., pp. 95–96; Warington, op. cit., p. 62.
40. See Warington, op. cit., p. 107.
41. Ibid., pp. 113–14.
42. Pliny, however, described people who greatly resemble Indonesians bringing cinnamon to East Africa after a long direct sail. They returned earward with glass and bronze, clothing, brooches, armlets and necklaces. See Miller, op. cit., p. 218.
42. Ibid., p. 209.
44. See John R. Cady, Southeast Asia: Its Historical Development (New York, 1964), p. 27.
45. It is said that after Vespasian cut off supplies of Roman bullion to India, the Indians’ search for the precious metal led them to Malaya and other countries of Southeast Asia. Malaysia was called in ancient India Suvarnadvipa, or the "Gold Islands." See O.W. Wolters, Early Indonesian Commerce, op. cit., p. 63. See also R.C. Majundar, Suvarnadvipa (Dacca, 1937).
46. Mookerji, op. cit., p. 103.
48. Ibid., p. 119.
55. See for details of early ships in Gungwu, op. cit., p. 108.
56. See Cady, op. cit., pp. 32–33. See also Gungwu, op. cit., p. 28.
58. Wolters, op. cit., p. 79.
59. See Chau Ju-Kua, op. cit., p. 7; see also Wolters, op. cit., pp. 80–1.
60. But for early Chinese trade for more than a thousand years with Southeast Asia known as the Nanhai trade, see Wang Gungwu, op. cit., pp. 3–119.
63. Ibid., p. 70; see also John K. Whitmore, "The Opening of Southeast Asia, Trading Patterns through the Centuries," in Michigan Papers on South and Southeast Asia (Ann Arbor), p. 143.
64. See for a description to these routes, Gungwu, op. cit., p. 103.
66. Ibid., p. 62.
68. See Cady, op. cit., p. 66. This is confirmed from the Chinese sources, see Gungwu, op. cit., p. 104.
69. Quoted in Chau Ju-Kua, op. cit., pp. 15–16.
70. Quoted in Gungwu, op. cit., p. 101. Another Chinese record of the work of a governor of Ling-nan (817–20) corroborated the above statement: "When the foreign ships arrive and are docking, they are charged a lowering-anchor-tax (tonnage dues). (When the cargo is landed), there is an examination of the merchandise. Rhinoceros (horns) and pearls were so numerous that bribes were offered to the servants and retainers: the Governor stopped this (practice)." Quoted, ibid., p. 101.
72. Canton was sacked in 878 by rebel Huang Ch’ao. See Cady, op. cit., p. 67; George Fadlo Hourani, Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times (Beirut, 1963), pp. 77–78.
73. The principal articles of this import-export trade, according to the annals of the Sung Dynasty, included gold, silver, Chinese coin, coined money, lead, piece-goods of all colours, porcelain-ware, cotton fabrics, incense and scented woods, rhinoceros horns, ivory, coral amber, strings of pearls, steel, shells of turtles, tortoise shell, cornelians, rock crystal, foreign cotton stuff, ebony and sapan wood. See Chau Ju-Kua, op. cit., p. 19.
75. Chau Ju-Kua, op. cit., pp. 19–21. The duties were increased from 30 per cent to 40 per cent in 1144 and 50 per cent in 1175. Chau Ju-Kua, ibid. Marco Polo, the famous Venetian traveller, records that in his time (thirteenth century), Kublai Khan derived a large revenue from customs duties levied in Zayton (T’Yuan Chou) port. See William Marxen (Ed.), The Travels of Marco Polo (Trans. by William Marsden) (New York, 1948), p. 246.
76. See Cady, op. cit., p. 80.
77. See O.K. Nambiar, op. cit., p. 19.
78. Chau Ju-Kua, op. cit., p. 62.
80. See Cady, op. cit., p. 139.
81. In 1074, Chang Fang-P’ing spoke of the carts loaded down with cash crossing the frontiers of China and seagoing junks full of cargoes of cash leaving Chinese ports in exchange for
“precious stones and useless things.” Sumptuary laws were passed in 1034, 1042, 1068, 1107, 1157, 1201 and 1214 against the use of brocades and embroidery, king-fisher’s feathers and gold for ornaments, but all to no avail. See Rockhill, op. cit., pp. 421–23.


83. Toussaint, op. cit., p. 76.

84. Most of the so-called "tribute missions" to China from Ceylon, India, Persia or Arabia were in reality trade missions seeking commercial advantages in Chinese ports. See Gungwu, op. cit., pp. 118–19.

85. In 1281, his armada against Japan met with failure and in 1282 and 1287 he was beaten on the sea by the Cham and the Annamese. See Toussaint, op. cit., p. 77; Cady, op. cit., pp. 134–35.

86. See Rockhill, op. cit., pp. 118–19.

87. Toussaint, op. cit., p. 77.


89. Ibid., pp. 251–53.


91. Ibid., pp. 438–39.


93. Ibid., p. 235.

94. Ibid., Chapters VIII to X.

95. Toussaint, op. cit., pp. 78–79.

96. O.K. Nambiar, op. cit., p. 35. See also Rockhill, op. cit., p. 81.

97. Toussaint, op. cit., p. 79.

98. Ibid., p. 79.

99. See also Melink-Roelofs, infra., p. 75.


103. Ibid., p. 29.

104. See Cady, op. cit., p. 156.

105. Melink-Roelofs, op. cit., p. 34.


107. Ibid., p. 228.


109. *One Shahbandar* took care of trade with Chinese, Liuchiuian, Cham, Eastern Borneo and Siamese ships; one handled ships coming from Palembang, Java and other Indonesian islands; the third dealt with traders from Bay of Bengal, Sumatran ports and the Malabar Coast of India; and the fourth was allocated to the Gujaratis who had the largest commercial community in the city. See Cady, op. cit., p. 157.

110. Ibid., p. 157; Melink-Roelofs, op. cit., p. 42.


113. Ibid., p. 7, where he quotes Yule and Burnell.

114. See G.J. Resink, *Indonesia's History between the Myths* (The Hague, 1968), pp. 48—51. He refers to such Shahbandars in several Indonesian islands, Cormandel coast of India, Persia and Siam.


117. Ibid., pp. 64—65.

118. See quoted in G.J. Resink, op. cit., p. 64.

119. Ibid., pp. 45, 198.

120. Ibid., p. 45, where Van Vollenhoven is quoted.

121. See Tomé Pires, op. cit., pp. 268—69, where he refers to 84 languages spoken in Malacca "everyone distinct"; see also Cady, op. cit., pp. 160—61.

122. See for details of the import-export trade of these ports Tomé Pires, ibid., pp. 20ff; 42ff; 48ff; 54ff; 267ff.

123. See Melink-Roelofs, op. cit., pp. 74—80.


126. Tomé Pires, op. cit., p. 45.

127. Ibid., p. 42.

128. Ibid., p. 43.

129. See ibid., pp. 74—75 where he refers to 25 ports with ships from Malabar alone.

130. See ibid; Barbosa, op. cit., vols. I and II; Ibn Battuta, op. cit.


133. See Miksic, op. cit., pp. 8—9, where he quotes several historians.

134. J.C. van Leur, op. cit., p. 78.


138. Admiral G.A. Ballard, op. cit., p. 3.

139. Ibid.
3. EUROPEAN SEARCH FOR THE INDIES

Lure of India and Yearning for Spices

India had been known to Europe from the earliest days of history and had always excited the imagination of the West. Throughout human history "it has ever been a fateful magnet, drawing to it mariner and explorer, soldier, and adventurer." Strabo, the great Roman geographer, without knowing much about India, called it "the greatest of all nations and the happiest in its lot, whose confines reach both to the eastern sea and to the southern sea of the Atlantic." It was "the dream of every age and land since the days of Solomon and Semiraimis," a country the lure of which changed to a great extent the course of history. As Hegel noted: "India as a land of desire formed an essential element in general history. From the most ancient times downwards, all nations have directed their wishes and longings to gaining access to the treasures of this land of marvels, the most costly which the earth presents, treasures of nature — pearls, diamonds, perfumes, rose essences, lions, elephants, etc. — as also treasures of wisdom. The way by which these treasures have passed to the West has at all times been a matter of world historical importance bound up with the fate of nations." 

Although India had commercial and cultural contacts with Greece long before Alexander reached the Indian frontiers, and later active trade flourished between Indian states and the Roman Empire, as we have seen earlier, during the so-called "Dark Ages" of Europe, the contacts were neither so regular nor so intimate. After the early crusades, Europe's interest in Asia increased and during the thirteenth century several European travellers, Marco Polo, Friar Odoric and Monte Carvino, to mention only a few, visited India and other parts of Asia. However, ever since the twelfth century, Islam based in Egypt had been organized as a powerful barrier between Asia and Europe. Even after two hundred years of efforts by the unified forces of Christendom, the area of Syrian and Egyptian coasts remained firmly in Muslim hands.

On the other hand, ever since Rome had made Eastern products fashionable and her Egyptian subjects had gone out to seek them in the Indies, the European world had been possessed with the splendour of the East. When Arabs shut off all access to the Indian Ocean, Europe continued to supply herself for some time from the markets of Asia through the caravan routes of the Levant. But even this had become ever more difficult in the fourteenth and fifteenth centuries because of religious wars between the Muslims and the Christians. Aromatic spices from India and the East Indies had been and were in greatest demand and yielded the largest profits to merchants. Even during the Roman period, as we have seen above, pepper was sold against the weight of gold. Gibbon tells us that among the ransom of Rome demanded by Alaric in 408 A.D. was 3000 lbs. of pepper. Marco Polo reported that tonnage of junk was calculated by their capacity in baskets of pepper. "The scarcity of fresh meat," wrote Trevelyan, "in winter before the era of roots and artificial grasses was a chief reason why our ancestors craved for spices; they were used both to preserve meat, and to season it highly when it had little else to recommend it." The supply was never sufficient and the prices charged by the middlemen, whether Arabs or Venetians, were exorbitant.

As we have noted earlier, in the fourteenth and fifteenth centuries, Arabs were the great intermediaries of trade between Europe and India, although a few Gujarati Muslims also sailed cargoes to the West. But the spice trade of the Malabar Coast had been more or less monopolized by the Arabs and they had a number of colonies in Calicut, Cochin, Quilon and other parts on the western coast of India. From the marts on the Red Sea coast, the Venetians who had the control of the Mediterranean, carried the goods to markets in the West. By a combination of skillful diplomacy, adventurous spirit and far-sighted policy, the Venetians had for a long time established a strong influence in Cairo and other Muslim areas in the Levant and had made themselves the monopolist agents of Eastern trade in Europe. Having no scruples about trading with the Muslims, despite papal interdictions, they had established various colonies in the Red Sea ports. As a result of these monopolies of trade routes, not only Arab ports prospered, but Venice became the greatest emporium of Eastern trade in Europe and subject of strong rivalry and conflicts with Genoa. Although earlier, in the twelfth century, Genoese merchants had received commercial privileges from Byzantine emperors and several of them had travelled to the East and established themselves in some countries of the Indian Ocean, after the fourteenth century, Genoa declined because of international dissensions. In the fifteenth century, Venice had no rival and its commercial prosperity was at its height. Unable to break Venice's monopoly of Eastern spices, an all sea route seemed to be the only answer to Islam's power and Venice's monopoly.

It is interesting to note that spice trade with the East, especially pepper, was one of the great motivating factors of history. As a recent writer points out:
“Pepper may not mean much to us, but in that age it ranked with precious stones. Men risked the perils of the deep and fought and died for pepper.” Spices were the “Golden Fleece of the Orient.” Men faced death by shipwreck or the sword, and hazarded some of the most remarkable exploits in the early annals of oceanic navigation in their quest for sackfuls of pungent little seeds of pepper. G.F. Hudson in his famous study, Europe and China, succinctly summarized the position:

Spices which became more and more an essential for European cookery could not be obtained except from India and Indonesia and most came through Persia or Egypt; this indispensable and naturally monopolistic trade came to be the chief bone of contention in the politics of the Levant and was the most powerful single factor in stimulating European expansion in the fifteenth century. Europeans knew where spices were produced and at what cost, so that when they were again cut off from the Indian market by a hostile Islam and by incessant wars in the Levant, they were well aware of the opportunities awaiting any Power that could find a route to the “Indies where the Spices grew.”

Unable to find a route to India on their own, Genoese entered the service of Spain and Portugal, the two Iberian nations which, apart from their interest in trade, had a real crusading spirit still alive to fight Islam. Having fought thousands of battles with the Muslims (“Moors” as they called them) from the tenth to the thirteenth century, fight against Islam was considered as a religious duty and patriotic necessity. Finding a sea route to the Golden Land of India and taking Christendom directly to the Indian Ocean came to be adopted by Portugal’s King, Prince Henry the Navigator (1394–1460), as part of the grand strategy to turn the tide of Islam. Although religion was more important for Henry than trade, “yet he wanted gold, trafficked in slaves and did not despise the wealth that he regarded as God’s blessing.” This combination of greed and godliness – lust for riches and passion for God – drove the Portuguese as well as Spanish – and later, to a lesser extent, British, French and the Dutch – remorselessly on into the torrid, fever-ridden seas that lapped the coast of tropical Africa and beyond. The immediate objective was, of course, to capture at least a large part of the wealth that was pouring into the coffers of Venice as well as the Muslim treasures, for it would mean obtaining both the cargoes and the carrying trade of the Indies. Both for the Spanish and the Portuguese to find a sea route to India and the East had become an obsession. They went on all sides but did not succeed. Columbus sailed west in search of India and reached America in 1494 which he deceived himself into believing was India. Up to his death he adhered to the conviction that in sailing along the shores of Mexico he was following the coast of Asia somewhere near Japan.

Although Prince Henry the Navigator hardly every “navigated,” he made the discovery of a sea route to India his life-long mission which he pursued with a “fanatical zeal to cut at the root of Islam by attacking it from behind.” He collected around him the best mathematicians, cartographers, astronomers and even Moorish prisoners with knowledge of distant lands, devoted himself to the study of nautical science and established the first regular school of navigators and seamen. He improved ship building and built galleons, which were heavily built and slow moving, but which were capable of carrying cannons, and he sent out expeditions that were to systematically explore the African coast. It may sound strange, but it is nevertheless true that until the fifteen century, European navigation was confined to inland seas like the Mediterranean, the North Sea and the Baltic and to the coast of Europe. Only the Asians – the Indians, the Chinese and the Arabs – had developed a tradition of oceanic navigation. But there was nothing haphazard about Henry’s pathfinding. Highly technical knowledge was put at the service of God and profit. The result was, as Plumb puts it, “as savage, as piratical an onslaught on the dazzling rich empires of the East as the world has ever known.”

Pope Divides the World between Spain and Portugal

In the absence of any rules in the fifteenth century Europe about relations with the extra-European world and new continents, and continuously engaged in religious wars against Muslims, some of the frontal European states, like Portugal and Spain, adopted the convenient doctrine that the Christian states had the right to occupy and possess the lands of the heathen and the infidel without regard to the rights of the native peoples concerned. They also claimed that, as head of the Christian Church, the Pope had the right to allot temporal sovereignty to any lands not possessed by a Christian ruler. As early as 1454, the Portuguese persuaded Pope Nicholas V to issue a bull granting them title to the territories they were discovering along the African coast toward India. The Pope declared in this document:

After having established Christian families in some of the unoccupied islands of the Ocean and having consecrated churches there for the celebration of Holy Mysteries the Prince [Henry, the Navigator], remembering that never within the memory of man had anyone been known to navigate the sea to the distant shores of the Orient, believed that he could give God the best evidence of his submission, if by his effort the Ocean can be made navigable as far as India, which, it is said, is already subject to Christ. If he enters into relations with these people, he will induce them to come to the help of the Christians of the West against the ene-
and guidance of Prince Henry continued although he died long before his well-laid plans came to fruition. In 1487, Bartholomeu Dias discovered the “Cape of Tempests,” renamed “Cape of Good Hope” by King John because it gave hope of the discovery of India, so much wished for and sought over so many years.29

It may be mentioned that, anxious to maintain a monopoly of their trade on the African coast, especially in view of conflicting Spanish claim, the kings of Portugal had adopted a strict policy, during the lifetime of Henry and later, to suppress or restrict as much information as possible concerning the sea explored and the lands visited. These sailing directions were among the most secret national data of the Portuguese. Charts, maps and travel documents were kept secret or censored in order not to excite the jealousy or cupidity of other maritime Powers, or to prevent them from making practical use of the Portuguese findings. Sailors were forbidden to discuss their travels; accounts of sea voyages were tampered with, and an intensive organization of spies was kept in foreign courts and ports.30 This policy of commercial secrets, it may be pointed out, however, was not confined to Portugal but was followed by other European states as well.

In order to find out more about the country of Prester John, legendary Christian King of Ethiopia, and to investigate thoroughly the spice trade at its source in India, King John II of Portugal sent in 1487 two men, Pero de Covilhan and Alfonso de Paiva, disguised as “Moors” and speaking Arabic, on a mission to provide intelligence. While Paiva sailed from Aden to Ethiopia, Covilhan reached Calicut on the Malabar Coast and found him-
off lands, travellers and merchants from Banda, Sumatra, Java, Peru and Siam. But to his utter surprise, he found fellow Indian Christians on the Malabar Coast. Trade was peacefully conducted in the bazaars of Calicut and its port was busy. After a few years the Portuguese writer Barbosa confirmed this information. Speaking about the rich and thriving Arab merchants and the dependence of the ruler of Calicut on their trade, Barbosa wrote:

As soon as any of these Merchants reached the city, the King assigned him a Nayre, to protect and serve him, and a Chatim clerk to keep his accounts and look after his affairs, a broker to arrange for him to obtain such goods as he had need of, for which three persons they paid good salaries every month.

Calicut was still a safe and secure place, as narrated a few years earlier in 1442 by a Muslim writer, Abd-er-Razzak, Ambassador of Persian King Shah Rokh:

Calicut is a perfectly secure harbour, which...brings together merchants from every city and every country; in it is to be found an abundance of precious articles brought thither from maritime countries. Security and justice are so firmly established in this city, that the most wealthy merchants bring thither from maritime countries considerable cargoes, which they unload, and unhesitatingly send into the markets and the bazaars, without thinking in the meantime of any necessity of checking the account or of keeping watch over the goods. The officers of the custom-house take upon themselves the charge of looking after the merchandise, over which they keep watch, day and night. When a sale is effected, they levy a duty on the goods of one-fortieth part; if they are not sold, they make no charge on them whatsoever.

Vateria, the Italian, who visited Calicut in 1505, has much the same to say. He particularly praised the administration of justice and the probity of merchants. It is to this peaceful and busy international port and trade centre that Vasco da Gama was to land within ten years of Covilhan's visit. From Calicut, Covilhan took a small coasting vessel which, after touching ports reached the island of Goa, an independent Muslim state and a busy centre for trade. After thorough investigation of the Genoese trade, Covilhan took back an Arab ship. But on reaching Cairo he learned of the disappearance of his companion and received a secret order from his King to return to Abyssinia and establish contact with Prester John. Poor Covilhan had no choice. He wrote all he had discovered in India in a letter to King John and once again began on his heart-breaking travels.

Vasco da Gama Reaches the Land of Dreams

Covilhan's report probably helped King John's successor, Don Manuel, to make preparations for a maritime expedition to India under Vasco da Gama, a nobleman of the King's household. On July 8, 1497, four ships sailed from the harbour of Belem, near Lisbon, which included the flagship San Gabriel, a small vessel of 120 tons, carrying twenty guns, and its consort San Raphael, commanded by Paul da Gama, a younger brother of Vasco. In March 1498, da Gama reached Mozambique on the east coast of Africa, which was already an important Arab trading centre doing business with India, Persia and Arabia. The local Sheikh, thinking that they were Muslims, treated the Portuguese with courtesy. The captain-general was looking for a pilot to guide him through the Indian Ocean. Since he did not get one in Mozambique, he unnecessarily harassed some innocent people on the African coast, and picked quarrels at Mombassa. Ultimately, he got an experienced Indian Muslim pilot, sent to him by the Sheikh of Melindi, who guided him without any difficulty to the port of Calicut on May 27, 1498.

The region known as Malabar, or Kerala, extending from Mangalore to Cape Camorin, was the pepper country par excellence from which for a period of more than two thousand years ships had sailed without interruption to the Persian Gulf and to the Red Sea, carrying spices, textiles and other products of India and the East Indies. In spite of its rather limited area, it is important to note, Malabar was split into many small states, each vying with the other for a share in a very important and lucrative import and export trade. Well served by the monsoons and strategically situated as way stations for the trade of India, Ceylon, Malacca, the East Indies and China on the one hand, and for that of Africa, Persia, Arabia, the Red Sea and Europe on the other, the port cities of Malabar had for centuries been the important entrepôts for the sea traffic of Asia. Of all the ports, Calicut was the most prominent and wealthiest centre of the spice trade. Thanks to Covilhan's report, da Gama was well provided with letters to the Zamorin, or King, of Calicut and information concerning the city and its trade. Hindus, Jews, Arabs, Persian, Syrians, Turks, Somalis, Chinese, traders of Annam, Cochin-China, Malays from Malacca, hadjis from Mecca, local Christians and Jews, Negroes, and even some Italians, "all these rubbed shoulders in bazaars and streets of Calicut. A score of languages and a hundred dialects were heard on every side - yet peace and order always reigned in the city streets." When da Gama's crew reached Calicut, they were greeted by two Spanish speaking Tunisians who asked them: "What the Devil has brought you here?" They replied: "We have come to seek 'Christians' and spices!"

The Zamorin of Calicut, with hereditary title of "the King of the Mountains and the Sea," because of his prestige, power and wealth, was the most powerful ruler of Malabar and the object of hatred and jealousy of all other rulers of
the land. He maintained a strong navy of sorts, powerful enough to enforce his authority along the western coast of India. The most important and influential group of foreigners in Calicut were the Arabs, (or “Moors” as the Portuguese called them) who controlled the greater part of the Indian sea-borne trade, both as merchants and as carriers. They provided the life-blood of the city’s commerce, occupied their own quarters, as well as warehouses and ships throughout the city and had their own kadiis (judges) to settle disputes amongst themselves, and religious leaders. The material prosperity and political influence of the Moors gave rise neither to jealousy nor to fear and everywhere on the Malabar Coast they were encouraged to establish centres of trade which helped the local population and kings. Different communities lived together without friction and enjoyed absolute religious toleration.43

On reaching Calicut, da Gama was received with courtesy and honour. His two messengers to the Zamorin were sent back with a present “of much fine cloth”44 and a message of welcome to the city. Since the prosperity of the King and his people depended on commerce, it was surely to his advantage to open up as many channels as possible for trade with Europe. Da Gama landed with great pomp and ceremony and was received at the shore by a nobleman of the King who led him to the palace. On reaching the city, the Portuguese saw a temple but thought it to be a church and prayed in it. Throughout their stay in Calicut, da Gama and his party continued to believe that the local people were Christians and that the temples were churches.45 At the palace, da Gama, impressed by evidence of the Zamorin’s tremendous wealth, presented to him the letter of Don Manuel requesting commercial facilities. The Zamorin’s answer was gracious and he asked da Gama to communicate to the Treasurer of the King what commodities he wanted.46

In those days it was a universal custom for every embassy sent to a sovereign ruler, from whom some advantage or favour was sought, to bring some valuable presents. Da Gama did the best he could, but his best muster was a poor lot: “twelve pieces of stripe cloth, four scarlet hoods, six hats, four strings of coral, a case containing six basins for washing hands, a case of sugar, two casks of oil, and two of honey.” Seeing the presents the Zamorin’s officer “laughed contemptuously” and refused to forward them to the King. Although failure to provide proper presents annoyed the Zamorin, on da Gama’s second audience with him, permission was granted to the Portuguese to land the merchandise they had brought to sell.47 In a sense da Gama was baffled at the extraordinary civility he received; the Zamorin got his goods transported free of charge from the ships to Calicut.48

Leading Muslim merchants of Calicut, intelligent and shrewd as they were, were quick to grasp the import of da Gama’s feats of navigation and perceived a dire threat to their trade monopoly of the commerce of the Indian coast. They enlisted the sympathies of many of the Zamorin’s closest advisors and

King that the Portuguese commander was merely a “cruel, bloody-minded pirate,” who could not be trusted.49

Although the Zamorin listened to his advisors, and got enough proof of Vasco da Gama’s arrogance, haughtiness and tactlessness, according to the Portuguese themselves, “the acted with fairness and dignity in his dealings with the exacting and arrogant Gama.”50 He supplied part cargo of spices and allowed da Gama to erect one of his precious stone pillars, with which he marked the progress of his voyage. He sent a letter to King Manuel and offered him all the cargoes he wanted in exchange for gold, silver, coral and crimson cloth. After several months’ stay when da Gama made preparations for returning to Portugal, he was asked to pay customs according to the regulations of the port. Da Gama not only refused to pay custom dues but sailed away from Calicut as soon as the monsoon season was over, taking with him five hostages he had captured.51

Leaving Calicut on August 29, 1498 da Gama sailed north and reached the port of Cannonore ruled by Kolathiri Raja who had a hereditary feud with the Zamorin of Calicut. The Raja of Cannonore, anxious to win Portuguese friendship, helped them to load their ships with spices. On November 20, da Gama left Cannonore and, after a long and arduous journey in which his brother Paulo died, he reached Lisbon on August 20, 1499.52

Da Gama’s Voyage; A Great Success

Vasco da Gama had found a sea road to the long-desired land of spices, ivory, gold, and precious stones and had proved that the seas about India were not landlocked, as many of the old geographers had believed. Whether his feats were as great as those of Columbus or Magellan or whether he was merely reaping the fruit of others’ labours,53 life in the world of Europe or Asia was never to be the same again. Along with the discovery of America his voyage had completed the process which led ultimately to the Atlantic coast becoming paramount in European history, and the Mediterranean ceasing thereafter to be the focus of Western commerce. Not surprisingly, apart from the Moors who were alarmed at da Gama’s arrival in India, the Italian cities, Venice and Genoa, got deeply worried when they heard of da Gama’s successful return because of its threat to Italien prosperity. Hardly had his ships arrived in Lisbon when the Italian ambassadors and spies in Portugal sent frantic letters to their governments. As a Venetian diarist noted: “As soon as the news (of Gama’s return) reached Venice, the populace was thunderstruck, and the wiser among them regarded the news as the worst they could have received.”54

They realized that the flow of wealth would now be transferred from Italian cities to the coast of the Atlantic and the centres of European civilization, following the commerce, would move from the Mediterranean to the West. The
sea route to India also weakened the Ottoman Empire — the Muslim power which had threatened to overthrow Western Europe — by cutting off a considerable part of the Turkish revenue. The period of Hindu supremacy in the ocean, as Panikkar stresses, was one of complete freedom of trade and navigation. Tomé Pires pointed out, "the heathen of Cambay — and in older time the Gujaratees — held that they must never kill anyone, nor must they have an armed man in their company. If they were captured and (their captors) wanted to kill them all, they did not resist. This is the Gujarat law among the heathens." Later, however, and during Tomé Pires' own time, they began to "have many men-at-arms to defend their tombs to complete security of property and person. The populace was roused to fury and in the riot that followed the Portuguese warehouse was destroyed and the Portuguese factor, Ayres Correa, and almost fifty of his men were killed. The mob was finally controlled and driven off by Zamorin's rescue party. Cabral, holding Zamorin responsible, retaliated in his brutal fashion and burned ten Arab vessels lying off the shore, massacred the crew, and then bombarded the town. This "act of senseless barbarism" of the Portuguese leader "turned a probable friend into an enemy and they lost the use of the best harbour on the Malabar Coast."

Introduction of Ships Armed with Cannons in the Indian Ocean

It is important to remember that until the arrival of the Portuguese, the Indian Ocean had never been the theatre of very serious naval conflicts. No doubt piracy had always taken place in some areas. But whenever a strong kingdom emerged, it suppressed piracy which had always been considered a crime. In fact the strong rulers of Asian coasts like Gujaratt, Calicut, Cholas, Sri Vijaya and others, maintained navies for the protection of the coast, suppression of piracy and security of trade. The Asians were generally land powers and never cared to have big navies. During the Hundred Years' War between the Cholas and Sri Vijaya, their navies had often come to grips, but all that was, as a modern historian points out, "sham fighting compared to the raging battles that closely followed the Portuguese expeditions." In fact, as Panikkar points out, the reported battles were "all on land, the Chola King carrying whole armies across to the Malay Peninsula and fighting successive campaigns in the territories of the Malayan ruler. Naval fights on any large scale, in the manner of wars between Carthage and Rome, seem to have been unknown in India before the arrival of the Portuguese." No Asian "had any knowledge of naval warfare as a science," nor "did they ever come to understand that a mere mob of ships without organization or power to manoeuvre as a fleet is not a certain instrument of victory."

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More Portuguese Expeditions to India

If da Gama had left a trail of resentment and hatred in Calicut, inspired by his arrogance, ruthlessness, unbridled temper and reliance on lies, the Portuguese King could not have selected a worse officer as his successor. The Zamorin was not pleased by the return of the Portuguese and sent a message welcoming Cabral to Calicut. But the Admiral was in no mood for friendship. He asked for an audience with Zamorin, insisting at the same time that his proposal and the Portuguese envoy was received cordially, and a dwelling and a warehouse were allotted for the Portuguese goods. But the Portuguese found themselves harassed by restrictions and could not compete with the Moors. After three months, they could buy cargoes for only two ships. The Zamorin agreed to this unusual request, in which chance led him to the coast of Brazil, which was thus "discovered and taken possession of" by the Portuguese, Cabral reached India with only six ships on September 13, 1500.
Malacca, whose prosperity entirely depended upon their seaborne trade, possessed no ocean-going warships. The Arab, Gujarat, and other Muslim-controlled shipping which dominated the trade of the Indian Ocean, consisted of large ocean-going vessels, as well as small coastal ships. But even the largest was not provided with artillery, and no iron was used in their hull construction. They were, therefore, much frailer than the Portuguese carracks and galleons which they had to encounter. Unfortunately for the East, the Portuguese were heirs of the long accumulation of the technical skill from the Middle Ages. The Arabs and the Jews had provided them astrolabes and maps; the shipbuilding skills had been developed and sharpened by the rough Atlantic Ocean whose challenge had produced ships which were "marvels of manoeuverability that made short work of the junks and dhows of the Indian Ocean, armed as they were with the best artillery that Europe could produce." The only non-European power which had developed gunnery on the sea was the Ottoman Empire. But when the Portuguese arrived in Calicut, the Turks had no navy in the Indian Ocean. By the time the Sultan realized the menace, Portugal had not only gained a foothold, but was able to reinforce its navy which, with its naval power concentrated in the Levant, was unable to do.

The arrival of Portuguese ships with heavy cannons, therefore, introduced a new and revolutionary factor in the Indian Ocean. The armament of the Portuguese ships gave them an immediate and decisive advantage over their Indian opponents. Indian Powers, accustomed to look only to dangers from land force, did not realize the menace to their security implied by a few Portuguese ships which had reached the Malabar shore. This was the end of India's political isolation from Europe. So far her encounter with outside peoples was confined to those who lived on her northwest frontier. Indians did not realize the possibilities of sea power and the political strength that it could bring. In this sense, Vasco da Gama created for India a new frontier and with it new political and commercial problems.

Vasco da Gama Returns and Commits Piracy

After Cabral sailed away to Cochin, the bloody affairs had made the Zamorin an enemy and Calicut the most determined opponent of Portuguese connection. The King of Cochin, hostile and jealous of Calicut's prosperity, immediately granted permission to the Portuguese to buy whatever they wanted. A cargo of pepper, cinnamon, benzoin, musk, porcelain and fine weaves was purchased back for Portugal. In the meantime, the Zamorin equipped a fleet of about 80 ships and 1500 men to avenge Cabral's barbarism. But on sighting the ships of Cochin, Cabral fled and sailed back to Portugal.

Although only six ships returned to Lisbon out of thirteen, they had brought enough wealth to pay for the whole fleet. Although on Cabral's return it came to be recognized that the sovereignty of the seas, which King Manuel had asserted for himself, would be keenly contested, his desire for spices had been whetted and he was prepared for any sacrifice. The Portuguese King wanted not only to seize the fruits of Asia's trade with Europe but also to attack Muslims from the rear. He fitted up a new armada to be sent to the Indian waters to retaliate against the Zamorin and assert the authority of the Portuguese in the Arabian Sea. He also issued instructions to seize Muslim vessels on the high seas. The armada, consisting of 15 ships and 800 trained soldiers, was led by Vasco da Gama himself who was appointed captain-major of this fleet. On February 10, 1502, the fleet sailed followed by another squadron of five vessels after six weeks under Estavo da Gama. The Portuguese had come to realize that they could not compete with Arab, Indian and other Southeast Asian traders in the Indian Ocean. Therefore, they sought to destroy that trade by brute force and to create a monopoly for themselves by an effective control of the sea. This they "proceeded to do with complete ruthlessness and astonishing speed." On his way towards the Indian coast, "a savage and relentless Vasco da Gama" committed several acts of piracy in order to enforce the claim of his sovereign to be "the Lord of Navigation" and his right to have monopoly of spice trade. An Arab ship belonging to a brother of Khoja Kassim of Calicut was returning from Mecca. Da Gama stopped it and plundered its goods. Although he met no resistance and had pillaged a peaceful ship of a country with which he was not at war, he was not satisfied. "Cold-bloodedly he ordered the passengers (380 men, women and children) to be locked in the hold of the Meri, the ship to be set afire, and all on it burned to death." Explaining the reason for capturing the vessel, the Portuguese contemporary historian Barroes said:

It is true that there does exist a common right to all to navigate the seas and in Europe we recognize the rights which others hold against us; but the right does not extend beyond Europe and therefore the Portuguese as Lords of the Sea are justified in confiscating the goods of all those who navigate the seas without their permission.

Ruthless da Gama Attacks Calicut

After destroying the Mecca ship, da Gama sailed to Cannonore and renewed his friendship with the King there. From there he proceeded to Calicut to teach the Zamorin his lesson. Although the Zamorin sent several messages of friendship, da Gama "treated the envoys with contempt." He demanded as the
price of peace immediate banishment of every Muslim in Calicut. Since this impossible demand was refused, da Gama immediately bombarded the city. He also caught thirty-eight poor innocent fishermen or crew of a small rice vessel and ordered his men, in the words of Correa, his scribe, "to cut off the hands, the ears, the noses of all the crew and put them all into one of the small vessels in which he ordered them to put the friar (a Brahmin envoy of the Zamorin who came with a Portuguese safe conduct) also without ears nor nose nor hands, which he ordered to be strung round his neck with a palm leaf for the King on which he had told him to have a curry made to eat of what the friar brought him." The missionaries of Christ, the Prince of Peace, followed the trade of blood feeling that "the rape was a crusade." No such cruelty, however, ever stirred the conscience of any Portuguese commander. For them, "these Orientals were heathens, blacks, Moors, Turks, containing, as one of them wrote, 'the badness of all bad men'."

On the following day, the bombardment of the city was renewed and a heavily laden ship which had been seized the day before was looted and then burned. After these unprovoked acts he sailed off to Cochin to load spices. In the meantime, the Zamorin of Calicut made his own preparations and collected a large fleet under Khoja Kassim which was reinforced by a fleet of Khoja Ambar, a leading Calicut merchant engaged in Red Sea trade. Although the Calicut fleet had the advantage of speed, it did not have the fire power of the Portuguese ships fitted with heavy artillery. In an indecisive engagement that followed off Cochin, the Calicut fleet suffered serious losses, but gave anxious moments to da Gama as well. Soon thereafter, da Gama left for Lisbon leaving behind a trail of blood and hatred.

No sooner had da Gama left the Indian Ocean than another Portuguese fleet of fourteen ships under Lopo Soares arrived in Calicut waters and in a surprise attack destroyed a squadron of the Calicut force lying at anchor off Cranganore. Soares then proceeded to attack a mercantile fleet assembled in another port and dispersed it. It is important to note that Portuguese practically always acted in a most high-handed manner. Thus, they always killed their prisoners of war "with the most horrible tortures or enslaved all prisoners whom they could not hold to ransom." On the other hand, "the Portuguese who were captured were...treated with the greatest humanity." Although many Portuguese were undoubtedly killed or murdered on shore, these murders were the outcome of sudden riots, "and in no case do we hear of any torture." Things did change somewhat in later days when Indians had never gave up their humanity and justice.

Steps Toward a Portuguese Maritime Empire

It came to be realized in Lisbon, however, that dependence on scattered factories and looting of native vessels could not continue forever. If Portugal was to maintain her peace in Indian trade some sort of a system had to be created to assure a steady stream of merchandise flowing into Lisbon. King Manuel, therefore, decided to create a new office of Viceroy of India and appointed Dom Francesco d'Almeida as the first Viceroy. Clothed with full powers to make treaties, wage wars, build fortresses, and hold strategic centres, from which seas could be commanded in order to secure monopoly of the export trade of India for Portugal, Almeida sailed from Lisbon in March 1505 with a large fleet and 1500 soldiers. He was instructed to destroy the power of the Moors and drive them from the sea, to get the Mahommedans merchants from Calicut expelled, and to divert all Indian trade, some of which passed through the Persian Gulf and the Red Sea, to the Cape route. Almeida also planned to make alliances with the various princes, guaranteeing them protection from the Portuguese ships in exchange for their promise to supply cargoes and guard the factories against attack.

Almeida started by erecting a strong fort at Kilwa, on the east coast of Africa, occupied Socotra (which controlled the entrance to the Red Sea), and looted and destroyed several towns nearby. On reaching the Indian coast he built forts at Cannanore and Cochin, which had become friends of the Portuguese because of their own quarrels with the Zamorin of Calicut, and started looking for Muslim traders on the high seas and killing them indiscriminately. Soon Almeida found himself attacked by the Zamorin of Calicut who had assembled a large fleet against the Portuguese. But although the Indian ships greatly outnumbered the Portuguese, the Portuguese had heavily armed vessels and big guns, and they outgunned and outranged both the Hindus and the Moors.

The Zamorin, now realizing that his ships stood little chance against the heavily armed Portuguese caravels, sought help from the Sultan of Egypt. In 1507, an Egyptian fleet, consisting of 12 caravels, built by Venetian engineers and equipped with the latest weapons, and 1500 men under an experienced admiral, Mir Hussain, entered the Arabian Sea and was joined at Diu by the Zamorin's fleet. At the first encounter, the Portuguese were beaten and Almeida's son was killed. But they soon returned the charge and scattered the enemy forces. The artillery of the Europeans was more than a match for the Egyptians and their allies from Calicut.

In 1510 Almeida was succeeded by Alfonso d'Albuquerque. D'Albuquerque had come to the Indies in 1506 on an expedition to attack the Red Sea traders and to blockade the entrance to that sea. In 1507 he attacked and subdued the famous Persian port of Hormuz, ruthlessly burned and sacked three towns, and slaughtered the helpless civilians. But the Hormuz ex-
pedition failed because of the disloyalty of some of the Portuguese captains and d’Albuquerque sailed for India. 99 In India he attacked Calicut but was defeated and seriously wounded. His first attempt to challenge the power of an Indian ruler on land ended in a disaster. 99 Later, in January 1510, with the help of the Hindu Chief of the area, who was an enemy of the Muslim Sultan, he captured Goa; but soon thereafter he was driven out by a counter attack. Returning six months later, he captured it again and took a terrible vengeance on the population. As he himself boasted in a letter to his King: “Afterwards, I burnt the city and put all to the sword...whenever we could find them no Moor was spared, and then filled the mosques with them and set them on fire.” 99

After settling the affairs of Goa and making it the seat of Portuguese power in Asia, he turned towards the eastern region because a major portion of the spice trade came from the Indonesian islands through Malacca. In Ceylon and Pegu he signed treaties with native kings, but his main objective was the emporium of Malacca. As the main entrepot of trade of the archipelago, of rare spices that grew in Java, Moluccas and other islands, it was frequented by thousands of ships from the East and the West. 92 Although its rulers had adopted Islam in the fourteenth century, as we have seen, Hindu Tamil traders adopted Islam in the fourteenth century, as we have seen, Hindu Tamil traders from the Coromandel were as much welcome there as were Muslims from Gujarat, Java and Sumatra. Europeans who visited Malacca just before the occupation of the Portuguese, wrote lyrical accounts of this thriving port 93 which were echoed by Tomé Pires, the Portuguese scribe, in his report in 1515:

Men cannot estimate the worth of Malacca, on account of its greatness and profit. Malacca is a city that was made for merchandise, fitter than any other in the world; the end of Monsoons and the beginning of others. Malacca is surrounded and lies in the middle, and the trade and commerce between the different nations for a thousand leagues on every hand must come to Malacca. Wherefore a thing of such magnitude and of such great wealth, which never in the world could decline, if it were moderately governed...and not neglected.... Whoever is lord of Malacca has his hand on the throat of Venice. 94

Malacca’s importance was well recognized by the Portuguese. D’Albuquerque attacked Malacca with a fleet of 18 ships and captured it in 1511. Urging his followers before the attack “to quench the fire of the sect of Mahamede,” d’Albuquerque also emphasized the prospects of material gain. “I hold it certain that if we take this trade of Malacca away from them (the Moors) Cairo and Mecca will be entirely ruined and Venice receive no spiceries unless her merchants go and buy them in Portugal.” 99 He later sent a fleet of three ships to explore the islands of Indonesia, the legendary and inexhaustible storehouse of spices. With the conquest of Malacca, d’Albuquerque not only established his mastery of the Indian Ocean, but opened the way for expansion into the Pacific. He converted Malacca town into a strong fortress and appointed to its government an able captain, Ruy d’Avco, before he returned to Goa. This completed the structure of Portuguese maritime empire in Asia based on an unchallengeable position in the Indian Ocean. The major ports of Africa were already in Portuguese hands. By the annexation of Socotra, political influence at Hormuz, by capturing Goa and by holding Malacca, he established a system of control which remained unshaken as long as Portuguese naval power remained strong enough in Europe. 94 D’Albuquerque’s strategy aimed not at territorial conquest but only at the control of trade routes by occupying a number of strategic points which, once fortified, could easily be defended from the sea by armed men-of-war. Tomé Pires, the Portuguese author and a great admirer of d’Albuquerque, wrote in 1512:

In the same way as doors are the defense of houses, so are the seaports the help, defense and main protection of provinces and kingdoms; and once these are taken and subjugated, the provinces and kingdoms are put to great suffering, and if they have quarrels among themselves or with their neighbours, they are immediately lost because they have no help. ...A kingdom without ports is a house without portals. 97

This grandiose idea, conceived by d’Albuquerque, 94 was later adopted, in the beginning at least, by almost all the Western peoples who followed the Portuguese in the Indian Ocean. Similarly, the fortified trading posts, as conceived by d’Albuquerque, remained the standard type of European establishment in the Asian seas until the nineteenth century. Strange to the Orientals, the fortified trading post was a real stronghold and had a life of its own completely apart from the territory surrounding it and constituted a perpetual threat to that territory. 99

Attempts to Establish Portuguese Monopoly of Trade

Having seized three of the principal entrepôts, d’Albuquerque then tried to enforce a monopoly system of his own. Trade with certain ports and in certain commodities (chiefly spices) was declared to be a Portuguese crown monopoly. Asian shipping was allowed to ply as before provided that a Portuguese license (cartaz: similar to the British navicert of 1939–45) was taken out on payment by the shipowner or the merchants concerned, and provided that customs dues were paid on spices and other designated goods at Goa, Hormuz or Malacca. Unlicensed ships were liable to be seized or sunk if they met the Portuguese ships, particularly if such ships belonged to Muslim traders. 100 By placing
cruiser patrols close to every other harbour in southwestern India, d'Albuquerque compelled all incoming freights to be diverted to Goa for discharge. To provide return freights for these ships forced to unload he established a supply market stocked with all the main products of Southern India. In this trade, Portuguese agents acted as middlemen with great profit to the Lisbon treasury. 101

It may be pointed out that although the Portuguese controlled trade from Mozambique to Hormuz to Malacca, east of Malacca they had little or no control over shipping. Although there was a bitter power struggle going on in the Indonesian islands between converted Muslim rulers and the Hindu kingdoms, and Portuguese successfully repulsed an attack by the Java ruler on behalf of the Ruler of Malacca in Malaccan waters, their influence remained very limited. Sumatra, the second largest island of the Indonesian group, was divided into a varying number of petty states, most of them Islamized by this time. Aceh, spreading its influence from the northwest tip of the island, became the most important Sumatran Kingdom in the second half of the sixteenth century. Pepper, benzoin and gold were the most valuable commodities exported from Aceh to Malacca. The Javanean Hindu Empire of Madjapahit was now reduced to a declining kingdom in eastern and central Java. The Muslim Empire of Mataram was extending its influence rapidly on this island. The Muslim sultans of Terente and Tidore, "whence merchants bring their spicy drugs," competed for control over the clove-bearing Moluccas and the adjoining islands from Celebes to New Guinea. Muslim traders had already reached the island group now known as the Philippines, where they had converted inhabitants of several of the islands. But their further progress was blocked in 1565 by the settlement of the Spanish at Cebu and Luzon. 102 Seizing the favourable opportunities, these states attacked the Portuguese at least seven times during the sixteenth century but could not dislodge them from Malacca. 103 Superior armament, better leadership and good luck brought victory to the Portuguese. But the struggle was a long drawn-out one and made it impossible for the Portuguese to establish a monolithic control over the entire theatre of Asian commerce. 104

Portuguese ships could sail unchallenged and get their cargoes of cloves from Amboina, Terente and Tidore, but "Portuguese shipping was merely one more thread in the existing warp and woof of the Malay-Indonesian interport trade." 105 These Spice Islands, which became subjects of intense disputes later between European Powers, could be divided into several groups: Banda Islands supplied nutmeg and mace; the islands of Amboina and Ceram produced cloves; and the Moluccas, including such islands as Terente, Tidore, Makian, Batchan, Motir and Gilolo grew cloves and pepper. Not only did the inhabitants of these islands have commercial relations with Malacca, where they traded their spices for other goods, but many foreigners, Chinese, Malays, Javanese and others, visited their ports regularly. 106

Later, in 1521 and 1522, when Portuguese tried to apply in the South China Sea the strong-arm methods that had served them well in the Indian Ocean, they were decisively defeated by the Chinese coastguard fleets. When they later gained admission in the coveted Chinese trade, it was on the terms laid down by the Chinese authorities and not on those imposed by themselves. 107

Although the Portuguese were able to control the Indian Ocean to a great extent under d'Albuquerque, it is important to remember that they did not succeed in ousting the Muslims or completely annihilating the Hindu naval forces on the Malabar Coast. The Zamorin of Calicut changed his tactics and built a large fleet of large paraoes and kept on harassing Portuguese commerce. All efforts of d'Albuquerque to blockade Calicut failed. The threat of an invasion of Indian waters by Turkey led him to launch an expedition in February 1513 to Aden in order to open up the Red Sea. But an attempt to take Aden ended in disaster and the Portuguese fleet returned to Goa in September without achieving anything. He made a second expedition against Hormuz in 1515 and managed to set up a Portuguese station there. Death overtook d'Albuquerque on his way back to Goa the same year. 108

In Southeast Asia, it is important to remember that Malacca was almost entirely dependent upon supplies from outside. Since the Portuguese did not have enough ships or men to control the transport of local supplies themselves, they had no choice but to take steps to revive the Asian commercial traffic which Malacca had had before 1511. But the exiled Sultan still exercised authority over a vast territory. Forming an alliance with other Malay states, such as Pahang and Perak, he made himself thoroughly troublesome to the Portuguese at sea. The Asian traders continued to visit the Sultan's capital on the island of Bintan, near Singapore, and later after the destruction of Bintan, in Johore on the Malay Peninsula. Another port-town which benefited by the fall of Malacca was the North Sumatran state of Pasai. Tomé Pires, struck by the growing opulence of Pasai, said: "...since Malacca has been punished and Pedir is at war, the Kingdom of Pasé is becoming prosperous." 109 Soon, however, Pasai came under the influence of the Portuguese. But a large share of the trade with West Asia came to be annexed by Achin, the small but rapidly developing state on the island of Sumatra, which had grown into an important harbour for commercial traffic. 109 Although serious rivalry developed between Johore and Achin right through the sixteenth century, Malay lived under the continued threat of war with both neighbours. By the end of the sixteenth century, Johore had become a fairly strong state and important trading centre. On the other hand, to avoid Portuguese attack, Achinese and Western Asian ships began following a new route via the Maldive islands where they, many a time escorted by armed Achinese galleys, could escape cruising vessels of the Portuguese. Shipping trade shifted in part from the Strait of Malacca and took instead the route along the west coast of Sumatra and through the Sunda Straits. Muslim
traders had no alternative but to disperse and avoid the usual trading routes. This capacity to disperse and reappear at alternative trading centres seems to have been the secret of survival of the unweaponed Asian merchants in periods of political turbulence. Thus, spices from the Malay-Indonesian area continued to reach the Mediterranean evading the Portuguese monopoly and cutting out the voyage round the Cape of Good Hope. In fact, Achin became an important junction in the sixteenth century for sale of spices to western Asia, and the import of goods from the West to the Malay-Indonesian area. It sought and got help to fight the Portuguese not only from the Zamorin of Calicut but also from the Sultan of Turkey.

Portuguese Attempt to Destroy Freedom of Navigation and Trade

The importance of d’Albuquerque’s work must not be underestimated. With a small fleet and badly trained and armed men, he had established and maintained the control of the trade routes of the Indian Ocean. There were several reasons and special circumstances which made this possible. In the first instance, of course, the Portuguese employed well-armed ships and more advanced naval and military techniques and tactics. In the Indian Ocean, on the other hand, all the ships were generally unarmed merchant vessels and no Asian ruler had warships or big guns used by the Portuguese. While the Asian rulers were strong on land, they were helpless at sea. Even more clearly than Spain, they demonstrated to Europe the effectiveness of a sailing ship with a cannon even against the well-fortified ports and empires of the East. Such a powerful kingdom as the Mughal Empire did not possess a war fleet and its ruler was partly dependent upon the Europeans for sea transport. It was only by favour of the Portuguese that the Emperor was able to send ships to Mecca every year. Against the armed merchant ships of the Portuguese, Dutch and the English, the Indian ships, even if they carried some arms to fight the pirates, were helpless. In a letter written in 1612 to the great Mughal, an English Admiral Middleton, who had captured some dozen Indian ships off the entrance to the Red Sea, wondered “much that your Highness being so great a monarch to live as it were in slavery to the Portugals...that your subjects' ships cannot make any voyage anywhere, but they must first pay tribute to the Portugals, which is a great disgrace to the greatness of your monarchy, much marvelling that it can be suffered by your Highness such open injuries within your own land.” The Asians never learnt from their weakness and mistakes and later were obliged to sail under English and Dutch passes, besides the Portuguese passes which they could not dispense with. Instead of arming their merchant ships, they preferred to be subjected to double taxation and disgrace, but still earned so much profit that Asian shipping trade continued to prosper. Later, they even began to depend on European ships for transporting their freights because of their greater seaworthiness. In fact, many Asian rulers shared the conviction of the King of Gujarat, Bahadur Shah, that “wars by sea are merchants’ affairs and of no concern to the prestige of Kings.” The result was that “the Orient lay at Europe’s mercy.” The centralization of inter-Asian trade by political and military means was something quite new in Asia. In this respect, the Portuguese paved the way for other Europeans who followed them.

The Portuguese were not opposed by a united Asia. Apart from the division between the Hindus and Muslims and frequent warfare between them, there were divisions between various trends and sects. Thus the long-standing rivalry between Mombasa and Melindi in East Africa enabled the Portuguese to establish their power on the Swahili coast. The age-old enmity between the Zamorin of Calicut and the Raja of Cochin enabled the Portuguese to get their firm foothold in India and a strong position in the Malabar pepper trade. Ceylon was divided into three weak and mutually hostile kingdoms. In its struggle against Sunnite Turkey, Portugal found an ally in Shiite Persia. Its attempts to destroy the trade monopoly of the Muslim merchants on the coast of India were supported by a large proportion of the Hindu population. The Portuguese supplied the South Indian Hindu rulers firearms and horses imported from Arabia and Persia to resist Muslim expansion from North India. In the Malay-Indonesian area too, closer relations were sought with the Hindu countries of Java. In Malacca, it was the Hindu element which promoted Portuguese settlement. The endemic enmity between the sultans of Terente and Tidore enabled them to achieve a commanding position in the clove trade of the Moluccas. The Portuguese did not create these rivalries, but they naturally and wisely exploited those which they found.

Whatever the reasons for their success, the Portuguese sought to destroy the freedom of the seas and navigation that had been the unchallenged law in the Indian Ocean and Southeast and East Asia for thousands of years. In an attempt to have monopoly of trade, d’Albuquerque had established a chain of fortresses from Hormuz to Molucca to stop the ships plying in these waters without Portuguese cartazes. But this chain of fortresses required military force at each place and a permanent squadron on the seas. This, however, was getting beyond the capacity of tiny Portugal. As supply of men from Portugal could not be depended upon, d’Albuquerque had encouraged Portuguese men to marry Indian women whom he took as prisoners. But this hardly helped Portugal. D’Albuquerque was succeeded by Lopo Soares, who, contrary to d’Albuquerque, was a weak and greedy person who permitted Portuguese officers to engage in private trade. This led to disloyalty of officials, breakdown of internal administration, and piracy and plunder by Portuguese officials themselves on the sea. Soares was recalled after three years, but the governors
who succeeded him, Diogo Lope de Sequeira and Dom Durate de Menezes, were even worse. Private gain was the only motive of these governors, and corruption and intrigue became the chief characteristics of their government. In February 1524, Vasco da Gama, who was living in retirement, was commissioned to go as Viceroy of India and he arrived in Goa on September 23. However, before he could accomplish anything, he died on December 24, 1524.

**Portuguese Pretensions Defied**

Da Gama was succeeded by Dom Henrique de Meneses who continued to be troubled by warfare in Malabar. The traditional policy of the kings of Calicut was to encourage trade with Egypt, Cambay, and Arabia. The Portuguese pretensions of being sole masters of maritime traffic was a terrible loss to their prestige and prosperity. Even after his naval defeat, therefore, the Zamorin continued to harass the Portuguese. In fact for nearly a hundred years the naval fight between the Zamorin's fleets and the Portuguese from Goa and Calicut continued without interruption. It was only in 1599 that a treaty was signed between them.

In 1538, the Turkish Sultan, Suleiman the Magnificent, who had taken over Egypt and come to realize the disastrous effect of the exclusion of Arabs from the trade in the East, made another effort to expel the intruders. Pursuant to an agreement with the Zamorin of Calicut, he fitted out a large fleet and arrived in the Indian Ocean. However, he was unable to effect a junction with the fleet of the Zamorin because the Portuguese Governor was able to disperse the latter in time. Thereupon, Suleiman sailed back to Egypt after a futile cruise of the Arabian Sea.

**Portuguese Success in Destroying the Freedom of the Seas**

In the Malay region, although the Portuguese held Malacca until 1641, they had to be constantly on the alert against the Malays and the Achehese, who themselves however never managed to get along well enough to form a common front against their adversaries. Malacca in the Portuguese scheme was even more important than Goa, because it made it possible to control the whole group of the Molucca islands, which were the centre of spice trade, and included the islands of Terente, Tidore, Motir, Makian, Bachan, and even Ambon and the Banda islands. The Spaniards also coveted these islands and were extremely jealous of the Portuguese spice cargoes. They realized that they had been beaten in the race for the Spice Islands. Claiming that the line of demarcation defined by the Tordesillas Treaty ran right round the globe, in 1519 Spain sent Magellan, a Portuguese "traitor" in the service of Spain, west in search of Asia, hoping that he would find at least some of the Spice Islands on the Spanish side of the line. In a remarkable navigational feat round the world, after crossing the straits that bear his name, Magellan arrived at the Philippine islands in March 1520, where he and forty of his men were killed later that year. With the aid of the native pilots, the surviving Spaniards sailed to Borneo and thence to their destination, the Moluccas or Spice Islands. The Portuguese, who were already there, attacked the two remaining Spanish ships. But despite all the obstacles the Spaniards were able to obtain cargoes of cloves and then set off on the journey back home. While one of the surviving ships was captured by the Portuguese, the other successfully negotiated its voyage through the Macassar Strait, across the Indian Ocean and around the Cape of Good Hope, and limped into the harbour of Seville on September 3, 1522. But the single cargo of spices of this leaking ship was sufficient to defray the expenses of the entire expedition. In 1524, the Spaniards sent another expedition to the Spice Islands but the Portuguese foiled it. The Spanish king was desperately in need of money at this time to finance his war against France. So in 1529 he signed the Treaty of Saragossa with Portugal by which, for a sum of 350,000 ducats, he gave up all claims to the Spice Islands and accepted a demarcation line fifteen degrees east of them. In a vain attempt to regain a foothold in Moluccas the Spaniards later conquered the Philippines in 1571 and established themselves in Manila where they attracted a large part of the Eastern trade and gave a stiff competition to the Portuguese settlement of Macao in China. Even if the coveted cloves and nutmegs of the neighbouring Moluccas were unobtainable, Chinese silks, porcelain wares, and other products of the richest and oldest civilization in the world were close at hand. The Chinese from Fukien province had been trading with the Philippines for centuries and their commerce was of great profit. Thus, what came to be known as the "Manila-Acapulco galleon trade" in Chinese and other Asian goods in exchange for Spanish-American silver, despite all its hazards and although illegal according to Spanish law, lasted for nearly two hundred and fifty years because of the huge profits which in many cases were as much as 400 per cent.

In China the Portuguese had better luck. After their first defeat in 1522, the Chinese Government refused for a long time to deal with a people who recognized no international rights and committed open and large-scale piracy on the high seas. But the local Chinese governors did not prohibit trade and commercial intercourse with foreigners who brought valuable commodities. Flourishing, though unofficial trade, therefore, came into existence and the Portuguese were permitted in 1557 to hire and use a deserted promontory Amakau (later called Macao) as a place to land their goods and carry on trade. So it remained
until 1887. Until 1849, the Portuguese continued to pay rent for the land and the Chinese exercised both civil and criminal jurisdiction and fiscal authority over Macao.128

Without going into the details of all the struggles which went on in the Indian Ocean, it may be pointed out that the Portuguese were fairly successful all through the sixteenth century in destroying the freedom of the seas and navigation in the Asian waters and in curbing the trade of the Arab traders who had dominated the scene for a long period. By occupying Hormuz, the islands of Diu, Bombay and Goa, a few fortified trading posts, and Malacca, they were able to control to a large extent the shipping trade in the Indian Ocean. Lisbon became a great distribution centre for Mediterranean and the Atlantic worlds of merchandise, especially pepper and other spices, originating in Asia.

Decline of the Portuguese Empire

But circumstances conspired to make the Portuguese over-extend themselves by maintaining a chain of forts and coastal settlements, numbering more than forty, between Mozambique and Japan. To enable these channels of maritime trade to flow smoothly, the Portuguese needed large numbers of men and ships, both of which were in short supply.129 For obvious reasons, Portuguese maritime power was effective in the immediate vicinity of their principal bases—Goa, Diu, Hormuz, Malacca and Mozambique. The inherently weak structure of the Portuguese maritime power was the most important reason for the success of Calicut’s small vessels and Turkish raiding flotillas in 1551–52 and 1585–86 respectively. Similarly, Malacca was frequently reduced to severe straits by blockading Javanese or Achinese fleets and Malays achieved substantial successes with their small crafts.130 In fact Malacca lost a lot of its value as a central market for the Malay-Indonesian area, since a large part of its trade was transferred to other ports which acquired significance.131 It is not surprising, therefore, that all this resulted in terrible corruption, considerable exploitation and oppression.132 The missionary work of the Portuguese (by St. Xavier) and real efforts at conversion in Goa and Ceylon only developed in the second half of the sixteenth century when the maritime power of the Portuguese was already beginning to show signs of stagnation and decline.133 In fact the Portuguese conduct and policy not only cancelled out the prosecution of their missionary objective, but stimulated the spread of the hostile Muslim faith, especially in Southeast Asia, as a weapon of alignment against them. A Portuguese writer, Mendes Pinto, who journeyed from Burma to Japan from 1538 to 1557, cast serious doubts on the capacity of his countrymen in Asia to secure the cause of religion through their murderous greed.134 The Portuguese had made themselves so unpopular that by 1590 in Ceylon, for instance, they were safe only behind their Colombo fortifications. At the eastern end of the Ganges-Brahmaputra delta between Bengal and Arakana, numerous Portuguese fort captains turned pirates during the last quarter of the century and did thriving business in slaves with the Government of Arakana.135

As we shall see in the next chapter, in 1580 Portugal came under the Spanish Crown. The Spanish Court, being totally engrossed in the administration of its immense American Empire and in European politics and conflicts, paid little attention to Portuguese India and Portuguese interests there were left to their fate. Few supplies arrived from Europe. The commanders on different Portuguese stations ceased to act in concert with each other. Not restrained by a regular home government, each tried to enrich himself. The mother country groaned under the yoke of Spain. Mostly natives of the East, the Portuguese in India lost all their affection for the home country.140 It is said that some of the Portuguese viceroys who returned to Portugal during this period, brought with them private fortunes amounting to £ 300,000; several of the governors and generals returned with £ 100,000, and many subordinate officers, both civil and military, with, from £ 20,000 to £ 50,000. Most of those fortunes, it is admitted by Portu-
guine historians, were acquired through iniquitous means. It is pointed out that "in proportion as they added to the opulence, they promoted the corruption and accelerated the downfall of the mother country." 14

Besides shortage of shipping and manpower and corruption of its officials who continued private trade, Portuguese plans to establish an effective monopoly of Asian spice trade was thwarted by other factors. Thus, although they dominated the maritime trade with the Persian Gulf because of their stronghold at Hormuz and Muscat, they could not close this route completely to Muslim traders, because they had to stay on good terms with Persia whose friendship was necessary as a counter-weight to the Turkish menace. Turkey, which had conquered Syria and Egypt between 1514 and 1517, came to occupy Iraq in 1534-35, Aden in 1538 and Basra in 1546. The spice trade to the Levant through the Red Sea, never completely closed, revived markedly after 1540, although both the Persian Gulf route and the Cape route retained their importance. 14 The production of spices in Asia had doubled by the second half of the sixteenth century, and their prices had risen two- to threefold in Europe. But the Portuguese share in this trade, which never exceeded more than 50 per cent, dropped to 20 per cent or less by the end of the sixteenth century. In 1585, a Portuguese official is said to have stated that the Achinese were exporting (mostly in Gujarati ships) some 40,000 to 50,000 quintals of spices, mostly pepper, to Jidda each year. 43 Much of the pepper produced in Sumatra and western Java was absorbed in the Chinese market. Although this pepper was cheaper and of the same, if not better, quality as the Malabar pepper, the Portuguese could never secure enough because of the Achinese and Chinese competition. With the dawn of the seventeenth century and the arrival of the Dutch and the British in the East, the Portuguese position deteriorated still further. Even so, as late as 1611, pepper was still the basic commodity of the Portuguese Indian trade which yielded a satisfactory profit to the King. 14 For most of the sixteenth century, Antwerp was the principal entrepôt for pepper which was sold through Casa da India (India House) to Portuguese and foreign merchants and distributed to the various countries of northwest Europe. After 1549, the crown monopoly in the sale of pepper was withdrawn and during the last quarter of the sixteenth century foreign pepper contractors were allowed to station their own representatives at Goa and Cochin, in order to supervise the purchase and shipment of the spices for which they had contracted. The Portuguese also abandoned their official monopoly by the end of the sixteenth century in cloves, nutmegs and other spices from the Moluccas, and permitted merchants from all over Asia to buy spices from the Portuguese officials and private traders in Hormuz and other Asian markets. 145

Portugal Fails to Hold the Tide

The possession of the seaborne empire not only was disastrous for the East, but also appeared of little avail, ultimately, to Portugal itself. Of course, it enabled the mother country to enrich herself and provided sons of gentility a career. Yet Portugal proved capable neither of forming a well-knit empire, nor of organising and administering it effectively, so that its days of greatness were soon over. As Plumb observes, "the epic days of plunder gave way to a settled and inefficient exploitation that grew ever more inert as decade followed decade and century." It was not long before Portugal was outranked by other Europeans — the Dutch and then the British — even in navigation and shipbuilding. It could no longer hold the tide and was soon swept over. 146

Notes

1. It is important to note that the terms "India" or "The Indies" were often vaguely applied in fifteen century Europe to "any unknown and mysterious regions to the east and southeast of the Mediterranean." An elastic and shifting term, "the Indies" often embraced Ethiopia and East Africa as well as what was known as Asia. But more specifically, as Boxer points out, "Nearer of Lesser India meant, approximately, the north of the Subcontinent; Further or Greater India meant the south between the Coasts of Malabar and Coromandel, and Middle India meant Ethiopia or Abyssinia." See C.R. Boxer, The Portuguese Seaborne Empire, 1415-1825 (Victoria, Australia, 1969), p. 19.


6. Ibid., pp. 24-25.

7. In the ancient world India was the only pepper producing country and had no rivals. It was only in later centuries that Indonesian islands became famous as pepper-producing regions. See O.W. Wolters, Early Indoenesian Commerce (Ithaca, N.Y., 1967), p. 66.


11. Several travellers during the thirteenth and fourteenth centuries testify to the great fortunes of Aden, Alexandria and other ports. See Morley, op. cit., pp. 152-53.


17. See Panikkar, op. cit. He was determined to find the land of Prester John in East Africa or Asia, a legendary Christian monarch who would aid Portugal in its wars against infidels whom they would strike from the other side. See Hart, op. cit., p. 7; also R.S. Whiteway, *The Rise of Portuguese Power in India 1497-1550* (New York, 1969) pp. 2–3.


19. Hart, op. cit., p. 8. The crusading motive must not be over-emphasised because the infidels were not the only target of Portuguese policy to obtain an Asian spice monopoly. Portuguese policy was directed just as surely against the Christian commercial town of Venice. See Marie A.P. Meilink-Roelfsz, *Asian Trade and European Influence* (s-Gravenhage, 1962), p. 117.


21. His longest voyage, it is said, was never out of sight of land. See Hart, op. cit., p. 7.


27. Ibid., pp. 31–32.


31. The compass is said to have come into use only in the late eleventh and early twelfth centuries. Though invented by the Chinese, the Arabs were perhaps the first to use it. See Wang Gungwu, “The Nanhai Trade,” *Journal of the Royal Asiatic Society*, Malayan Branch, vol. 31, No. 2, p. 108. See for interesting details of the secret mission and journey of the two emissaries of King John II, Hart, op. cit., pp. 43–78; Alan Villiers, *The Indian Ocean* (London, 1952), pp. 111–14.

32. *Ibn Battuta: Travels in Asia and Africa (1325–1354)* (Trans. by H.A.R. Gibb) (London), p. 238. According to this Arab traveller “a single merchant will buy a vessel with all that is in it and load it from goods in his own house.” Ibid., p. 238.


37. In 1493 he reached Abyssinia and established himself at the Court. If this was Prester John, the contact was not of much use to the Portuguese. But Covilhan was not permitted to leave Abyssinia where he died in exile after thirty years. See Hart, op. cit., pp. 73–78; Villiers, op. cit., pp. 113–14.

38. It is said that da Gama had nothing of value to give to the Sheikh and offered him “such trash as hats, garments, and strings of coral” which were treated “with contempt.” See Hart, op. cit., p. 144.

39. Ibid., pp. 146–52.

40. Ibid., pp. 154–57.

41. Ibid., p. 160; W.S. Lindsay, op. cit., p. 11.

42. Boxer, op. cit., p. 37.


44. Hart, op. cit., p. 175.

45. Ibid., pp. 176–77.


47. Villiers, op. cit., p. 127.


52. Panikkar, ibid., p. 38.

53. Panikkar believes that the discovery of sea route to India was a great event from the point of view of results that followed from it, but not a great feat of exploration of nautical adventure and Vasco da Gama cannot be called a great explorer or navigator. See Panikkar, *India and the Indian Ocean*, op. cit., pp. 38–39.


55. Ibid., pp. 196–201.

56. Lindsay, op. cit., p. 23.

57. Hart, op. cit., p. 201.

58. Ibid., p. 211.

59. Ibid., p. 201.


63. Panikkar, *Asia and Western Dominance*, op. cit., p. 35.

64. Ballard, op. cit., p. 130.


68. Plumb, op. cit., xxi–xxiii.


73. Bozer, op. cit., p. 46.

74. Villiers, op. cit., p. 134.


77. Quoted by Panikkar, *Asia and Western Dominance*, op. cit., p. 42.


79. Plumb, op. cit., xxiii.

80. Hart, op. cit., p. 231; see also Lindsay, op. cit., pp. 35–37.
113. Even if some Indian Gujarati ships started carrying small guns, Indians did not know where
4. MARE LIBERUM VS. MARE CLAUSUM

The Dutch Arrive in the Indian Ocean

With respect to the history of the East Indies after the Portuguese failed to control the spice trade, a recent historian observed: "The Portuguese made the breach through which the jackals raced to get their fill." The increasingly weakened and corrupt Portuguese Empire could not hope to exclude the other European countries from the Indian Ocean for ever, especially because the Portuguese did not have enough ships at their disposal to ensure the resale in Europe of the Eastern spices and other goods they obtained in Asia. The Portuguese carracks, piled high with Eastern spices, had already aroused the lust of Europe. The Dutch, the first to challenge the Portuguese monopoly in the East Indies, had some early experience with the spice trade in the East and were the financiers supplying money for buying pepper and spices in the Indies. They were the great carriers of Europe and played a large part in distributing the products which the Portuguese imported.

During the sixteenth century Europe was torn by religious strife and dynastic rivalries and conflicts. Strong national monarchies had developed in Western Europe during the fifteenth century, but in the next, the balance between these dynasties was upset by the sensational rise of the Spanish house through marriage ties, giving rise to dynastic troubles and wars. Moreover, in 1517 Martin Luther began his public opposition to certain church practices and thereby generated a movement that split Western Christendom permanently into two camps, Catholic and Protestant. A frustrated man, Charles V abdicted in 1556, and his son King Philip II of Spain not only inherited the vast Spanish kingdoms, including the increasingly restive Netherlands, but also acquired Portugal in 1580 after the defeat and death of the childless King Sebastian of Portugal. The crowns of Spain and Portugal remained united for the next sixty years, and the Iberian Colonial Empire (from 1580 to 1640), stretching from Macao in China to Potosi in Peru, became the first world empire where the sun would never set. Philip II had also inherited from his father the dynastic struggle with France and religious struggle with Protestantism. He was a Catholic, fervid and fanatical, committed to upholding the sway of the Universal Church in which heretics were no more than rebels. As Protestantism spread from Germany to other parts of northern Europe, new tensions and conflicts developed. This was particularly the case in the Netherlands where Philip sought to force Catholicism upon all his subjects. Spain, whose history had been a crusade, was ideally suited to be Philip's instrument in re-Catholicizing of Europe. The Dutch revolted in 1567 and a bitter struggle ensued.

Economic factors played a prominent part in the Dutch revolt. For a long time the whole of Europe had been jealous and had eyed covetously the spices that were pouring into Portugal and bullion that was flowing into Spain. The Dutch, the French and the English all wished to crack Portugal's monopoly in the East Indies, and to trade with the Spanish colonies in the New World. Philip II had taxed the Netherlands heavily, and had imposed restrictions on Dutch commerce in the interest of commercial monopolies of Spain and Portugal. In 1585, Philip's troops occupied Antwerp and forbid the access of Iberian ports to the Dutch "heretics." The Dutch ships used to bring salt fish to these ports and carry products of East Indies back; and Dutch financiers, with Italians and Germans, had assisted in financing Portuguese expansion almost from the beginning. Reacting strongly to Philip's "high-handed" attitude, the Dutch united to throw off the yoke of Spain and had no hesitation in attacking Iberian possessions, especially Portuguese, scattered round the world. Moreover, having been driven off from Lisbon and denied access to the spice countries in the East, they decided to send their own vessels to the Indian Ocean to secure at their source the cargoes which Philip had denied them.

Queen Elizabeth of England lent aid to the Netherlands for economic as well as religious reasons and together they attacked Spanish ships, captured the treasure ships, and even pillaged the Spanish colonies in South America. Philip II retaliated against England by attacking it with the famous invincible Spanish Armada in 1588. But the English vessels, commanded by Sir Francis Drake, the famous "sea dog," destroyed the Spanish Armada and with it Philip's hopes for a Catholic Spanish domination over Europe, and opened the sea both for the English and the Dutch.

The defeat of the Spanish Armada had a tremendous impact on the fortunes of European countries as well as Asia. For generations prior to this cataclysm, the Iberian peoples were supreme on the sea and they dominated practically all the oceans of the world. By virtue of their naval power they exercised considerable influence on all the continents. Even in Europe the Spanish ruling house threatened the independence of every Protestant nation. All European countries had to pay extortionate prices for Eastern spices and other products. All
Europe on its Atlantic side was enclosed by the wall of Spanish maritime power. But once the barrier of the Spanish fleet had been removed from the Atlantic, it made navigation comparatively secure for any vessel that could hold her own against ordinary pirates.6

It is important to note that, unlike the Portuguese, Hollanders were a nation of ship-owners and merchants. The Portuguese had gone to the East as crusaders, not necessarily as traders. But in Holland "successful trade was not merely respectable. It was almost a religion."7 As we have mentioned earlier, they had been carriers of Eastern spices in Europe to the ports of France, the Netherlands and the Baltic, as distributors and middlemen. Unable to cross the Atlantic for fear of Iberian power, for a long time they, along with the English and the French, had been grooping towards the icy waters of the misty North for a way to reach the Spice Islands round the north of Canada or Siberia. Though all these attempts were doomed to failure, the smart Hollanders profited by exploiting the cod, seal and whale fisheries of the North. Trained in the hard school of North Sea fisheries, the Dutch had become trained mariners and excellent shipbuilders.8

**Jan van Linschoten: The Dutch Marco Polo**

The Portuguese had managed to keep their geographical knowledge of the East secret for a long time. The sailing directions had been assembled by the government, carefully checked and edited, zealously guarded, and given only to the Portuguese pilots. The pilots evidently had instructions to destroy them in case of imminent capture, because they were rarely found among the papers of Portuguese Indiamen taken by the Dutch and the English in the latter part of the sixteenth century. However, all these secret documents, charts, and Portuguese pilots' rutters were graphically disclosed and published by an energetic and adventurous Dutchman, Jan Huyghen van Linschoten, who went to Lisbon and managed to get berth in a Portuguese ship on its way to the Indies. Linschoten lived in Goa, the exotic, secret Indian Empire of the Portuguese from 1583 to 1592, as a secretary to the Portuguese archbishop there and gathered, organized and reported all the necessary information about the Indian coast, the Bay of Bengal, Malacca, Malayan and the Indonesian trade which gave the Dutch and the English all the data they needed in order to oust the Portuguese and become masters of the Orient themselves. In 1595, he published his first guide to navigation to the East Indies, *Reysgeschreid* called "Rutter," or "Pilot's Guide," in English, which later formed part of his magnum opus, *The Itinerario*, or "Seavoyage of Jan Huugen van Linschoten to the East or Portuguese Indies," published in 1596, which had a direct effect on the discoveries and conquests made by the Dutch, English and French navigators in the secret world of the East. *Itinerario* is said to be "one of the keys that opened the entrance to India"8 and had an enormous impact upon the chancellories of Western Europe, particularly in the Netherlands and England, where it was translated soon after its appearance in Dutch.9 The importance of the book may be assessed from the fact that successive editions of Linschoten's Dutch text were brought out, after the first edition of 1596, in 1604, 1614, 1623 and 1644, and the appearance of French editions in 1610, 1619 and 1638. The English and German translations were published in 1598 and two Latin translations in 159910 (one at Frankfurt and one at Amsterdam). *Itinerario* indeed became the bible of Dutch and other European navigators in the East.11

Linschoten's detailed account of *Asia Portugesa* disclosed that "the colonial empire of the Portuguese was rotten, and that an energetic rival would have every chance of supplanting it."12 He not only presented in detail the hitherto unknown Portuguese sailing routes from Europe to the Orient as far as the Japanese islands, but gave a graphic account of the network of maritime trade of Asia and various trade marks and entrepôts, with all the details about their products, commodities, trades, weights, measures, prices, peoples and their customs and lives.13 He even recommended a new and untried course to his countrymen which completely turned the fortune of the Portuguese Empire. He suggested that the Dutch avoid the established Portuguese route around the Cape of Good Hope and north by east to Goa, but instead sail from south of the Cape due east and then north through Sunda Strait, outflanking the Portuguese bases in the Indian Ocean and tap the undefended source of their vital spice trade. Describing the importance of trade with Java, which produced precious pepper, frankincense, camphor and Benzoin, through his recommended route, Linschoten said that there "men might well traffique, without any hindrance, for that the Portingales come not thither because great number of Java come themselves unto Malacca to sell their wares."14 This advice helped the Dutch to reach directly the great islands which were to become the Dutch East Indies in the coming centuries. Linschoten's sound counsel helped the Dutch in their final economic and military victory because, by following the sea route which he recommended, the Dutch Indiamen escaped the hitherto unavoidable problem of having to sail only once annually, with the monsoons. Instead, they could sail any season of the year both to and from Java. Moreover, while the Portuguese war fleet was bottled up in Goa harbour for half a year by the southwest monsoon, the Dutch war fleet, staying south of the equator, where these monsoons did not prevail, was free to sail where it wished and had a great strategic advantage.15
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A few years ago, when I saw that the commerce with that India which is called East was of great importance for the safety of our country and it was quite clear that this commerce could not be maintained without arms while the Portuguese were opposing it through violence and trickery, I gave my attention to stirring up the minds of our fellow-countrymen to guard bravely what had been felicitously begun, putting before their eyes the justice and equity of the case itself, whence I thought was derived "the confidence" traditional with the ancients. Therefore, the universal laws of war and of prize, and the story of the dire and cruel deeds perpetrated by the Portuguese upon our fellow-countrymen, and many other things pertaining to this subject, I treated in a rather long Commentary which up to the present I have refrained from publishing.28

It is important to note that although the Commentary was not published in full until 1868, and only a part of it (Chapter XII) was published anonymously in 1609, it was revised and amplified by Grotius in the form of his most famous treatise, De Jure Belli ac Pacis (On the Law of War and Peace) which is said to be "the first systematic treatise on international law" and which brought him the greatest glory and earned him the title of "father" of modern international law. The influence of this book was so great that it came to be accepted as the laws of nations in Europe.29

The cargo of the vessel captured by van Heemskerck was partly perishable and it was impossible to await the end of the case before offering it for sale. The States General of Holland authorized the public sale of this cargo on July 29, 1604, although no judgment had declared the property good prize. On September 9, 1604, the vessel with its cargo was declared good prize by the Dutch Admiralty Court in Amsterdam before which Grotius appeared as an advocate on behalf of the Company.30

In 1609, as we have noted earlier, a truce was concluded between Spain and the Netherlands. The truce provided that, while Spain should not molest Dutch commerce with the independent and neutral nations in India, the Dutch should not enter any of the Portuguese or Spanish ports in that country. The Company, which had more than two-score ships of 600 to 800 tons in the Indian Ocean, equally adapted for commerce as well as war, had no desire to accept the truce.31 Grotius had refrained from publishing his original book De Jure Praedae, perhaps because the East India Company on whose behest he had written it had "decided that silence and activity would be a better vindication of its right to prize than publication of a controversial work."32 On the eve of the truce of 1609, however, he was persuaded by the Company to publish in Dutch the twelfth chapter of this book under the title Mare Liberum, "with such changes as were necessary to enable it to stand alone."33 It was specifically published "in order to defend the interests of the Company and to influence favourably the negotiations then in progress between Spain and Holland for peace on reciprocally acceptable bases."34 It was "intended to be used as moral ammunition" and designed to justify "in the eyes of the world the whole cause and methods of the Dutch as against Spain."35

This remarkable book, said to be first book on international law, brought untold fame and glory to the young Dutch jurist after its anonymous publication in November 1608. But it incited a bitter controversy amongst publicist and states in Europe. As Grotius himself said later:
But when, a short time thereafter, some hope for peace or truce with our
country was extended by the Spaniards, but with an unjust condition
demanded by them, namely, that we refrain from commerce with India,
a part of that Commentary, in which it was shown that this demand
rested neither upon law nor upon any probable colour of law, I deter-
mined to publish separately under the title of Mare Liberum, with the in-
tention and hope that I might encourage our countrymen not to with-
draw a little from their manifest right and might find out whether it was
possible to induce the Spaniards to treat the case a little more leniently,
after it had been deprived not only of its strongest argument but also of
the authority of their own people. Both of these considerations were not
without success. 36

Explaining the reason why he published Mare Liberum anonymously,
Grotius stated:

To this little book I had refrained from signing my name, because it
seemed to me to be safe, like a painter skulking behind his easel, to find
out the judgement of others and to consider more carefully anything that
might be published to the contrary. 37

In propounding his thesis about the "Freedom of the Sea or the Right which
belongs to the Dutch to take part in the East Indian trade," it is significant to
note that, Grotius not only was well aware of the long tradition of freedom of
navigation in the Indian Ocean, but also got his helpful cue from the Asian
state practice of freedom of commerce and trade between various countries and
peoples without any let or hindrance. This fact of history has been generally
ignored by historians of international law. As Professor Alexanderowicz, in his
pioneering study on the history of the law of nations in the East Indies, pointed
out that in studying Grotius' treatment of the freedom of the high seas, "histo-
rians have often overlooked one aspect of the problem which was significant to
Grotius, that is, the impact of the study of the actual regime of the Indian
Ocean, which he carried out in the archives of the Dutch Company, on the
formulation of the doctrine of mare liberum, at a time when the doctrine of
mare clausum was more prevalent in European state practices than the ideal of
the freedom of the high seas." 38 He had no doubt "that Grotius either con-
ceived or perfected his doctrine of the freedom of the sea under the influence of
maritime traditions prevailing in the East." 39 As we shall see, Grotius, while
getting his support and encouragement from the Asian international legal
system, heavily relied on Roman law and Christian, especially Spanish,
theligionists, which is understandable because he was writing for the European
clientele and to convince his own countrymen to have trade with the East Indies
in defiance of the Portuguese prohibition. Grotius made extensive use of the
writings of two Spanish theologians, Francis Alphonso de Castro and Ferdi-
nand Vasquius (or Vasquez), who were the first to raise their voice against the
prevailing practice in Europe to appropriate the sea. Castro, who wrote about
the middle of the fifteenth century, protested against the Genoese and Vene-
tians who prohibited other peoples from freely navigating the Ligurian and
Adriatic Seas, as being contrary to the imperial law, the primitive right of
mankind and the law of nature. He was also against the Spanish and
Portuguese claims of exclusive rights to navigation to the East and West Indies.
Vasquius, writing in 1564, was of the same opinion and for similar reasons. He
argued that the sea could not be appropriated, but had remained common to all
mankind since the beginning of the world. In his view, the claims of the
Portuguese and the Spaniards to forbid others to navigate through the spacious
and immense sea were as vain and foolish as the pretensions of the Venetians
and Genoese. The law of prescriptions, he said, was purely civil, and could not
apply to disputes between princes and peoples. Law of nations could never
admit of such a usurpation of a title to the sea. With regard to the right of
fishery, Vasquius said that the sea, contrary to rivers and lakes, had always re-
mained free, both for navigation and fishing, and that its use could not be
exhausted by fishing. 4.0

Mare Liberum is divided into three main parts: the first part (Chapters
II—IV) contains a discussion of titles to sovereignty; the second (Chapters I,
and V to VII) deals with the freedom of navigation in the Indian Ocean; and
the third (Chapter VII—XIII) relates to international trade. In all three parts
the same legal titles are analyzed mutatis mutandis, viz., (a) the title based on
discovery and occupation; (b) the title relying on papal donation; and (c) the
title relating to war and the title on the basis of prescription and custom.
Throughout Mare Liberum, Grotius shows a keen awareness of an
independent political and legal state system and of society in Asia with its own
rules of inter-state conduct. Thus, challenging Portuguese claim to sovereignty
to those parts of the East Indies to which the Dutch sailed, like Java, Ceylon
and many of Moluccas, Grotius pointed out:

These islands of which we speak, now have and always have had their
own kings, their own government, their own laws, and their own legal
systems. The inhabitants allow the Portuguese to trade with them, just as
they allow other nations the same privilege. Therefore, inasmuch as the
Portuguese pay tolls, and obtain leave to trade from the rulers there, they
thereby give sufficient proof that they do not go there as sovereigns but
as foreigners. Indeed they only reside there by suffrance. 41

He made it clear that the East Indies were not terra nullius which could be
discovered or occupied. Nor could they be acquired on the presumption of their inferior civilization. As Grotius put it:

First of all, if they [Portuguese] say that those lands have come under their jurisdiction as the reward of discovery, they lie, both in law and in fact....Neither can the Portuguese by any possible means claim to have discovered India, a country which was famous centuries and centuries ago! It was known as early as the time of the emperor Augustus....And have not the Romans described for us in the most exact way the greater part of Ceylon? And as far as the other islands are concerned, not only the neighbouring Persians and Arabs, but even Europeans, particularly the Venetians, knew them long before the Portuguese did.42

Relying on the authority of the famous Spanish publicist, Victoria, Grotius argued that “Christians, whether of the laity or the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels.” “To take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians.” He added that “a greedy longing for the property of another hides itself behind” the pretexts of “civilizing barbarians” and “forcing nations into a higher state of civilization against their will” which were “considered by all theologians...to be unjust and unholy.”43 However persuasively the True Faith was preached to the heathen, said Grotius, “if they are unwilling to heed it, that is not sufficient cause to justify war upon them, or to despoil them of their goods.”44

Discarding the Pope's authority to divide the world between Portugal and Spain, Grotius contended “that the Pope is neither civil nor temporal Lord of the Whole World” and that “he ought to be satisfied with his own spiritual jurisdiction and be utterly unable to grant that power to temporal princes.” If the Pope had any power at all, Grotius surmised on the basis of opinions of Spanish theologians, it was in the spiritual realm only. In any case, “he has no authority over infidel nations, for they do not belong to the Church.”45

In Chapter IV, Grotius showed awareness of the fact that “the Portuguese actually obtained from the East Indians the right to trade” and said that on that score they could have “no grounds of complaint.”46 He reiterated, therefore, that the East Indies are not res nullius and the East Indian nations are “not the chattels of the Portuguese, but are free men and sui juris.” Even the Spanish jurist Victoria agreed with his view.47

**Freedom of the Seas in Grotius and its Antecedents**

In Chapters V to VII, Grotius propounded his famous doctrine of “freedom of the seas” for which he heavily relied on Roman law. It may be recalled, as we have described in Chapter 2 above, that the Romans had had extensive trade relations with India and other parts of the East Indies for centuries since even before the Christian era. Neither Asians nor Romans ever claimed jurisdiction over the sea. Indeed, freedom of navigation and maritime trade and commerce without any restriction were accepted as parts of the universal law of inter-state conduct. Nobody ever claimed jurisdiction or sovereignty over any part of the sea except to suppress piracy. The states did try to regulate and control by law the navigation of ships owned by their own citizens and their seaborne commerce, and the relations, both business and personal, between their merchants and seamen, as is clear from the time of Kautilya's *Arthasastra* to the adoption of Malacca Maritime Code. They also exercised a power of police over the shore and ports. But no one was ever forbidden to navigate in the sea or trade with other peoples. A state possessing naval supremacy for the time being would naturally take advantage of that position, as several states in India did, and later the Chinese, Persians and Arabs were to do. Yet there is no record of any state ever attempting to set up a claim of ownership of the sea under the form of law. Neither the exercise of maritime jurisdiction nor the possession of naval supremacy carried with it a legal right to abridge the freedom of the seas.

It is important to note that not only Asians and Arabs, but the Romans, and before them perhaps the Greek and Latins, had followed these general principles of maritime law.48 But although there was a general practice relating to freedom of navigation and maritime trade, and it was universally accepted that no state had a right to appropriate the sea and restrict the right of access to it, there is general absence of a legal doctrine about the status of the sea or about the right of men to appropriate the products thereof in a legal code. Some statements asserting the freedoms of the sea can, of course, be found throughout history. Thus, resisting the attempts by the Dutch Company's commissioners to monopolize the trade on the Spice Islands and prohibit all other, the ruler of Macassar in 1615 said:

> God has made the earth and the sea, has divided the earth among mankind and given the sea in common. *It is a thing unheard of that anyone should be forbidden to sail the sea.*49

This is as close to a doctrine as one can find in the East. Even Roman law before the second century is as silent as Greek and Indian law on the subject of the status of the sea. While there are numerous statements and evidence relating to free maritime commerce and navigation, it is difficult to trace a definition of the legal status of the sea. The first such definition can be found in Roman law in the Digest of Justinian (529 A.D.) in a text of Marcianus who lived in the second century.50 The sea is declared there as *jus naturale*, and common to all, incapable of appropriation as is the air, and its use open freely.
to all men. The same is true of the shore, which derives its character from the sea, and it is not considered as part of the land. The shore extends as far as the winter tides can reach and the shore line is measured from the sea inland, not from the land outward. Harbours are differentiated from the sea and fall within the class of res publicae, as are the navigable rivers. It is interesting to note that the Justinian law on the subject, like Arthasastra and Manu’s Code, are extremely precise and occupy a small space. It may not be far-fetched to infer that there was no need to elaborate a widely accepted doctrine which was not the subject of dispute anywhere in the world.

It is pertinent to recall here that, while the general practice of freedom of navigation and unobstructed maritime trade and commerce continued to prevail and prosper in the Indian Ocean and the East Indies right up to the sixteenth century or even later when the Portuguese tried to destroy it for the first time, as we have seen in Chapter 3, in Europe the tradition of freedom of the sea came to be broken and forgotten after the disintegration of the Roman Empire and the emergence of numerous nation states each vying with the other. With the break-up of the strong Roman Empire, there was a "state of wild anarchy" throughout European waters. As Fulton relates:

Pirates swarmed along every coast where booty might be had. Scandinavian rovers infested the Baltic, the North Sea, and the Channel; Saracens and Greeks preyed upon the commerce of the Mediterranean; everywhere the navigation was exposed to constant peril from the attack of freebooters. The sea was then common only in the sense of being universally open to depredations.

The absolute lawlessness and insecurity at sea led merchants to form associations for mutual protection. By the thirteenth century, nation states came to discharge this duty of exercising jurisdiction on the neighbouring sea and protection of navigation, which soon turned into assertions of exclusive dominions and sovereignty. Thus in the Middle Ages, European seas were more or less appropriated. In most cases such appropriations were effected by force and the disputes "not infrequently led to sanguinary wars." Sometimes the publicists tried to justify these occupations of the open seas by their states, or argue for the states’ right to have jurisdiction ranging from 60 to 100 miles from their coasts, and including all the area within which navigation was practically confined. Thus, long before the end of the thirteenth century, Venice, known for her commerce, wealth and maritime power, assumed the sovereignty of the whole of the Adriatic and enforced its assumed right to levy tribute on the ships of other nations which navigated the Gulf to protect their passage altogether. Not only were the neighbouring cities and common-

wealth forced to accept her claim, but it came to be recognized by the Pope and other European Powers who were themselves busy in making their own claims. On the other side of the Italian peninsula, Genoa made a similar claim on the dominion of the Ligurian Sea, and some other Mediterranean states followed their examples in waters near their shores. In the north of Europe, Denmark and Sweden, and later Poland, claimed or shared in the dominion of the Baltic. The Sound and the Belts were appropriated by Denmark; the Bothnian Gulf came to be possessed by Sweden; and all the northern seas, between Norway on the one hand, and the Shetland Isles, Iceland, Greenland and Spitzbergen on the other, were claimed by Norway and later by Denmark on the basis that they possessed the opposite shores. All these claims gave rise to innumerable disputes about fisheries, trading and navigation, and led to several wars. Until the second half of the nineteenth century, Denmark continued to charge a toll from ships passing through the Sound. Nor were the other claims of closed seas given up by European states until the nineteenth century, as we shall see later.

England’s claims to the sovereignty of the sea and dominion in the Channel or the Straits of Dover perhaps arose in the interest of peaceful navigation. In 1201, King John issued an ordinance by which any ships or vessels which refused at sea to lower their sails when ordered to do so by the King’s Admiral, were to be regarded as enemies, and the ships, vessels and goods were to be seized and forfeited and the crews punished. This demand of lowering the topsails and striking the flag, perhaps made to enable the King’s officers to ascertain the true nature of the vessel in the interests of suppressing piracy and maintaining the security of navigation, later became notorious as supposed acknowledgement of the English sovereignty in the so-called “Sea of England.” After the Stuarts came to the throne of England, sovereignty of the sea came to be asserted in no uncertain terms. In 1609, King James I issued a proclamation in which he laid claim to the fisheries along the British and Irish coasts, and prohibited all foreigners from fishing on those coasts without obtaining licenses from the King’s officers. The proclamation was aimed against the Dutch, the great commercial nation in those days, for whom the ever-increasing herring fishery along the British coast was one of the principal sources of their wealth and power. This was the first blow in the great contest between the English and the Dutch for maritime and commercial supremacy which, as we shall see, continued throughout the seventeenth century. Though bound together in alliance against Catholic Spain, the rivalry between the English and Dutch increased because of their competition in the trade with the East Indies. The feeling of jealousy of the English against the Dutch was further embittered by the Netherlands’ phenomenal successes in the East Indies as the century advanced and the feeling that the English were often circumvented by the Dutch by unfair means. It was therefore against the Dutch that the English pretensions to sovereignty of the sea were specially directed.
It was in this atmosphere of confusion and contention, it is important to remember, that Grotius sat down to defend the freedom of the seas and freedom of trade and commerce with the East Indies against the Portuguese. He was, to be sure, not only encouraged by the fact that these wholesome practices were still prevalent in the East, except in the areas controlled by the Portuguese, but found a powerful support from the Roman law. Neither did Grotius invent his doctrine of the freedom of the seas, nor was it a new practice he was recommending. His genius lies in pointing at the existence of that practice, as well as in systematically presenting it as a doctrine relying on the ever-respected Roman law, and recommending it to Europeans as the most sensible practice. As Ernest Nys (quoting Robert Flint) points out, "the man of genius who is called the founder of a science merely brings together its already existing elements; he confines himself to uniting its disjecta membra and breathing into them the breath of life. Such was the role of Hugo Grotius...."³²⁸

The fact that Grotius was writing only as an advocate of the Dutch East India Company for the protection of his country's interests does not and cannot take away from the importance of his work and he has rightly been called the father of modern international law which is believed and said to be of European origin. Whatever may be said about some other rules of international law, freedom of the seas, which had formed the pith and substance of the modern law of the sea, is one principle which Europe learnt and got from Asian state practice through Grotius.

In Chapter V of Mare Liberum, on the basis of Roman law and history, Grotius tried to establish two propositions. The first one is "that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation." The second one is that "that which has been so constituted by nature that although serving some one person it still suffices for the use of all other persons, is today and in perpetuity to remain in the same condition as when it was first created by nature." The air belongs to this class of things and so does the sea. Therefore, Grotius said, "the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries."³²⁹ He insisted that "the sea is one of those things which is not an article of merchandise and which cannot become private property. Hence..., no part of the sea can be considered as the territory of any people whatsoever."³³⁰ Grotius said that he was not talking of inner sea³³¹ which was surrounded on all sides by the land, a gulf, or a strait, but the vast ocean which, "although surrounding this earth, can be neither seized nor enclosed; nay, which rather possesses the earth than is by it possessed."³³² If the claims of Portuguese and Spaniards were to be accepted, Grotius pointed out, "only a little less than the whole ocean is found to be subject to two nations, while all the rest of the peoples in the world are restricted to the narrow bounds of the northern seas."³³³

Discussing the Portuguese claim over the vast Indian Ocean on the ground that they were the first to sail over it, Grotius called it not merely "ridiculous" but untrue. A great part of the sea in dispute near Morocco, he said, "had already been navigated long before, and the sea as far east as the Arabian Gulf had been made famous by the victories of Alexander the Great,... Arabs knew those seas very well." He then went on to give the description of Rome's political and commercial relations with the Indies which showed that he was well informed about the history of free navigation in the Indian Ocean since times immemorial. As Grotius narrated:

Pliny's description of the route to the East, the embassies from the Indies to Augustus, and those from Ceylon to the emperor Claudius, and finally the accounts and deeds of Trajan, and the writings of Ptolemaeus, all make it quite clear that in the days of Rome's greatest splendor voyages were made regularly from the Arabian Gulf to India, to the islands of the Indian Ocean, and so far as to the golden Chersonesus, which many people think was Japan. Strabo says that in his own time a fleet of Alexandrian merchantmen set sail from the Arabian Gulf for the distant lands of Ethiopia and India, although few ships had ever attempted that voyage.... Pliny says that every year 500,000 sesterces were taken out of Roman empire by India alone, or 1,000,000 sesterces if you add Arabia and China; further, that merchandise brought from the East sold for one hundred times its original cost.⁴⁴

All this proved, according to Grotius, that long before the Portuguese ever reached India, "every single part of the ocean had long been explored." For, he asked rhetorically, "how possibly could the Moors, the Ethiopians, the Aborians, the Persians, the peoples of India, have remained in ignorance of that part of the sea adjacent to their coasts." Grotius admitted that the Portuguese restored the navigation to the Indian Ocean which had come to be interrupted for centuries and become unknown to Europeans for which they deserved the thanks, praise and immortal glory reserved for all explorers. Moreover, the Portuguese got huge profits from their first voyages which brought them profit sometimes forty times the original investment. But they had "neither just reason nor respectable authority to exclude others" from the Indian Ocean because they did not have any power or control over its ports and circumjacent shores. In fact, in the East Indies, Grotius asserted, "the Portuguese have nothing which they can call their own except a few fortified posts."⁵⁵

In Chapter VI, Grotius reiterated that donation of the East Indies to the Portuguese by Pope Alexander was nothing more than an "empty ostenta-
tion... since neither sea nor the right of navigating can become the property of any man.” Nor could the right of exclusive appropriation of the sea be acquired, he pleaded in Chapter VII, by prescription or custom — usually “the last defence of injustice” — since custom “cannot invalidate general or universal law. And it is a universal law that the sea and its use is common to all.” In this connection, as in several others, Grotius does little more than cite and adopt the extensive arguments and conclusions of Spanish jurists like Vasquez and Castro who, in spite or their government’s opposition, did not hesitate to argue for the freedom of the seas and navigation. Indeed, according to several writers these views, which are generally regarded as peculiarly Grotian, are in fact the views propounded long before him by Spanish scholars. In fact, James Brown Scott said that after the labours of Spanish jurists, like Victoria and Suarez, “the fruit of the international tree was ripe for plucking. And... it was the hand of a Netherlander, the hand of Grotius, that plucked it.”

In any case, contesting the Portuguese claim of prescription on the ground that they had exercised possession of the Indian Ocean since time immemorial, Grotius referred to navigation in the East Indies by other countries and to the challenges to the Portuguese authority. He said:

From the year 1519, the Spaniards rendered the possession by the Portuguese of the sea around the Moluccas a very uncertain one. Even the French and English made their way to those newly discovered places not secretly, but by force of arms. And besides these, the inhabitants of the entire coast of Africa and Asia constantly used for fishing and navigation that part of the sea nearest their own several coasts, and were never interdicted from such use by the Portuguese.

In Chapters VIII to XII, Grotius argued for the right of every state to freedom of trade, which was taken for granted and never questioned in the East Indies until the Portuguese arrived in the late fifteenth century but which yet continued at that time. Asserting that by the law of nations, trade “should be free to all men,” and “no one nation may justly oppose in any way two nations that desire to enter into a contract with each other,” he denied that the Portuguese could claim a monopoly of that trade on the basis of discovery or occupation, “papal donation” or prescription and custom. The Portuguese could not claim prescription, said Grotius, on the basis of coercion since “coercion is contrary to the law of nature and obnoxious to all mankind, [and] it cannot establish a right.” Further, prescription must be for so long a time that “memory of its beginning does not exist.” And yet, said Grotius, “not even a hundred years had elapsed since the Venetians controlled nearly the entire trade with the East Indies, carrying it via Alexandria.” Not only that but, he added, “the Arabians and the Chinese are at the present day still carrying on

Dutch Attempts to Create Monopoly of Spice Trade

Although Grotius was arguing against the Portuguese monopoly of trade with the East Indies and for the freedom of navigation in the Indian Ocean, the Dutch East India Company was trying to create a monopoly of its own. The truce with Spain made no difference to their plans for expansion in the Indian Ocean. In 1609, the Company’s first Governor-General, Pieter Both, was appointed with clear instructions “that the commerce of the Moluccas, Amboyna and Banda should belong to the Company, and no other nation in the world should have the least part.” It is interesting to note that, as the Portuguese had tried to exclude other European nations from any commerce with the East Indies and included discriminatory clauses against other states in treaties with local rulers in their attempt to acquire trade monopoly for themselves, the same was sought by the Dutch and, later, by the English, the French and other European nations. Soon India and other parts of Asia “were covered by a network of monopolies and discriminatory arrangements, a situation which remained in a state of flux until it resulted in a more rigid distribution of possessions.” Even before the formation of the Dutch East India Company, in 1600, a Dutch Commander, Steven van der Hagen, signed an agreement with the Ruler of Amboyna for the acquisition of monopoly of the spice trade in the Ruler’s possessions. In 1604, the treaty between the Company and the Zamorin of Calicut clearly stated that it was negotiated “with a view to the expulsion of the
Portuguese.⁹⁴ In 1612, the Dutch helped the King of Candy in Ceylon in his war with the Portuguese. After the defeat of the latter, the King concluded a treaty with the Dutch granting them the exclusive trade in cinnamon, and permission to build a fort.⁶⁷ There were several such treaties concluded with the rulers of the Spice Islands.⁴ It is interesting to note that as late as 1766, the Dutch concluded another treaty with the King of Candy which provided for monopoly rights of the Dutch to buy goods in Ceylon “to the exclusion of all other nations.” The King was also forbidden to maintain any correspondence with other European nations or to conclude treaties with them, a clause which frequently appeared in treaties between the English East India Company and Indian rulers. The Ceylonese king also undertook to deliver to the Company anyone who would enter the country unlawfully.⁹⁵ Trade monopolies, as we shall see later, led from power economies to power politics, and the contracting Asian country tended to be cut off from relations with other countries. It was not long thereafter that they lost their sovereign status.⁹⁶

It is important to mention, however, that the rulers of Asian states did not accept these rights of monopolistic trade of the European companies without considerable resistance. Thus the Ruler of Macassar and the Dutch Company waged a long and bitter struggle in the seventeenth century regarding maritime authority and power on and over the high seas. As a “godown state” with a large-scale transit trade in spices from the Moluccas to elsewhere, the ruler had no choice but to strongly resist the efforts of the Company to force him to promote the monopoly it desired in the nutmeg and clove trade through treaties that banned shipping, transportation and trade on the part of others. In 1637, 1648 and 1655, King Allahudin refused to accept a ban on trade with places hostile to the Company or forbid his subjects and other foreign merchants to sail there. In 1659 he declared that such a prohibition was contrary to the commandment of God:

...who created the world in order that all people should have the enjoyment thereof, or do you believe that God has reserved these islands, so far away from the place of their nation, for your trade alone?⁹¹

While the Dutch came to look upon the Macasserese local trade as “smuggling” and “illegal” according to the treaties forced by them, it was perfectly legal trade in the Macasserese view and in accordance with their “open-door” policy of free trade and the general principle of the freedom of the seas. These may be modern terms not understood as such by the rulers of Macassar, but as Resink correctly points out, “it is impossible to understand the past without using the concepts of one’s own times.”⁹²

Dutch Build Up an Empire

After Pieter Both, the able Governor, Jan Pieterszoon Coen, said to be d’Albuquerque of the Dutch, further built up the Dutch Empire and continued the policy of “implacable hostility to all other Europeans.” He moved his headquarters from Bantam to Jakarta, which he re-christened Batavia, and laid the foundations of the Dutch Empire in the East. For excellent strategic reasons, the Dutch chose to concentrate their power in the islands of Indonesia. As Villiers points out, “lying in the belt of the permanent trade wind and so outside the changeable monsoons, sailing ships could always reach and leave Batavia by using different routes across the Indian Ocean.”⁹² The Portuguese power was concentrated on the northern shores of the Indian Ocean. In the Malay-Indonesian archipelago, the Portuguese opposition was less to be feared owing to the distance from Goa and the weakness of their outposts. The Portuguese had always to depend on monsoon winds to reach the islands while the Dutch could take initiative anytime. Also, since there was no danger of attack from any of the powerful continental states of Asia, it was easier for the Dutch to influence the petty princes.⁴ Moreover, Java itself was immensely rich and the position of Batavia was convenient with respect to the highly valued Spice Islands. The monopolistic aspirations of the Dutch were directed not just against the Europeans. Even for the Asian peoples in general and the inhabitants of the Spice Islands in particular, the success of the erstwhile “praiseworthy” company and “gentlemen” traders “meant that native trade and shipping were strangulated and the price of resistance was national extermination.”⁹³

As soon as the Dutch acquired a monopoly over the spice trade, “they destroyed spice producing trees and vegetation in many areas, and in some cases deported entire populations from Spice Islands, in order to create a scarcity of spices which would drive up their market price in Europe.”⁹⁷ They also raised the European prices of dyes, drugs and other Oriental specialities by their monopolistic policies.⁹⁶

Just as the rapid initial success of the Portuguese over the Asians was mainly due to their technical, naval and military superiority, the decisive factor in the Dutch success over the Portuguese lay in their improved maritime techniques and military strategy. They arrived in Asia with lighter and better constructed ships, easier to manœuvre than the large and heavy Portuguese vessels, but equipped with heavy artillery and superior guns. Moreover, the Dutch had far more ships, and much better trained crews. In 1600, the Dutch had the largest merchant marine in the world, numbering more than 10,000.⁹⁸ By 1649, they are said to have possessed over 14,000 vessels which could be used as warships. They also had almost a quarter of a million sailors available to man their ships, whereas the Portuguese could not muster 4000⁹⁹. In the sphere of trade, the Dutch Company was far more efficient and had a much more business-
The disasters which the Portuguese suffered at the hands of the Dutch in the first forty years of the seventeenth century constituted one of the chief reasons for their rebellion against the Spanish Crown and the re-establishment of their independence in 1640. But the Dutch were not to be desisted in their persistent onslaughts. In 1641 a ten-year truce between the contestants was signed at The Hague, but it was not implemented in Asia until November 1644. Soon after the expiration of the truce, the intensification of the hostilities led the Portuguese to seek the protection of an English alliance through Charles II’s marriage to Princess Catherine in 1661, in which Bombay was given to the English as part of Catherine’s dowry. The peace which Portugal secured with the Dutch (in 1668–69), partly through English mediation, was a peace of exhaustion so far as Portugal was concerned.  

**“King Log for King Stork”**

As their power increased, the Hollanders showed themselves capable of ruthless brutalities to obtain their ends. The justification for the pressure exerted upon the natives to make them hand over their products (spices) was the “protection” that the Dutch provided by waging war against the Portuguese and the Spanish, although the Dutch monopoly was much more of a burden on the population than the Spanish and Portuguese trade had ever been. Indeed, this so-called Dutch protection proved costly for the inhabitants of the Spice Islands. These people, who were completely dependent for rice and cloth upon imports by foreign merchants to whom they sold spices for these goods, found their supplies completely cut off by the Dutch. The Dutch did bring them rice and cloth in exchange for their spices but in very inadequate quantities and at prices which were much too high. They were thus fairly successful in ruining the economic system of the Moluccas and reducing the population to poverty. The system was later extended to Java and the other islands where the Company had secured political authority over them. Coen was most ruthless in the implementation of these policies and was fairly successful in curbing traditional Asian shipping and maritime trade by a series of protracted and exhaustive expeditions against the natives who offered resistance. The Dutch never succeeded in completely destroying it. While the commercial affairs of the Company prospered, Coen created an intense feeling of hostility in the minds of the Indonesians against the Dutch. Although at first many Asian peoples had welcomed the Dutch “as a counterweight to Portuguese pride and pretensions, experience soon showed that those who fell into the sphere of the Dutch East India Company’s monopoly had exchanged King Log for King Stork.” In fact they began to prefer Portuguese (despite their ill treatment), to the Dutch oppression and their adoption of an attitude of arrogant superiority.

In the beginning, the Dutch East India Company sought to avoid acquisition of territorial possessions. But in its efforts to establish a trade monopoly, the Company was led step by step to territorial expansion it wished to avoid. Monopoly could be enforced, as the Portuguese experience had shown, only by a network of fortified posts. The posts required treaties with local rulers, treaties led to alliances, and alliances to protectorates. Although by the end of the seventeenth century the Dutch were actually administering only a small area, a much greater area and several states had become their protectorates. In the next two centuries, the Dutch annexed these protectorates and built up a great territorial empire.

While the Dutch reaped huge profits from the rich trade with the East Indies, the Asians were so disgusted with them that they were prepared to bring “even the devil and his dam” into their countries to throw the Hollanders out. The
Portuguese were not the only rivals the Dutch had to reckon with in the Indian Ocean. The mariners and the merchant-adventurers from the stormy British Isles were there as early as the Dutch, if not earlier, and the Danes and the French were soon to follow. The Dutch could not keep their monopoly for too long.

English Competition

England’s quest for the Orient and its riches had started as early as 1527 when the first successful attempt was made to find a passage sailing north about. From 1537 they started voyaging to the Mediterranean in search of Indian spices and in 1581 formed a Levant Company for trade via Syria and the land route to the Indies. In 1577, they entered the Indian Ocean for the first time when Sir Francis Drake, in his privateering operations against the Spaniards, sailed through the Straits of Magellan, up the coasts of Chile and Peru, across the North Pacific, to the Spice Islands. Although he almost lost his life on the way, and only one ship out of five returned in 1580, it angered the Portuguese and the Spaniards not merely because it was regarded by them as a contemptuous infringement of their rights, but also because of Drake’s ruthless piracies and pillage. But Drake’s voyage also revealed the Portuguese weaknesses and showed that, far from being masters of the East, they were trying to monopolize immensely long trade routes with widely scattered strongholds. In 1587, when England was at war with Spain and Portugal, Drake captured near the Azores a Portuguese carrack from the East Indies whose papers “afforded so much information as to the value of the trade, and the mode of conducting it,” that the English decided to send trade expeditions thither at once. Elated by the defeat of the Spanish Armada in 1588, a group of London merchants obtained a license from Queen Elizabeth to send the first commercial expedition in 1591. Despite the disasters that this expedition met, the English were not deterred from sending some more expeditions which also met with failure. The Dutch, who had by this time started an extensive trade in the Spice Islands, and were the middlemen of spice trade in Europe, took advantage of the English dire need and demand for pepper, and raised its price from three to eight shillings a pound. To the English spices were particularly important at that time. “The Elizabethan,” it is said, lived on salt meat from autumn to spring, their fresh meat was of poor quality in general; for the good of the fishermen the law compelled them to eat fish more often than they cared about and with all this insipid food their craving for pungent flavourings was probably and naturally much stronger than ours. They liked heavily spiced drinks, moreover, for they had no tea.

Aggrieved by the Dutch imposition, the leading merchants of London formed a company for trading with the East Indies and received a Charter from the Queen at the end of the year 1600. The company’s first vessel sailed in February 1601 under Captain Lancaster with a letter from Queen Elizabeth “To the great and mighty King of Achen...our loving brother.” It reached Achin in Sumatra and Bantam, and returned two and a half years later with a cargo of 1,030,000 lbs. of pepper. Although a friendly treaty was signed with the King of Achin, the English trade progressed very slowly, especially in competition with the Dutch. Despite their advantageous position which might have allowed them to act otherwise, the Dutch at first tolerated English competition in the East Indies. They were still fighting for independence from Spain and could not afford to add to their enemies. But when they concluded the Truce of Antwerp with Spain in 1609, they turned against the English. With their strong position – the Dutch having five times as many ships and a string of forts giving them control of the key points in the Indonesian archipelago – the outcome of the struggle was never in doubt. But in 1619, the English and the Dutch signed a treaty of conciliation. This treaty settled the proportion of naval and military force which either was to employ for the protection of common trade of both nations, and assigned two-thirds of the spice trade of the Moluccas to the Dutch and one-third to the English. However, as we have seen above, the Dutch governors applied their policy of military domination ruthlessly and increased their influence and trade in the East Indies rapidly. Coen not only drove the Portuguese from the East Indies, but also harassed the English out of the archipelago, compelling them to look for other markets. He also developed inter-Asian trade, which was much greater in volume than the traffic that rounded the Cape to Europe, and established a base on Formosa (Taiwan) controlling the commerce routes to China, Japan and the Indies.

Grotius Argues for Dutch Monopoly and against Mare Liberum

Contrary to her own claims of sovereignty over the narrow seas, when Spain protested against Drake’s circumnavigation as a violation of its sovereign rights over the Pacific and Indian oceans, Queen Elizabeth of England retorted:

Neither nature nor public interest permit the exclusive possession of the sea by a single nation or private individual; the ocean is free to everybody; no legal titles exist whatever that would grant its possession to anyone in particular; neither nature nor usage permit its seizure; the domains of the sea and of the air are common property of all men.
Likewise, when King Christian of Denmark threatened to exclude the English from fishing in the North Sea, she declared that “fishing on the high seas was free by the law of nations and the customs of all peoples,” and that “the law of nations allowed fishing in the sea everywhere even in seas where a nation hath power of command.”

The English were, of course, not prepared to accept this doctrine universally and certainly not in the undefined English sea. As Fulton points out, “her actions...pertained rather to the sphere of diplomacy and politics than to legal controversy.” This contradiction in policy was not confined to England alone. The greatest overseas traders of the world for more than a century, the Dutch, as we have noted earlier, had quite early formulated their claims to the freedom of the seas. As early as March 15, 1608, the State Council of Holland passed a secret resolution that they would never “in whole or in part, directly or indirectly, draw out, surrender or renounce the freedom of the seas, everywhere and in all regions of the world.” Later in 1645, the States General reaffirmed that “the existence, welfare and reputation of the State consists in navigation and maritime trade.”

While the right to sail all seas, remove any restriction on free navigation, right to fish off all coasts, to trade with all nations and to protect the rights of neutrals in time of war, remained the basic policy of the greatest shippers of Europe throughout the seventeenth century, they did not hesitate to “abandon their free-trade principles when it suited them, or when they thought they could maintain a profitable monopoly.” As early as 1614, they resolved to take the most drastic steps to secure such a monopoly in the Spice Islands against all others, whether Portuguese, Spaniards, English, Chinese, or Indonesian traders. The home government agreed with Coen that in this region it would be impossible to improve their position merely by “being virtuous and doing good,” and that it was necessary “to ride the natives with a sharp spur.” The ruthlessness with which Coen virtually extirpated the Banda islanders in 1621, although it shocked his countrymen, invoked only a “mild rebuke” from his government. The Dutch claimed that they were entitled to monopolize the purchase of cloves and nutmegs at prices fixed by themselves, in return for the “protection” they had given the islanders against the Portuguese and Spaniards.

In fact, the high priest of Mare Liberum himself, Grotius, was hard put to defend his country’s claim of monopoly when he accompanied a Dutch diplomatic mission to England in March 1613 to resolve the long-standing Anglo-Dutch dispute over the Dutch actions in ejecting the English from certain ports in the Spice Islands, seizing their cargoes, imprisoning and even killing seamen, and intimidating the natives.

The English, quoting verbatim from Mare Liberum against its author, contended for the principles of the freedom of the seas and of trade as a right under the law of nations, and against the illegality of Dutch monopoly on the grounds that the English had known those islands before the Dutch and had even concluded treaties of commerce with the natives.

Grotius, as a typical advocate and envoy of the Dutch Company, argued that, having regard to the fact that the Dutch had been engaged in trade of the East Indies for so many years, had invested so much money in it, and incurred much danger in fighting against the Portuguese, it would be “hard upon them” if the English should now want some share of that trade “seeking a harvest at our expense, ... escaping the cost.” He was somewhat surprised that his book published anonymously was quoted against him. But he tried to answer the arguments. Against his assertions in Mare Liberum, he denied that “universal freedom of trade is the creation of the law of nations.” He now said that “many of the laws of nature and nations are indefinite,” i.e. their content and application must depend upon particular human opinions and social conditions. He reminded the English that all nations arbitrarily defined their own boundaries, and restricted and regulated their trade in their territories as they wished, excluding what persons they liked. This, he pointed out, was the essence of the natural liberty to bind or limit the action of others. Furthermore, the Dutch had acquired monopolies by contracts or treaties that they had entered into with several peoples of the East, and these contracts had the sanction of natural equity and the law of nations, and were as sacred as public treaties themselves. Contract, he said, extinguished the liberty of the law of nations and he asserted that the author of Mare Liberum did not “differ from this.” The treaties, he argued, were fair and honest and if the Indians could withdraw from these after the Dutch had put so much in reliance on them, that would be injustice.

Professor Verzijl reasonably surmises in this connection that “it is hardly credible that a man so astute as Grotius should not have realized himself the inner inconsistency of this argument pursuant to which a mandatory rule of the law of nature and of nations, binding upon and profitable to all states of the international community, could be set aside by contracts with native rulers, entered upon by one of them in its own selfish interest.” When he tried to justify this pretension “by the high costs which the Company had to incur for the ‘protection’ of the native rulers against foreign aggression as a quid pro quo for the monopoly,” Verzijl correctly points out, “he ignores that much the same reasoning was employed by the Portuguese to support the justice of their asserted monopoly.”

Despite all the genius of Grotius to advocate a cause so opposed to the principles of his own published work and in the process of attempting to destroy the freedom of the seas, in order to support the interests of his country and the Dutch Company, he failed to move the English from adherence to the principles of Mare Liberum in the East Indies because of their own interests. They insisted that the Spaniards used the same arguments as the Dutch. If the Dutch said that they defended the natives, the Spaniards claimed to save their souls. The smallness of the area of the claim made no difference, nor the limitation to one species of goods, because the species in question was of primary importance.
and was the only article of commerce of those places. The so-called treaties, the
English argued, "were so monstrous and so unjust in every way that nothing
could be more contrary to the law of nature and the freedom of human
society."  

The legal controversy thus ended by being absorbed into the economic and
political quarrels from where it started. The rivalry and controversy became
even more intense and led to three wars, as we shall see below.

**English-Dutch Rivalry Continues**

All that the English wanted was quiet trade. In 1616, Sir Thomas Roe, an envoy
of the East India Company at the Court of the Great Mugal in India, had
advised that war and trade were incompatible. "Let this be received as a rule," he wrote, "that if you will profit, seek it at sea, and in quiet trade for without
controversy it is an error to effect garrisons and land wars in India." But they
could not get this "quiet trade." Finding that there was a great demand in the
Indonesian islands for Indian textiles which could earn enough profits for the
spice trade from the Moluccas and Bantam, they sought to establish a trading centre in India at Surat in 1612. Although they got a lot of opposition from the Portuguese, they obtained permission from the Indian king to establish their factories on the Indian coast in Surat and other places at the Gulf of Cambay. In the Persian Gulf, they captured Hormuz from the Portuguese in 1620 and from then on the Portuguese power steadily declined. The struggle then was between the Dutch and the English.

The Dutch were determined not to countenance any rival in the Indonesian islands. The expiration of the truce between Spain and Holland in 1621 gave an opportunity to the Dutch to recommence their hostilities against their ancient enemy. But they felt so strong that they attacked not only the Spanish-Portuguese ships and possessions in an attempt to expel the latter from the Indies, but also attacked their ally, the English, on the ground that the natives of Banda had placed themselves under the sovereignty of the States General. Their purpose of course was to divest the English of their share of trade under the terms of the 1619 treaty. In 1623, the relations between the two countries became very strained following the so-called "Amboyna massacre," in which the Dutch governor arrested and tortured eighteen English traders, twelve of whom were executed. Horrified by the Dutch behaviour, the English left Batavia. But the "Amboyna massacre" became a battle cry through much of the seventeenth century as the two nations gradually became deadly enemies in a series of wars in the last half of that century that were markedly commercial in motivation. Although the English continued to have factories in Macassar till 1667, and in Bantam till 1685, it was clear that they could not gain a foothold in Indonesia.

After that they clung even more tenaciously to India, where the Dutch hold was not so strong. After Charles II received Bombay in dowry from the Portuguese with Princess Catherine, the English Company moved its headquarters to that port which began to prosper along with the affairs of the Company.

**The French and the Danish in the East**

The riches which the Portuguese brought from the East Indies had attracted the attention and envy of all the Europeans. As early as 1604 the first French Company was formed for trade in the Indies, but the first shipping enterprise to Java was undertaken only in 1616. However, because of strict Dutch watch, it returned empty-handed. It was not until 1664 that the French became serious competitors for eastern trade and a new well-organized East India Company was established for trade with India. In 1668, the first French trading post was opened at Surat, and in 1672 the French had a settlement in Pondicherry, and in 1673 a small trading post in Chandernagore. In 1688 Pondicherry was conceded to the Company by the Mugal King Aurangzeb, which in the next century the French tried to make a bridgehead for the conquest of southern India. But by the end of the seventeenth century, the French had not made much progress in the East Indies trade.

In 1615, a Danish East India Company was established in Copenhagen and it sent an expedition which reached the Coromandel coast of India in 1616, where it got permission from the Raja of Tanjore to start a factory in the port of Tranquebar. For some time the Tranquebar settlement prospered and sent home richly laden vessels, and the Danes extended their operations on the Malabar Coast and along the Bay of Bengal. But as a result of the wars in which Denmark got involved in Europe, the affairs of the Company suffered and it became bankrupt in 1654. A second company was formed immediately, followed by a third in 1686, and a fourth in 1732. By the end of the seventeenth century, the situation of the Danes in India was that of "poor whites" living by their wits and even by piracy. Without the help of the English, they would have lost their trading post in Tranquebar.

**Pleas for Mare Clausum in Europe**

While the European Powers were challenging the Portuguese supremacy in the
Indian Ocean on the basis of *Mare Liberum*, each one was also struggling to
create a monopoly for itself and trying to keep the others out. But the real
power game was being played in the Atlantic and the European waters. It must
be remembered, as Toussaint points out, that the game was of "prime impor-
tance, for this was no simple commercial rivalry but a far more serious conflict, in which the stake was nothing less than the command of the seas.\textsuperscript{139} Although Grotius in his famous \textit{Mare Liberum} was arguing only as an advocate on behalf of the Dutch Company in the context of Portuguese appropriation of the Indian Ocean, and indeed later relented from his thesis like an astute advocate to protect the Netherlands' assumed monopoly in the East Indies, he had made a formidable case for the freedom of the seas as an "unassailable axiom of the law of nations." At that time, as we have seen earlier, the practice in Europe was for states to claim jurisdiction in wide seas around them. In 1609, King James I of England had not only ordered all ships passing through the English seas to lower their top-sails and strike their flags, as an acknowledgement of English sovereignty, but prohibited fishing by foreigners along the British and Irish coasts. This policy of exclusive fishing was directed at the Hollanders and affected them most.\textsuperscript{140} While arguing for the freedom of the seas, Grotius put navigation and fishing on the same footing.\textsuperscript{141} In regard to revenues levied on maritime fisheries, he had said that they applied to persons engaged in fishing in fishing but did not bind the sea or the fisheries. While a ruler might impose such levies on his subjects, he could not do so on foreigners because "the right of fishing ought everywhere to be exempt from tolls, lest a servitude be imposed upon the sea, which is not susceptible to a servitude."\textsuperscript{142} He regarded interference with fishing as most unreasonable. As he put it:

If in a thing so vast as the sea a man were to reserve to himself from general use nothing more than mere sovereignty, still he would be considered a seeker after unreasonable power. If a man were to enjoin other people from fishing, he would not escape the reproach of monstrous greed.\textsuperscript{143}

Not unnaturally, there was a strong feeling in England, which was shared by King James, that Grotius had attacked English policies as use of such strong language "about the right of free fishing in the sea was scarcely pertinent to his theme" in \textit{Mare Liberum}. Moreover, "neither the Portuguese nor the Spaniards contested that right, and the Dutch did not fish in waters under their control."\textsuperscript{144} On the other hand, Grotius was aware of England's intention to prohibit fishing of assize-herring and to tax foreign fishermen, about which negotiations were afoot in 1608 between the English Government and the Dutch Ambassador.\textsuperscript{145} Although King James was irritated at being attacked by an anonymous Dutch writer, it was a Scottish lawyer, William Welwood, who undertook the task of replying to Grotius.\textsuperscript{146} In 1613, in a revised and enlarged edition of his earlier work on \textit{Sealaws of Scotland}, he added a chapter on "The Community and Propriety of the Seas," so as to refute the argument advanced in \textit{Mare

Liberum}.\textsuperscript{147} He argued that Roman law applied only to the Romans, and was not international as between state and state; that the fluidity of the ocean was no bar to its occupation; and that it could be, and had been in certain cases, divided by the ordinary methods used by navigators within "certain reach and bounds of seas." He did not explain what these bounds were but quoted the Italian limit of 100 miles with approval. He held that the freedom of navigation in the "main sea or great ocean" was beyond all controversy, but felt that the free use of the sea could be interfered with for the sake of fishing, if the fish become exhausted and scarce, as he said was the condition at that time on the east coast of Scotland. In 1615, he published another small book on the domination of the seas in which he said that adjacent sea was and could be claimed by the neighbouring state, which could exercise there the rights of navigation and fishing, with the power to impose taxes for either. He maintained that fishing was for the most part appropriated and the English prince had a right to stop foreigners from fishing in his waters. With England's interests in mind, it is important to note that "he was the first author who clearly enunciated, and insisted on, the principle that the inhabitants of a country had a primary and exclusive right to the fisheries along their coasts — that the usufruct of the adjacent sea belonged to them; and that one of the main reasons why that portion of the sea should pertain to the neighbouring state was the risk of the exhaustion of its fisheries from promiscuous use."\textsuperscript{148}

Besides Welwood, within twelve years of the publication of the \textit{Mare Liberum}, several Italian writers, Pacius, Matthierius, Francipani, Magenius and Zambono, wrote in defence of the claims of Venice on the bases of Roman law and early jurists without even mentioning Grotius' work.\textsuperscript{149} But neither Welwood, nor any of these writers, were any match for an intellectual "giant like Grotius."\textsuperscript{150} Stirred up by Welwood's criticisms of his book, Grotius wrote a brief and incomplete reply in the form of \textit{Defensio} which, however, he never published in order perhaps not to arouse the attention of James I to the subject of \textit{Mare Liberum} at which the King had once expressed dissatisfaction.\textsuperscript{151} While arguing ironically in favour of the Dutch Company's monopolistic interests in the East Indies, as member of the Dutch delegation, when Welwood's \textit{Abridgment} came out in 1613, in \textit{Defensio} Grotius reiterated his thesis of \textit{Mare Liberum} and encountered Welwood's criticism "with some of the customary logic-chopping and wire-drawn reasoning."\textsuperscript{152} He thought that it was "ridiculous" on the part of Welwood, "a man rather suspicious and who can see what does not exist,"\textsuperscript{153} to suspect that the intention of the author of \textit{Mare Liberum} "was to assert the freedom of fishing and that the Indian controversy was used for the attempt."\textsuperscript{154} Grotius asserted that indeed much of the law of nations had emerged by usage or custom, "which is the index of tacit consent" and that freedom of the seas was such a custom and therefore binding "even if the reasons were obscure why it should have been established."\textsuperscript{155} But he reaffirmed that "the sea cannot be possessed naturally,
neither its entirety nor any part which may remain joined and united to its entirety” because “nothing can be apprehended unless limited corporeally.” Liquids must be limited to be possessed, “as wine is possessed by means of a vessel, rivers by means of their banks. Therefore an unlimited liquid is not to be possessed.” In regard to the freedom of fishing, with which the Defensio is mainly concerned, he stressed that since the sea was common to all, no one could prohibit fishing in it. “Fruits of what belongs to no one became the property of the occupier.” With respect to the right of the Dutch to fish on the English coasts, he cited the Burgundy treaties (of 1495, 1540, 1550 and 1594) between England and Holland in which the Dutch fishermen had been granted free use of the sea. He supported their right on the bases of treaties, immemorial usage, prescription and the law of nations. It is significant to note that, whereas in his Mare Liberum, as well as in his later authoritative work, De Jure Belli ac Pacis Libri Tres (Three books on the Law of War and Peace), Grotius had accepted a state’s right to occupy part of the sea, in his enthusiasm to demolish Welwood’s thesis he denied it altogether in Defensio. Whatever applied to the whole sea, he said here, applied to all its parts, even to a “diverticulum,” and he allowed no exception for a sea washing a coast. Refuting Welwood’s contention that the sea could be appropriated up to 100 miles, Grotius asked: “And what reason operates, if the sea can be occupied up to one hundred miles, to prevent it being occupied up to 150, thence to 200 and so on? If water is property up to the 100th mile, why cannot the water which is immediately contiguous to the property be equally property?”

“Battle of Books” Continues

In the “battle of books” that continued in the din of actual war almost throughout the seventeenth century in Europe, several publicists participated, generally each trying to defend the interests of his country and policies of his government. Amongst them may be mentioned the English authors like Gerard Malynes, Alberico Gentilis, Serjeant Callis, Lord Chief Justice Coke and Borough. But a more serious, effective and convincing reply to Grotius came from the expected quarters, Portugal, by “a scholar of Salamanca” whose work had been suppressed for some years by King Philip III. In 1625, there appeared De Justo Imperio Lusitanorum Asiatico by Seraphin de Freitas, a Portuguese monk and a professor at Valladolid. In this most scholarly, elaborate and effective treatise compared to the mere pamphlet of Grotius, Freitas dealt with every allegation and argument of the Dutch jurist at great length and in meticulous detail. He corrected “the many inaccurate, distorted and partial references of Grotius,” criticized “the history of Mare Liberum,” and added “to it a wealth of examples and illustrations which to Grotius must have been unknown.” While agreeing with Grotius that the Sea was res communis and open to all nations, Freitas argued, however, that the bed of the sea was susceptible to occupation. In regard to the surface of the ocean, he pointed out that countries surrounding the Indian Ocean had claimed and exercised rights of navigation and fisheries in waters adjacent to their territories and he referred to them as rights of “quasi-possession of trade and navigation.” Thus, though he rejected property rights, he believed that states could acquire rights of jurisdiction and protection in adjacent waters for suppression of crimes as well as an exclusive right to control access to their territories. He did not define the limit of this jurisdiction and felt that it depended on the effective control of the territorial sovereign from the shore. Freitas claimed Portuguese control of navigation in an undefined zone near any territorial possessions of Portugal in the East Indies, and control over far-reaching zones of access to those possessions in which they had assumed responsibility for combating piracy and anarchy. He said that Portugal had the right to exclude Europeans from the East Indies and control their navigation (1) towards Portuguese possessions on the basis of customary law of the Indian Ocean; (2) towards other East Indies states since they were waging a just war (against Islam) there and had a right to prevent the Dutch and others to support their enemies; and (3) to the Indian Ocean because they had the exclusive right to spread the Christian faith in these countries.

Holding that the right to free trade and navigation was not derived from the law of nature and was not an overriding principle of the law of nations, Freitas reiterated that each state was free to close its ports, commerce and territory to foreigners. But while denying free access to Asian trade, he sought to open the door of the East Indies for Portugal and defended the right of the Portuguese to free access for the purpose of spreading the Christian faith and civilization. This right, he said, had been delegated by the Pope to the Portuguese. In his view, the Pope, either by himself or through a Christian prince, could “compel a pagan state or prince, even by war, not to put any obstacles to the free preaching of the Gospel” and he could defend its subjects once they received the Christian faith. Freitas reserved a substantial part of his treatise to Portuguese title through papal donation. This extravagant claim for the papal power is said to be one of the important reasons “for the fact that he never influenced public opinion and for his neglect by posterity.” But there is no doubt that he appeared “to stand strictly in accordance with the general course of Spanish thought.” In considering the Grotius–Freitas controversy or even other academic and scholarly controversies with respect to principles of maritime law, it is important to remember that most of the differences between them clearly reflected the inter-European struggle transposed from Europe to the East Indies. As Knight points out,
each side was playing for its own hand, entirely indifferent, on all occasions of critical emergency, to considerations of pure or abstract right. Such considerations were to be dealt with, separately and ex post facto, in works of apology and public justification. Then it was only a question, on either side, of diligent collection of appropriate authoritative phrases – regardless, if necessary, of their real connection at learning – a skillful weaving of them into subtle and, at times, eloquent literary pleas.\(^{167}\)

Grotius had done exactly this in his *Mare Liberum*. He had referred “to number-less Spanish works, and from their very copius indexes extract[ed] the arguments – and even only the isolated sentences – that served his purpose.”\(^{168}\) As we mentioned earlier, *Mare Liberum* was the plea of an advocate, which exhibited, with some of the best, almost all the worst characteristics of such a work. After a thorough study of Grotius’ life and works, his biographer, Knight, said of this book:

It is the plea of an advocate – from first to last – of an advocate, too, whose client is his own fatherland fighting desperately to avoid sentence of political death. Its conclusions are based on facts and arguments generally most partially selected and marshalled, and these are frequently presented with a much too unrestrained rhetoric. It is, moreover, often so abstract and academic as to have but little relation to the actual facts and conditions of real life. Only its own age and conditions made it possible.\(^{169}\)

A contemporary wrote of him that he was “full of words and no great judgment.”\(^{170}\) Lawyers were quick to see his weaknesses, and he was assailed by old enemies and old friends alike. It is not surprising that such a work was almost irresistible to a contemporary, especially to a person like Freitas who was patriotically antagonistic to it.\(^{171}\) The substantial work of Freitas, written with the “minutest care,” was a befitting reply to Grotius. But this was also its undoing as a popular work. It was “too learned and too long” and “useless as a popular propaganda.”\(^{172}\) Moreover, right at that time Spain, with her scholastic literature and her maritime and political importance and influence, was disappearing from the world scene.\(^{173}\) Still, even Grotius found it so convincing that he wrote to his brother Willem on February 6, 1627, that “it is written rather carefully, and he is a man worthy of reply.”\(^{174}\) But Grotius never published any reply to Freitas. He would have certainly defended his earlier work if circumstances were different. When *De Justo* appeared, Grotius was an exile in Paris and he had a grievance against his country and his countrymen whom he regarded as ungrateful. Besides this natural feeling, he did not want to stir up bad feelings against himself in Europe which believed in *mare clausum*. As he

said to his brother: “I say that some of our judges should be sought out and the duty delegated to him.”\(^{175}\)

**Selden’s Mare Clausum**

The most formidable reply to Grotius and challenge to his theory of *Mare Liberum* came from John Selden, a brilliant British scholar who wrote on the behest of the English Crown, and whose comprehensive treatise *Mare Clausum, seu de Dominio Maris Libri Duo* (*The Closed Sea or Two Books Concerning the Rule Over the Sea*) was published in 1635 by the “express command” of King Charles “for the manifesting of the right and dominion of us and our Royal Progenitors in the seas which encompasses these our realms and Dominions of Great Britain and Ireland.” Prepared much earlier at the desire of King James and presented to him in 1618, the book remained unpublished for several years for political reasons and was later recast, revised and enlarged at the request of King Charles and published under his orders depicting and explaining the official English position on the subject. Charles did all he could to emphasize the importance of the book, complained to the Dutch ambassador when a pirated edition of the book was published at Amsterdam, and ordered its copies to be kept in the Privy Council Chest, Court of Exchequer and Court of Admiralty “as a faithful and strong evidence of the Dominion of the British Seas.”\(^{176}\) It is generally admitted that *Mare Clausum*, written after prolonged labour by one of the most eminent lawyers of his time, who was also an erudite scholar and a prominent historian, “is an elaborate and masterly exposition of the case for the sovereignty of the crown of England in the British Seas, which throws into the shade all the other numerous works which were written on that side of the question.”\(^{177}\) Grotius himself called Selden “an honour to his country.”\(^{178}\)

Relying on historical data and state practice at that time in Europe, Selden tried to prove that the sea was not everywhere common and had in fact been appropriated in many cases. Among all the nations of antiquity, he asserted, it was the custom to admit private dominion in the sea, and many of them exercised maritime sovereignty. Apart from Romans and the Carthaginians, he mentioned among these the Cretans, Lydians, Tharcians, Phoenicians, Egyptians and several others; but, as Fulton says, “in most cases the evidence adduced shows merely that naval power was exercised.”\(^{179}\) Among nations of his time, he mentioned numerous European states which claimed sovereignty in large areas of the sea. It is significant to note, however, that he altogether omitted the various countries in the East Indies and India which never claimed in antiquity and did not claim then any such sovereignty over the open sea. Although Selden admitted that humanity would not deny freedom of all harmless navigation and commerce, he emphatically maintained that it was
not contrary to the law of nature and the law of nations to forbid free navigation and commerce. He agreed with Grotius in denying the sovereignty claimed by Portugal and Spain in the great oceans not because it was opposed to reason and nature, but because it was not founded on legitimate title and these nations did not have a sufficient naval force to assert and maintain it. Selden denied that the sea was inexhaustible from promiscuous use. A sea might be made worse for him who owned it by reason of other men's fishing, navigation and commerce, and less profit accrue from it, as where pearls, corals and other similar things were produced. In such cases its abundance might be diminished by such overuse just as readily as in the case of metals and such-like on land.181

In the Second Book Mare Liberum, after partially defining for the first time the so-called British Seas, Selden tried to prove that the kings of England had perpetually exercised exclusive jurisdiction in the surrounding seas as part of their territory and preserved the right to prohibit fishing and even navigation by foreigners in these waters, or exacted tribute for that liberty. Claiming absolute maritime sovereignty for the kings of England, Selden concluded:

It is certainly true, according to the mass of evidence set forth above, that the very shores or ports of the neighbouring sovereigns on the other side of the sea are the bounds of the maritime dominion of Britain, to the southwards and eastwards; but in the open and vast ocean to the north and west they are to be placed at the farthest extent of the most spacious seas which are possessed by the English, Scots, and Irish.182

Selden's book may look "almost grotesque to modern readers unaware of the disproportionate importance attached in his day to an erudition which expanded itself upon Holy Writ, classical poetry, mythology and history in an unending search for analogies, even those remotely relevant."183 Moreover, there is little doubt that Selden had put a "strained or erroneous interpretation" on much of the evidence he had collected, if not invented, as some critics point out. He drew conclusions from "things which had in reality no connection with them." In his enthusiasm to prove his case, he "misrepresented" the bearings of many records, "others were passed over in silence, or, as with the 'Burgundy' treaties, referred to in such a way as to distort their plain meaning."184 But this was nothing unusual. As Knight, after analyzing works of this period, warns: "It is very dangerous for any reader of the political, and even philosophical and juristic science. It is almost a rule that they are incorrect, mala fide, and misapplied whenever the exigencies of the argument require. Certainly in the Mare Liberum Grotius was well in line with contemporary practice."185 Potter agrees and points out that "the works of Grotius and Selden and their coadjutors were products of personal and national desires rather than works of pure and unbiased juristic science."186 But despite all these "distortions" and "misrepresentations," "Mare Liberum was regarded, in a sense, as a law book and continued to be so for nearly two hundred years. It was an authoritative work to which eminent lawyers, such as Lord Chief Justice Hale and Hargrove, appealed as proving the existence and legality of the crown of England to the dominion of the British Seas" along "with Selden's definition of the extent of those seas."187 The English Minister resident at The Hague was instructed that "Mare Liberum must be answered with a defense of Mare Clausum, not so much by discourse as by the louder language of a powerful navy."188 It won the approval not only of English kings but also of the Long Parliament which ordered its translation.189

Selden's book created a great anxiety in Holland because it reflected not merely England's reply to Mare Liberum, but King Charles' policy which was reinforced by the formation of a strong English fleet. Within one year three editions of the book were published in Holland and the States General decided that it should be formally refuted. Although Grotius was perhaps the only one who could give a fitting refutation to Selden, he was then the Swedish ambassador in France and could not afford to offend his royal mistress by publicly opposing claims which were similar to those she herself made in the Baltic. Therefore, he preferred to remain quiet. In fact, it is said that Grotius now admitted that he had written Mare Liberum "as a Hollander, and is exceedingly glad to see the contrary proved."190 The official refutation of Selden was entrusted to a relative and former assistant of Grotius, Dirck Graswinckel, but the reply that he wrote was never published.191 In 1637, another Dutchman, Pontanus, employed by the King of Denmark as his historiographer, published a refutation to Selden, although he had to be extremely cautious because of Danish claims about the appropriation and dominion of the sea. In the same year, a Frenchman sought to defend the appropriation of the sea.192

Anglo-Dutch and Anglo-French Rivalries and Wars

Instead of solving the issue, these publicists merely confused the problem. As Azuni said, "impelled by the interests of their respective countries," these writers (especially Grotius and Selden) "so entangled the subject, by their passionate opinions, that instead of elucidating and deciding the question, they involved it, by their useless learning, and equivocal arguments, in greater obscurity."193 But from now on a free sea and a closed sea was to be the slogan of the various parties for a long time. Writers from practically all the European countries — Portuguese, Spanish, German, Italian, Danish and French — "played national politics and took part in this literary campaign on the side of a closed sea. Everywhere purely political products were involved, merely dressed in the arguments of international law."194
Yet it was not long before “the war of pens gave place to the war of arms.”195 The Dutch, who were enjoying huge profits from their monopoly of trade in the Spice Islands, were the object of great jealousy in England. In 1612 they had founded New Amsterdam on Manhattan Island in the New World. It served as a base and clearing house for a great volume of Dutch shipping that ran a lucrative, though illicit, carrying trade between Europe and the Spanish, English and French colonies in America. In 1621, they established a Dutch West India Company to exploit the loosely held colonies of Spanish and Portuguese America. They won control of the Brazilian coast from Bahia to the Amazon and founded colonies at Caracas, Curaçao and in Guiana in the Caribbean. Even more important, in 1652, they captured the Cape of Good Hope in South Africa from the Portuguese and established an important colony and halting station on their way to the East Indies. In England Charles I built up England’s first navy.196 Cromwell strengthened the English position at sea by enacting the Navigation Act of 1651 which provided that goods imported into England and its dependencies must be brought in English ships or in ships belonging to the country exporting the goods. English claim to sovereignty in the narrow seas, and striking of the flag by foreign ships as a token and acknowledgement of this sovereignty were also “insisted on with the utmost arrogance.” As Fulton points out, “the ‘honour of flag’ burned like a fever in the veins of the English naval commanders, who vied with one another in enforcing the ceremony, not merely in the Channel or near the English coast, but in the roads and off the ports on the Continent.”197 In fact, this insistence on “striking of the flag” by foreign ships and the fishery disputes with Holland resulted in three intermittent wars between the Dutch and English between 1652 and 1674 which weakened the Netherlands considerably and forced her to accept England’s sovereignty in the English seas.198

It is interesting to note that in 1652, an English translation of Selden’s Mare Clausum by Marchamont Needham was published by and on behalf of the Council of State in which the translator added some further evidence to support the British claim and a “ranting appeal to English patriotism” to defeat the enemy.199 This evoked a reply from Graswinckel, a Dutchman who had earlier been commissioned to refute Selden and whose work had been lying in secret archives at The Hague. Ostensibly writing against an Italian writer, Burgus, and Italy’s claim to the Ligurian Sea, Graswinckel took the opportunity to make a personal attack on Selden, accusing him of having written Mare Clausum in order to get out of prison. Selden himself made a strong reply and explained the circumstances under which he had written his treatise. Stimulated by wars, a number of other works were now published in defense of the freedom of the seas and the liberty of fishing in Holland including another dissertation by Graswinckel, this time assailing Welwood and his book, De Dominis Maris. From England also, several pamphleteers tried to vilify “the Dutch in pious but intemperate language without shedding much light upon the question.”200 But irrespective of these controversies, by sheer weight of naval power, the thesis of Welwood and Selden prevailed over that of Grotius.201

While thus assaulted at sea by the English, the Dutch were menaced on land by the French from 1667 to 1713 over the territorial ambitions of Louis XIV. It was only after William of Orange or William III of Holland also became the King of England in 1689 that he was able to get the English help to form a strong coalition against the French expansion. Peace came, however, only after the Treaty of Utrecht of 1713, long after the death of William. But the Dutch, strained by the war and outdistanced by England, never again played a primary role in European political affairs.202 It is interesting to note that even William III used the customary language as to the English sovereignty of the sea against France and referred to the challenge of Louis XIV to this sovereignty as one of the reasons for declaration of war against France.203

In the eighteenth century, Holland gave way to England and France and this period was marked by an intense struggle between these two Powers for colonial supremacy in North America, in Africa and in India. Without going into the details of this long, bloody and acrimonious struggle, it may be noted that England emerged as the strongest Power in Europe. As Godechot in his History of the Atlantic Ocean pointed out, in the eighteenth century the Atlantic became virtually an English lake. “Of course,” he added, “English dominion had its fluctuations, its ups and downs; it was at its height between 1763 and 1775, but at the beginning as at the end of the century, the British hold on the Ocean remained powerful, extensive, and even overwhelming.”204 With the increasing naval power, England became the “undisputed mistress of the seas,” or as its enemies called, “tyrant of the seas,” and it needed insist no longer on the honour of the flag as it had been doing for nearly two centuries. Forcing foreign ships “to strike in the British seas became an encumbrance unsuited to the times” and was allowed to fall into disuse after the defeat of France and Spain in the Battle of Trafalgar in 1805.205 But Denmark continued to exploit its geographical position to collect the Sound dues till the middle of the nineteenth century, when, as we shall see later, it was persuaded to sell its rights to other members of the international community.

The Struggle Goes On in the Indian Ocean

While England had won the battle of the Atlantic, the struggle in the Indian Ocean was still undecided. During the entire seventeenth and the beginning of the eighteenth centuries, the English Navy was too busy in the Atlantic to...
show itself in the Indian Ocean. It is interesting and important to note that the champions of the freedom of the seas in Europe, the Dutch, claimed *Mare Clausum* in the Indian Ocean and monopoly of navigation and trade in the Spice Islands, while the advocates of *Mare Clausum* in the Atlantic pleaded for the open seas in the East Indies. In the beginning the Dutch proved much superior to the English. They were better organized, had a superior navy, and they knew exactly what they wanted, whereas their rivals did not have a well-defined policy for a long time. While the Dutch were defeated in the First Dutch War (1652–4), in the Indian Ocean their ships got the better of the English East Indiamen. Indeed, they occupied the Cape of Good Hope to secure the route to the Indies. Even in the Second Dutch War (1665–67), while the Dutch Company suffered heavy losses of ships in Europe, their fortunes in the East were hardly affected. In fact the Hollander reached the high-water mark of their prosperity and the clear profits of the Dutch Company’s shareholders rose to 40 per cent of their capital. In the Third Dutch War (1672–78), when England and France joined hands to break Dutch economic power, which had remained largely unaffected despite two defeats, the loss of the Dutch settlement in North America and the dissolution of the Dutch West India Company, the fortunes of the Dutch East India Company were unscathed. In fact its vessels gained victory over a French squadron sent to seize Ceylon. Indeed, during the Anglo-Dutch wars, the Company is said to have had its period of greatest prosperity, its “golden age,” which lasted from 1639 to 1693. During this period, it established itself securely in India, Ceylon, Java, the Moluccas and at the Cape and transformed its purely commercial policy into a policy of territorial conquest. However, there is no doubt that the Anglo-Dutch wars had not only weakened Dutch economic power, but vast expenses involved in the territorial conquests in the Indies had lowered its profits. Also, Holland permitted itself to be outdistanced in naval construction, while the English shipping made great strides.

By the end of the seventeenth century, the English, having been driven from the Indonesian islands, had concentrated on India where they had built up a trading organization. The French had also entered the Orient and staked their claims at Pondicherry. But except in the Indonesian islands, the European traders exercised no political authority. In India, for instance, they resided and traded on the sufferance of the powerful Mugal emperors. The latter could easily drive the traders into the sea if they did not behave themselves and submit humble petitions for the privilege of carrying on their commercial operations. It is not our purpose here to discuss how, with the disintegration of the Mugal Empire and internal rivalries, English and French Companies transformed themselves from mere commercial organizations to territorial over-lords and tribute collectors. But the duel between the British and the French not only in India, but also in Africa, and the Americas in the seventeenth and eighteenth centuries ended in an overwhelming British triumph. The remarkable development of England’s industry, boosted by the Thirty Years’ War on the Continent (1618–48), helped in the creation of a strong naval power which was a decisive factor in the defeat of France. A British squadron cruising off Brest could, and repeatedly did, cut off the French colonies from the metropolitan state and leave them helpless. When the Treaty of Paris was signed in 1763, concluding the war between the two Powers, France suffered an even more humiliating and overwhelming defeat than the Netherlands had suffered in the seventeenth century, and Spain in the sixteenth. Spain and the Netherlands had been humbled, but each retained substantial colonial possessions — Spain in America and the Philippines, the Netherlands in the Indonesian islands. France was not only humbled but also shorn of all her overseas possessions.

Although France built another large colonial empire in the nineteenth century, the peace of 1763 was decisive for America and India. America north of Mexico was to become part of the English-speaking world. And with the expulsion of the French from India, the British Government was drawn increasingly into a policy of territorial occupation. Eventually a British “paramount power” emerged in place of the empire of the Mugs. Once installed in Delhi, the British were well on their way to world primacy and the establishment of a world empire. It was this incomparable base, with unlimited human and material resources, which enabled the British in the nineteenth century to expand into the rest of South Asia and beyond to East Asia.

It may be mentioned that the English East India Company, like the Portuguese, Dutch, French and other European companies, “was conservative, hide-bound, and monopolistic.” Contrary to its original policy of “quiet trade,” it had developed into a territorial Power with the rights to coin its own money, command its own fortresses and troops and maintain its own navy. But the real backbone of the Company lay in the strong arm of the Royal Navy without which “there would have been no Bombay Marine and, indeed, no Company.”

**Piracy in the Indian Ocean during the Seventeenth and Eighteenth Centuries**

To some extent piracy had always been there, not only in the Indian Ocean but in other seas as well. In Europe, piracy had continued for centuries both out of private avarice, and in the form of privateering which, in spite of all the precautions, “degenerated nearly always into licensed piracy and gave rise to gross excesses.” As McFee points out, “the difference between a pirate and a privateer was largely academic. The roles were inevitably interchangeable.” In fact, according to him, “privateering was merely licensed piracy.” Some of
the greatest explorers of Europe were nothing more than pirates. While the Portuguese, Dutch, English and French were fighting with each other and with the local rulers in the Indian Ocean, there was all around nothing but confusion and anarchy in the Indian Ocean, just as there was in European waters. There was "only one rule of law at sea in those days, to destroy one's rivals and make as much money as possible in the shortest possible time." The confused situation was further confounded by internal fights on the Indian subcontinent, for instance during the Maratha Ruler Sivaji's challenge to the Mugal emperors, and some of the local rulers' challenges to the European companies' possessions and appropriations of their territories. Europeans had continued their privateering operations in the Indian Ocean ever since the early sixteenth century.

Most of the early expeditions by Portuguese and Spanish explorers, like Magellan and others, as well as flotillas of Dutch, English, French, Danish and other East and West India Companies, were privateering operations which in many cases degenerated into barbarous piratical activities. Competition among the European Powers was severe and there were many bloody episodes. We have already mentioned the ruthless piracies committed by Vasco da Gama, Cabral, d'Albuquerque and other Portuguese commanders. Sir Francis Drake's famous circumnavigation was nothing more than part of his piratical activities. These privateering operations, more or less a façade for naked piracies, increased manifold during the confused situation in the Indian Ocean in the seventeenth and eighteenth centuries. European writers refer to literally hundreds or perhaps thousands of such privateering operations continuing right up to the middle of the nineteenth century. Several of these European privateers even started getting letters of marque or commission from Asian rulers for their nefarious activities.

Many of the Indian Ocean pirates originated in the West Indies. Because of the settlement of the West Indies, these buccaneers, who were very active there from 1550 to 1685, took refuge in Madagascar in the Indian Ocean where pirate settlements were established industry on the island and there were well-maintained communications both with the West Indies and New York. Discussing the problem of piracy in the Indian Ocean, Villiers points out that these pirates from Europe and North America were "the real fiends,"

who flocked into the Indian Ocean before the end of the seventeenth century when stories of its vast wealth became known. The area and the trade lent themselves almost ideally to the pursuit of piracy. Great lumbering ships, full of the richest cargoes, came year after year from the Malabar Coast and from the Persian Gulf and from Malacca toward the Cape of Good Hope, round which lay the only route to Europe. The island of Madagascar, with its many creeks, lagoons and harbours, might have been designed as a pirate lair. All shipping had to pass it, either to the east or the west...the coast of Madagascar abounded in natural retreats which were perfect for shipping with local knowledge and impregnable to others.

Under conditions of almost total lawlessness in the Indian Ocean and with possibility of finding easy prizes, it is not surprising that "some of the very worst" outlaws — the Englishmen Read, Teat, Williams, Avery and Kidd; the Americans Tew, Burgess and Halsey; the Irishman Cornelius; the Frenchman Le Vasseur and others — "roamed the Indian Ocean." It is interesting to note that, after the French had forsaken the islands in 1674, these pirates founded their own republic, whose very name signified its basic purpose and programme: Libertalia. Like any other state, it had its own code of summary laws, which was not to be trifled with, various administrative departments, and even an international language. Apart from some of the most notorious seashounds referred to above, it was inhabited by a whole group of minor pirates of all nations in which the English element is said to have predominated. The freebooters covered practically the entire Indian Ocean and attacked Arab, Indian and European vessels indiscriminately. They are reputed to have had accomplices in all the ports who informed them of shipping movements and bought the booty from them. It is said that in 1696 the English governor of Bombay himself colluded with the pirates and protected them at the expense of his company's own vessels. The booty from these depredations was so much that a big "market of the Jolly Roger" was formed at Madagascar where traders from North America started coming regularly around 1700. Later, real shipping enterprises in piracy were organized in New York, Boston and Philadelphia, called "grand round," for adventures in the Indian Ocean. Although Libertalia broke up in the second decade of the eighteenth century, piracy continued unabated throughout the eighteenth and early part of the nineteenth centuries because neither the trading companies nor the local rulers were in a position to lay down the law and enforce it, except in very limited areas.

Besides these European and American pirates, there were several local elements which indulged in attacking and looting all the ships at sea they could lay their hands on. Although they are generally referred to as "pirates," and several of them must actually have been nothing more than freebooters, it is important to understand the political and legal situation in the Indian Ocean before making a sweeping judgment on their activities. Thus in the eighteenth century on the Indian subcontinent, the Maratha Ruler Sivaji of Maharashtra in Western India, had revolted against the Mugal Emperor Aurangzeb. The Marathas, who lived near the sea, had equipped an impressive fleet to fight on the sea in conjunction with their armies on shore. Since the European companies — Portuguese, Dutch and English — had allied themselves with the
Mughal Emperor, the Marathas not only attacked the Mughal’s vessels but considered it legal and reasonable to attack the European ships. The Maratha Commander, Kanoji Angre, who had built up a strong navy, dominated the entire coast south of Bombay and harassed the European companies. From 1717 on, for nearly fifty years, the English and Dutch companies were unable to save their vessels from being captured by Kanoji Angre. It was only in 1756 that a powerful English squadron managed to defeat him but could not disintegrate his power. But to call the Maratha activities during their belligerency against the Mughal Empire “piracy,” can hardly be justified.

In Southeast Asia, the Portuguese had never succeeded in enforcing their assumed monopoly of trade and the displaced Arab and Indian merchants supported a rival trading power of Achin, a sultanate at the northern end of Sumatra. Although there were several skirmishes between Portuguese and Asian traders, they were rarely termed as piracies. But after the Dutch conquered Malacca in 1641, they concluded monopoly treaties with some, but not all, of the Malay sultanates in the area. In 1668, the Dutch instituted a regular patrol of the Strait of Malacca “to prevent ships from passing Malacca without first calling there and paying the customary dues.” It is important to remember that until about 1750, Dutch rule in Indonesia was confined to the administration of scattered establishments and forts from a central point, Batavia. The state of Mataram and the sultanates of Achin and Terente and numerous lesser principalities remained nominally independent, though greatly weakened, due to internal troubles and the operation of new economic forces, especially the Dutch monopoly in the export of spices. The Dutch assertions of the right to monopolize trade through the Strait of Malacca and with Indonesian islands, however, was opposed not only by the English but by the Malay sultans. Although the Dutch did not enforce their blockade of the straits upon England because of the Anglo-Dutch relations in Europe, they tried to enforce it vigorously on the traders of all other nations – whether the Chinese, Japanese, Spanish, or the Arabs, Indians and Malays. There is little doubt that, despite Dutch claims to monopoly there was a traditional local trade by Malay small traders in the Malay peninsula owing to some river systems, although the Arabs and Indian traders continued their activities in areas, like Achin, that were not controlled by the Dutch. Malay and Indonesian traders carried on trade not only amongst themselves but also with Siam and the Philippine islands. All of this activity was regarded by the Dutch as illegal. On the other hand, small traders of the islands and even the sultans themselves considered the Dutch interference as violations of their traditional rights and “turned to a kind of guerilla warfare at sea against the Dutch.” These attacks “were denominated ‘piracy’ by the Dutch at the beginning of the eighteenth century.”

The situation remained the same throughout the eighteenth and the early part of the nineteenth centuries when there was no dominating power in Southeast Asia. The drive by the European Powers — the Dutch and the English — for political expansion in Southeast Asia led them to consider the Malay and Indonesian sultans as “sovereigns” or “pirate chieftains” as suited their purpose. It is interesting to note that even when a Malay sultan was to be accepted and recognized as a legal “sovereign,” usually in order to conclude a treaty with him, “the tendency was marked to label his military arm as ‘pirates’. Neither the Dutch nor the English had any scruple to use force to obtain monopoly treaties, or to enforce treaty rights once obtained, and declare anybody who resisted these pressures as “pirates” and “outlaws” — a simple formula to bypass all legal ramification. On the other hand, the Europeans would be anguished if a Malay sultan were to treat a European naval officer doing his duty as a “pirate,” particularly if the acts complained of occurred on the high seas or within the boundaries of a third state. It is clear, therefore, that much talk by Europeans about “piracy” in the Indian Ocean in the seventeenth, eighteenth and nineteenth centuries was only a manipulation of the concept to suit their political needs. Under the pretext of suppressing “piracy,” the European Powers could and did use ruthless methods in furthering their interests and expanding their political influence.

English Consolidation of Maritime Power and Expansion to Southeast and East Asia

The English supremacy of maritime power was one of the most important factors in shattering Napoleon’s dream of bringing practically the whole of Europe under his political control and ultimately led to his defeat and banishment. By declaring France and its allies in a state of blockade during the Revolutionary and Napoleonic Wars in Europe, the British not only wanted to weaken their enemy’s naval strength and kill off enemy commerce and shipping, but also win a larger permanent share of the world’s seaborne commerce for themselves. Because of their command over the sea, the British claimed for their warships the right to stop neutral vessels anywhere on the high seas, inspect their cargoes and remove or destroy such as were contraband goods, as defined by the British themselves. The opponents, especially France, contemptuously rejected these doctrines of “paper blockade” and said that a country was lawfully blockaded only in so far as warships patrolled its ports. As against the British doctrine of command of the sea, the neutral and lesser naval Powers argued for the “freedom of the seas,” claiming extensive rights for neutrals to trade with all belligerents in time of war. By monopolizing the sale of sugar, tobacco and other overseas goods, Britain more or less destroyed the Continental System controlled by Napoleon. On the other hand, export of British cotton goods more
than doubled in four years between 1805 and 1809, and the annual income of the British people increased twofold in the Revolutionary and Napoleonic Wars. After the defeat of Napoleon in 1814, and before agreeing to hold an international congress at Vienna, both Britain and Russia specified certain matters that they would reserve for themselves as not susceptible to international consideration. Apart from some other subjects, Britain refused any discussion of the freedom of the seas and barred all colonial and overseas questions. The revolts in Spanish America were left to run their course.

During the Revolutionary and Napoleonic Wars, the British were also increasing their control of India, bringing much of the Deccan and the upper Ganges Valley under their rule. Also, since the Dutch had entered into an alliance with the Napoleonic France, the British Government was able to utilize its position in India for pursuing an aggressive policy in the East. Malacca was attacked and taken from the Dutch in 1795 and again in 1807. They also conquered the Cape of Good Hope, Ceylon and Java from the Dutch. Although they returned the Netherlands Indies to the Dutch (keeping Ceylon and the Cape) after the Congress of Vienna in 1815, they emerged as the strongest Power in both India and the Indian Ocean. Of all the colonial empires founded by Europeans in the sixteenth and seventeenth centuries, whose rivalry had been a recurring cause of war, only the British now remained as a growing and dynamic system. The old French, Spanish and the Portuguese Empires had been reduced to mere scraps of their former selves. The Dutch still had vast establishments, but all the important and intermediate stations — the Cape, Ceylon, Mauritius — were now British. The British were the only ones who had a significant navy. With Napoleon defeated and the Continental System in disarray, with the Industrial Revolution bringing phenomenal rise in power, machinery and capital, with no rival left in the contest for overseas dominion and a significant navy. With Napoleon defeated and the Continental System in disarray, the British embarked on a century of world dominance.

Notes

4. See for a succinct description of these reasons, Palmer, ibid., pp. 108—11.
5. Ibid., pp. 11—13.
43. Ibid., pp. 13—14.
44. Ibid., Chapter IV, p. 19; see also p. 20.
45. Ibid., pp. 15—16.
46. Ibid., p. 19.
47. Ibid., p. 21.
48. The maritime laws of Rhodes are one of the earliest codes of maritime law which were later adopted by the Greeks and the Latins. See Chapter II; see also Percy Thomas Fenn, Jr., "Justinian and the Freedom of the Sea," American Journal of International Law, vol. 19 (1925), p. 717.
50. See Fenn, op. cit., pp. 716; see also Christian Meurer, The Program of the Freedom of the Sea (Trans. from German by Leo J. Frachtenberg) (Washington, 1919), pp. 5—7.
51. There is no demarcation line where the sea ends and the harbour begins. Fenn, ibid., p. 724.
52. Ibid., p. 726, but cf. Pitman B. Potter, The Freedom of the Seas in History, Law and Politics (London, 1924), pp. 32—35, where he says that Roman law applied only to private relations and not to inter-state relations.
53. Comparing the Portuguese, Dutch, British and French trading practices in Asia in the seventeenth century with Graeco-Roman trade in the first three centuries A.D., Sir Mortimer Wheeler finds a lot of similarity in them. See quoted in John Norman Miksic "Archaeology, Trade and Society in Northeast Sumatra." Unpublished Ph.D. thesis submitted at Cornell University, Ithaca, N.Y. (1979), pp. 9—10. It may be pertinent to point out, however, one difference, namely, that while no one sought to control trade in Graeco-Roman trade, the European companies in the seventeenth century were engaged in bloody struggles with Asian rulers and themselves to create their own monopolies.
55. Ibid., p. 3.
56. Ibid., pp. 4—5; Potter, op. cit., pp. 36—38.
57. See Fulton, ibid., pp. 9—10; Potter, ibid., pp. 40—41.
60. Ibid., p. 34.
61. Grotius even included the Mediterranean as an example of the inner sea. He conceded the prescriptive rights of Venetians and Genoese because they "possess a continuous shore line on the sea." Ibid., p. 58.
62. Ibid., p. 37.
63. Ibid., p. 38.
64. Ibid., pp. 40—41.
65. Ibid., pp. 41—43.
66. Ibid., pp. 45—46.
67. Ibid., Chapter VII, p. 52.
68. Ibid., pp. 53—58.
69. See Knight, op. cit., p. 105. According to Knight the "Spanish scholastic jurisprudence was at once independent, scientific and humane, and has never since, in these characteristics, been excelled. Without it, its spirit and inspiration, as well as its learning and acumen, there would have been no international law of Grotius and of modern times as we now know it." See also Nys, op. cit., p. 98; James Lorimer, as quoted in Nys, p. 99.
70. James Brown Scott, The Spanish Conception of International Law and of Sanctions (Washington, 1934), p. 51. He believes that "the modern law of nations of which Victoria was the expounder, Suarez the philosopher, and Grotius the systematizer, is the contribution of what we may call, and indeed must call, the Spanish School of International Law. For if Grotius was not a Spaniard by conception of international law, and so far as the basic principles of his system are concerned, he was indubitably a member of the Spanish School." See also Scott, op. cit., p. xiv.
72. Ibid., pp. 61—64.
73. Ibid., p. 63.
74. Ibid., p. 66.
75. Ibid., pp. 67ff.
76. Ibid., p. 68 (emphasis added).
77. Ibid., p. 70.
78. Ibid., p. 71.
79. Ibid., p. 72.
80. Ibid., p. 73; See also p. 75.
82. See quoted in Villiers, op. cit., pp. 147—48.
83. Thus Portuguese treaties with South Indian rulers in the early decades of the sixteenth century contained a stipulation that all spice in the land should be sold to the King of Portugal. See Portuguese-Quilon Treaty of 1520 and several other treaties between 1504—16 in K.P.P. Menon, History of Kerala (1929) quoted in Alexandrowicz, op. cit., p. 128.
85. Ibid., p. 43.
86. Ibid., p. 129.
87. Milburn, op. cit., p. 369.
88. The Dutch concluded treaties with the Ruler of Macassar (1604, 1637); the Ruler of Johore (1606); the Ruler of Terente and Tidore in the Moluccas (1607, 1609, 1624); the Ruler of Achin (1607); and the Ruler of Jacarta (1611). See Alexandrowicz, An Introduction to the History of the Law of Nations, op. cit., p. 43; see also for details of these treaties, Java Factory Records, vol. I, in India Office Library and Records, no. IOR G/21/1, pp. 29 ff; 72—73.
89. See for several such treaties, Alexandrowicz, "Discriminatory Clause in South Asian Treaties," op. cit., pp. 32—39.
91. See quoted in Resink, op. cit., p. 46.
92. Ibid., p. 46—47.
93. Villiers, op. cit., p. 149.
94. European naval superiority over the Asians conferred defensive advantages on the Hollanders, while the Portuguese and later English posts were always exposed to their formidable land owners of India. See Ballard, op. cit., pp. 211—12.
96. See Parr, op. cit., p. xix.
97. The Dutch shipyards were highly mechanized and they could produce almost a vessel a day. Not until the eighteenth century were the English able to compete with the Dutch in merchant shipping. See Stavrianos, op. cit., p. 128.
125. Ibid., pp. 109-10.
121. See quoted in Potter, op. cit., 55.
120. Queen Elizabeth's reply to the Spanish envoy Menodoza in 1580, quoted in Christian Meurer,
132. See Knight, op. cit., pp. 147-49.
131. J.H.W. Verzijl,
128. In
127. Ibid., p. 79.
124. Ibid., p. 103.
126. See G,N, Clark, "Grotius' East India Mission to England,"
118. See Bruce, op. cit., p. 31.
114. For details of the Drake expedition, see Villiers, op. cit., pp. 153ff.
115. Ibid., p. iv.
123. See quoted in Panikkar, op. cit., p. 61.
117. See quoted in M.K. Nawaz, "Some legal aspects of Anglo-Mogul Relations," Indian Year
113. For details of the Drake expedition, see Villiers, op. cit., pp. 153ff.
115. Ibid., p. iv.
129. See quoted in Panikkar, op. cit., p. 61.
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131. J.H.W. Verzijl,
128. In
127. Ibid., p. 79.
124. Ibid., p. 103.
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113. For details of the Drake expedition, see Villiers, op. cit., pp. 153ff.
115. Ibid., p. iv.
129. See quoted in Panikkar, op. cit., p. 61.
190. Sir Kenelm Digby in a letter from Paris to Lord Conway, quoted by Fulton, ibid., p. 375.

191. See quoted in Potter, op. cit., p. 61; see Butler and Maccoby, op. cit., p. 42.

192. According to Toussaint, the French privateering started in the Indian Ocean as early as 1506 and continued along with other European operations until the nineteenth century. Many times these privateers turned into outlaws and professional bandits. See Toussaint, op. cit., pp. 160–63.


194. According to William McFee, "whether maritime trade or piracy came first is like arguing about the egg and the hen. Perhaps piracy came first" and it "was the oldest maritime profession." He also states that "conditions favourable to piracy existed in the Mediterranean more than anywhere else in the world throughout history." The Law of the Sea (New York, 1950), pp. 78–79.


196. England until the seventeenth century had no national navy. The ships that had defeated the Spanish Armada are said to have been the private property of Queen Elizabeth. Toussaint, op. cit., p. 134.

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198. In 1654, after the Anglo-Dutch War, the Dutch were compelled to salute the British flag in the "British Seas," an undertaking the renewal of which was insisted in 1667 at the end of a Second Anglo-Dutch War. The Third Dutch War of 1672–74 was precipitated all but deliberately by another incident over a salute when small British yachts, _The Merlin_, sailing by the Dutch Admiral's squadron, fired into the fleet because she had not been saluted. The Dutch were forced at the peace of 1674 to order even whole squadrons to salute a British ship. See Butler and Maccoby, op. cit., p. 45.

199. Fulton, op. cit., pp. 368; see also Butler and Maccoby, op. cit., pp. 44–45.

200. In 1654, after the Anglo-Dutch War, the Dutch were compelled to salute the British flag in the "British Seas," an undertaking the renewal of which was insisted in 1667 at the end of a Second Anglo-Dutch War. The Third Dutch War of 1672–74 was precipitated all but deliberately by another incident over a salute when small British yachts, _The Merlin_, sailing by the Dutch Admiral's squadron, fired into the fleet because she had not been saluted. The Dutch were forced at the peace of 1674 to order even whole squadrons to salute a British ship. See Butler and Maccoby, op. cit., p. 45.

201. Fulton, op. cit., pp. 368; see also Butler and Maccoby, op. cit., pp. 44–45.


205. Fulton, op. cit., p. 523.


208. The Portuguese and the British realized their folly of trying to challenge the authority of well-established states when they came in conflicts with the rulers in 1633 and 1689 respectively. See Panikkar, op. cit., p. 64.


211. According to William McFee, "whether maritime trade or piracy came first is like arguing about the egg and the hen. Perhaps piracy came first" and it "was the oldest maritime profession." He also states that "conditions favourable to piracy existed in the Mediterranean more than anywhere else in the world throughout history." The Law of the Sea (New York, 1950), pp. 78–79.


217. McFee, op. cit., p. 112.


221. See quoted in Fulton, ibid., p. 374.

222. See Palmer and Colton, ibid., pp. 411–12.


225. See quoted in Fulton, ibid., p. 375.


229. See quoted in Poter, op. cit., p. 61; see Butler and Maccoby, op. cit., p. 42.

230. See quoted in Potter, op. cit., p. 61; see Butler and Maccoby, op. cit., p. 42.

231. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

232. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.


235. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

236. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

237. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

238. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

239. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

240. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

241. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

242. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.

243. See _Mare Liberum_, the works of Hugo Grotius, op. cit., pp. 7–8.
5. RESURGENCE OF MARE LIBERUM AND
THE DEVELOPMENT OF THE MODERN LAW OF THE SEA

English Consolidate their Power

In the first half of the nineteenth century, the British further consolidated their power in India. The Marathas surrendered in 1819; the Punjab, defended by the Sikhs, was conquered between 1840 and 1850. The Indian Rebellion or Mutiny of 1857 led to the extermination of the last Mugal, suppression of the East India Company and the setting up of a colonial rule in India. From then on, it was not merely a British possession, but "a country 'owned' by the British people and governed primarily in their interests." With British rule firmly established in India, it began to disclose imperial ambitions towards neighbouring states. In order to secure the important trade route to China, it was essential to control the region of Malacca Strait. Since it had given Java and Malacca back to the Dutch after the Vienna Treaty, it acquired Singapore from the Sultan of Johore in 1819. Better located than Malacca, it was not long before Singapore supplanted Malacca as the main emporium on the trade route to China. In 1823, the value of its imports and exports had reached to over thirteen million dollars. The Dutch were angry and pulled a long face, but had no choice. In 1824, by an Anglo-Dutch Convention, even Malacca was handed over to Britain and the spheres of activity of the two Powers were definitively defined. By 1885, Burma was also completely in their hands and a British protectorate was established in Malaya in 1914.

Commercial Revolution in Europe

The great expansion of Europe overseas led to remarkable economic growth of Europe. In the age of expanding oceanic communications, Europe became the centre from which America, Asia and Africa could all be reached. The first to profit had been the Portuguese and the Spanish and they had retained the monopoly through most of the sixteenth century. The decline of the Iberian Powers paved the way for the triumph of the Dutch, the English and the French. In the eighteenth century, global economy, which had come to be created in a rudimentary form, had phenomenal expansion and the European countries, especially the Atlantic region north of Spain, became incomparably wealthier than any part of the world. In the commercial rise of Europe, the British conquest of India was a unique event in the history of both Asia and Europe. For the first time in history, a great and vast Asian state, which had always symbolized for Europe Eastern grandeur and power, had come to be completely subjugated by a European nation with relatively small forces which had come from a great distance. India had been conquered earlier also by the Muslims. But no Muslim ruler had ever been able to conquer the whole of India. Moreover, Muslims had come to be absorbed by India and they had become native Indians. For the first time the door was now open to exploit the almost unlimited natural and human resources of this vast land. Trade with India so far had been extremely burdensome for Europe. Ever since Roman times, Europe needed Indian spices, muslins, cloth and other exotic things, while India did not need anything from Europe and demanded only gold and silver bullion. Even in the seventeenth and eighteenth centuries, it attracted the metal currency and money Europe received from the New World. Now for the first time a European nation succeeded in dispensing with the sending of metals to India by the establishment there of sovereign rights. It came to possess enough subjects and taxable commodities to enable it to take desired Indian goods without bringing capital into India. The other European peoples had still to trade there, at a loss, using metallic currency. But, as the French historian, Abbe de Pradt, pointed out, the more English sovereignty spread into India, the more it exempted even other European countries from the needs to send capital into that country. The general interest of Europe thus came to be identified with that of England, and it became in the interest of all Europe to maintain the British power in India. Consequently, concluded Abbe de Pradt, the people who have enough control over India to reduce substantially the exportation of European metallic currency into Asia rule there as much for Europe's benefit as for their own; their empire is more common than particular; more European than British; as it expands, Europe benefits, and each of their conquests is also a real conquest for the latter. That fact must be clearly understood as to avoid confusion on this subject, the vital crux of which is the nature of Europe's trade with Asia, which alone is enough to give the European states in that part of the world a level of existence quite different from what they have elsewhere. The economic growth and enrichment that resulted from the commercial ex-
pansion of Europe was so pronounced and spectacular that it is commonly referred to as the Commercial Revolution. The new trade to America and the East Indies routes had not only led to reorganization and expansion of the English and French East India Companies in the eighteenth century, with an increased investment of capital, but also to the establishment of a number of others - by the Scotch, the Swedes, the Danes, that we have referred to earlier, the imperial city of Hamburg, the republic of Venice, Prussia and the Austrian monarchy. By the end of the eighteenth century, vessels from Poland, Russia, Hamburg, Genoa, Trieste and Spain had also started voyaging to the Indian Ocean. With the exception of the Danish Company, which lasted some sixty years, they all failed after a few years, either for insufficiency of capital or because they lacked strong diplomatic, military and naval support; the Europeans were beginning to understand that it was in their mutual interest not to fight for the freedom of the seas. The eastern world, the Americas and Africa, were big enough to be exploited by everybody, and better together. It is important to note that, although the Dutch, French and English were often at war among themselves in Europe, nationalism did not enter into their relations in the East. As Toussaint points out, “the Europeans were far less busy killing one another in the Indian Ocean during the eighteenth century than they had in the seventeenth, and they should be seen rather as a large international association, in which business came before everything else.” So also, he adds, “the social distinctions then prevailing in Europe no longer existed in the region of the Indian Ocean. Across the equator, as the old saying goes, all men are equal. The French gentilshommes of the ancien régime did not feel beneath their dignity to ‘do business’ in the Indies, and the same was true for English gentlemen.” Under the general, overall control of the British Empire in India and protection of its strong navy in the Indian Ocean, all Europe could profit. In fact the commercial activity of the French, the Dutch and the Danes in the eighteenth century clearly shows that all the Europeans had come to realize the benefits of a strong British Empire in India and supported it. It is not surprising, therefore, that as the British position became stronger in India and the Indian Ocean, its support for the doctrine of mare clausum weakened. Thus, Fulton noted:

As maritime commerce extended and the security of the sea became established, it was felt more and more that claims to a hampering sovereignty and jurisdiction were incompatible with the general welfare of nations; and as the states interested in this commerce had the greatest power, the assertion of a wide dominion was gradually abandoned, surviving only in remote regions or in enclosed seas, like the Baltic.

For Britain and France in particular the eighteenth century - between 1715 and 1787 — was an age of phenomenal rise. The main feature of the Commercial Revolution was the marked increase in the volume of trade. While England’s trade - both imports and exports - rose between 500 to 600 per cent, French imports from overseas territories increased tenfold and exports seven- to eightfold. While Europe still sought from Asia its spices, now brought in mainly by the Dutch from Indonesian islands, it received more manufactured goods, like rugs, Chnaware and cotton cloth, which were in great demand. Asia was still superior in technical skills. Cotton fabrics were never produced at a price to compete with India. The American trade was based only on one commodity, sugar, produced in “plantations,” owned by absentee in France and England, and produced in quantity with cheap labour of Negroes brought from Africa as slaves. The plantation economy in sugar and later in cotton (after 1800), led to manifold increase in the slave trade brought from black Africa. The phenomenal rise of British capitalism in the eighteenth century, it has been pointed out, was based to a considerable extent on the enslavement of Africans. The West European merchants sold the American and Asian products to their own peoples and central and East European countries, including Russia, and made huge profits.

Commercial Revolution Leads to Industrial Revolution

There is little doubt that “it is the riches of Asian (and American) trade flowing to Europe that enabled the great revolution to take place” in Europe. By the end of the eighteenth century, as we have seen, the British had conquered a huge colonial empire in America, staked out markets all over the Americas and Europe, built up a large merchant marine and won command of the sea. They could sell more, if only more could be produced. They had the customers, they had the ships, and even more important, they had the capital with which to finance new ventures and new ideas. To meet the demands of the new markets, the industries had to improve their organization and technology. It is not surprising that the breakthrough in scientific inventions leading to the development of big industries and rise of production came in England. Although France had been almost in an equal position until 1763, it lost ground when it was driven out of Canada and India in 1763. The British blockade in the Revolutionary and Napoleonic Wars also took their toll and France could not recover its commerce almost until 1825. Amongst the numerous inventions discovered under the stimulus of great demand, one may mention a series of successful inventions in the textile industry, especially the steam engine applied to cotton mills in the 1780s. Cotton cloth, originally imported from India, had become so popular that it had threatened the powerful woolen interests and led to the prohibition of the import of cotton cloth or goods. Protected by this law and
helped by the new invention, the textile industry progressed tremendously with the accompanying developments in the exploitation of iron and coal. The developments and expansion of the textile, mining and metallurgical industries, created a need for improved transportation facilities and led to building of canals and roads. After 1830, roads and waterways were challenged by railroads. The steam engine was applied also to water and by 1850 the steamship had proved better and faster than the sailing ship. The power industry was revolutionized after 1870 by the harnessing of electricity and by the invention of the internal combustion engine which used chiefly oil and gasoline. Communications were transformed by the invention of the wireless in 1896.12

The Industrial Revolution took place first in England. This explains in large part England’s primary role in world affairs in the nineteenth century. After the first quarter of the nineteenth century, industrialization started spreading gradually to the continent of Europe, and even to the non-European portions of the globe. But it was not until 1870 that Britain faced any competition from abroad. The British had a virtual monopoly in textiles and machine tools. In fact the British capitalists were accumulating surplus capital and were on the look-out for investment opportunities on the Continent and beyond. London became the world’s clearing house and financial centre.

New Imperialism

The needs and demands of the Industrial Revolution were largely responsible for the creation of huge European colonial empires in Asia and Africa. With the rapid industrialization in the last quarter of the nineteenth century, several European countries had developed substantial industries. The close relationship between the new imperialism and Industrial Revolution may be seen in the growing need and desire to obtain colonies which might serve as markets for the rising volume of manufactured goods. The several European and overseas Europeanized countries like the United States, Canada and Australia, which had become industrialized in the nineteenth century, were soon competing with each other for markets. In the process they raised their tariffs to keep out each other’s products. The only alternative was to sell their products to Asia and Africa and have colonies to provide “sheltered markets” for each industrialized country.

The Industrial Revolution also produced surplus capital which could not be invested in Europe, and led the European countries to seek colonies as investment outlets. In the first half of the nineteenth century most of the investments were made in the Americas and Australia – in the white man’s world. In the second half of the century, they were made mostly in the non-white world of relatively unstable countries of Asia and Africa. The Industrial Revolution also created a demand for raw materials to feed the machines. Many of these materials – jute, rubber, petroleum and various metals – could be obtained from Asia and Africa. In most cases, heavy capital outlays were needed to secure adequate production of these commodities.

There were, of course, other factors responsible for the spread of imperialism which is defined “as the government of one people by another.”13 Practically all of the Asian political systems, weakened by internal dissentions and outside pressures, were crumbling. There arose by this time an enormous difference in wealth and power between the decaying Asian empires and growing European states, enriched through the Commercial Revolution, and bubbling with new strength provided by the Industrial Revolution in the form of iron and steel ships, heavier naval guns and more accurate rifles. While Queen Elizabeth had dealt with the Great Mugal with genuine respect, and even Napoleon had pretended to regard the Shah of Persia as equal, coloured peoples now came to be considered as “inferior,” “backward” and “uncivilized.” In the vogue of social Darwinism, with its doctrines of struggle for existence and survival of the fittest, there arose the pride of racial superiority and the white man’s “burden” of ruling over the “inferior” coloured peoples of the earth. As Cecil Rhodes, the British Empire builder, said:

I contend that we are the first race in the world, and that the more of the world we inhabit the better it is for the human race... If there be a God, I think what he would like me to do is to paint as much of the map of Africa British red as possible.14

British Maritime Superiority Encourages Freedom of the Seas

The net result of all these economic, political and psychological factors was the greatest land-grab in the history of the world. After the Napoleonic Wars, Britain had become the colossus of the world. France had not yet recovered and the United States was still in the making. The British, who were prominent in the maintenance of colonial commercial monopolies until the early quarter of the nineteenth century, and asserting belligerent rights at sea, were in the second half of the nineteenth century mainly concerned with commercial prosperity and free trade. As McFee points out, “there was so much trading and it could be done so much cheaper with a completely free and open sea, that the very idea of ‘owning’ the sea vanished.”15 In the Paris Peace Treaty in 1856, after the defeat of Russia in the Crimean War, the rights of neutrals to trade in war time came to be recognized as part of international law. England had already given up forcing foreign ships to strike in British seas after the Battle of Trafalgar in 1805. After France and Spain had been humbled, it came to be
considered as an inconvenience which had long outgrown its utility and could not be maintained “except at the cannon’s mouth.” Pretensions to sovereignty which related to the fisheries along the British coasts had also become an anachronism since the Dutch fisheries had more or less been ruined and England had become the greatest fishing Power in the world. In fact, it joined Holland to protest against the Danish claims to prohibit fisheries within 69 miles of Greenland and Iceland and disregarded Danish ordinances. With British supremacy firmly established and relative calm at home, Europe embarked upon joint exploitation of Asia and Africa. In the age of new expansionism and colonization in the wake of the Industrial Revolution, freedom of the seas became a necessity. It is significant to note, however, that Europe came to accept freedom of the seas not because it suddenly was convinced of the doctrine but because this doctrine became the need of the time. “As the world shrank,” observed Butler and Maccoby, monopolistic pretensions broke down; they vanished not in obedience to any abstract theory, nor in the twinkling of an eye, but gradually, as nation after nation estimated the effort necessary for the maintenance of each particular claim and, openly or tacitly, threw up the sponge. ... Vast tracts of land became open to exploration, and the spirit of adventure found an outlet upon continents quite as much as on the seas. The point of saturation, of a clash between the nations, in colonial enterprise was still distant. The claim to an exclusive lordship of the seas became meaningless....

Even so Grotius, who had been the much abused “villain,” especially in England, for nearly two hundred years and had been discarded as a false prophet by most of the European Powers which practiced mare clausum, was resurrected as a great hero and “father” of international law. He was indeed welcomed as a gallant “knight whose kiss [had] awakened” the freedom of the seas which until modern times “slumbered the sleep of the Sleeping Beauty.” Selden’s scholarly work, an accepted authority for more than two centuries, was quietly put on the back shelves of the library to collect dust and was forgotten even in his own country, Grotius, it came to be said with a hindsight, had “defended the interests of mankind against the narrow-minded national policy of the Portuguese and English” and, therefore, “there could be no doubt as to the final victory of his principles.” It was suggested that his books, Mare Liberum and later De Jure Belli ac Pacis, “spread the doctrine of the freedom of the sea throughout the entire world.” We have already discussed, however, what led Grotius to write his Mare Liberum, to plead for the freedom of the seas, and later to abandon it in defense of the interests of his country without regard to any principle. In learning at least, Selden’s work was perhaps better, but it was “his misfortune that the cause he championed was moribund, and opposed to the growing spirit of freedom” in the nineteenth century. Be that as it may, it is not incorrect to say that “posterity has decided, that Grotius maintained a good cause badly and that Selden defended a very bad cause well.”

**Freedom of Trade: Eleventh Commandment**

With the increasing European need and demand for trade in an era of expanding economy, it came to be asserted “that there was a divine right to trade everywhere,” and “that it was unnatural for governments to close their countries to the free flow of trade.” With her dominant position in Europe and Asia, her expanding economy, and unchallenged shipping, Britain required new and expanding markets. If a country like China did not desire to encourage foreign trade, too bad for her: “she must be made to do so, in the interests of peace, prosperity and progress.” It is important to remember that China had granted certain limited commercial rights to the Europeans since the seventeenth century. The English trading community was granted further facilities at the end of the eighteenth century after the British King sent Lord Macartney to the Chinese Emperor as his ambassador (1792–94) with a request to permit trade facilities to his subjects. But the Chinese and, later, Japanese were naturally skeptical about the European intentions. As the English historian, Plumb, recently said, “few Western historians will face up to the consequences of the Western onslaught in India and the East, which broke not only webs of commerce but of culture, that divided kingdoms, disrupted politics and drove China and Japan into hostile isolation.”

A German writer of the eighteenth century, Justi, pointed out that “the Government of China, fully aware of what had happened in the East Indies, rightly imposed limitations on European merchants in Canton in order to counteract possible developments detrimental to its sovereignty.” Throughout history, as we have seen earlier, China had not only permitted trade with other countries but encouraged it. Its sudden decision to avoid the Europeans was because of their abuse of privileges and rights granted to them by other Asian states which were until then “within the sphere of Chinese civilization.” China thereafter adopted a “policy of distrust and isolation towards all European powers.” Wolff in his Jus Gentium confirmed this reason of the Chinese trade policy stating that “for the purpose of preserving their own interests [they] did not wish to unite in trade with other nations.” Whatever European writers might say about China’s arrogance to trade with foreign “barbarians,” the real reasons for Chinese hesitation to permit European companies (Dutch, English and French) were well understood in Europe and several publicists criticized the high-handedness and cupidty of these companies. Apparently China also avoided trade with the Europeans.
on the basis of its assumed superiority. As the Chinese Emperor, Chien Lung, wrote to the King of England at the end of the eighteenth century:

I set no value on objects strange or ingenious and have no use for your country's manufactures. ... Our Celestical Empire possesses all things in prolific abundance and lacks no product within its own borders. There was, therefore, no need to import the manufactures of outside barbarians in exchange for our own produce. ... We have permitted, as a signal mark of favour, that foreign hongs should be established at Canton so that your wants might be supplied and your country thus participate in our beneficence. 33

The Chinese might have lacked diplomacy, finesse and language in their dealings with Europeans, but there seems to be no doubt about the real reason for their attempts to avoid having any trade relations with them. It may also be noted that, while the Chinese or other Asians through the centuries never showed any hostility to the impact of other cultures or their religious and political ideas, like Hinduism or Mahayana Buddhism which were welcomed, they felt threatened by Europeans who themselves felt and declared that theirs was "a superior civilization on the march." 34

In any case, England would not accept the humiliating restrictions which China had enforced on European trade for so many years. So far, while European merchants had been buying immense quantities of Chinese silk, tea and rhubarb, they had little to sell them and had to export bullion to China. But a new method of payment was discovered in the eighteenth century in the growing popularity of opium. Though the trade was illegal, the British Government strongly supported it and forced a war on China to accept it in 1839. China was humiliated and in the Treaty of Nanking (1842) that followed the "Opium War" (1839–42): not only was Hong Kong annexed, but four other Chinese ports (Amoy, Foochow, Ningpo and Shanghai) opened to foreign commerce. Similar treaties were signed with the United States, (which since its successful revolution against England in 1776 had become a major maritime power), 33 at Wanghia (July 3, 1844) and with France at Whampoa (October 24, 1844). In Macao the Portuguese began to claim wide authority which they never had at the height of their power. It is beyond the scope of this chapter to go into the details as to how China's isolation was forcibly broken to compel her to trade with European nations and to teach her that, far from being superior to all other nations of the world, she was actually inferior. By numerous treaties forced upon China after several military interventions on one pretext or another, most European countries – England, France, Belgium, Russia, Germany – and the United States claimed rights, privileges, dignities and prerogatives, reducing the proud Chinese Empire to complete impotence. Still fighting with each other in Europe, together these Powers supporting each other's claims virtually partitioned Chinese vast territories into their "spheres of influence" for joint exploitation of their resources. They claimed extra-territorial rights for their consuls over their nationals through capitulation treaties, and adopted a policy of detaching from China states which had accepted her suzerainty. Thus, France annexed Cambodia (1863) and Annam (1873), and Britain took over Upper Burma in 1886. Even Japan, which had early learnt the secrets of the West and "Europeanized" itself, after defeating China in the Korean War in 1884, insisted on being given all the privileges which the European Powers enjoyed, including extra-territoriality. In 1899, as Panikkar relates, "China not only lay prostrate but her historic homelands were all but formally partitioned." 36 The United States, fearing that all China might soon be parcelled out into exclusive spheres of influence, declared its new "Open Door" policy in China to protect its commercial interests. According to this policy, China would remain territorially intact and independent, but the Powers having special concessions or spheres of influence could maintain the Chinese 5% tariff and must allow businessmen of all nations to trade without discrimination. The British supported this policy for fear that Japan or Russia, as the Great Powers adjacent to China, were the only ones that could dispatch real armies into its territory. It is important to remember that the Open Door was a programme not for leaving China to the Chinese, but for assuring that all outsiders should find it literally "open." 37

Even the whole vast continent of Asia was insufficient for the voracious appetite for raw materials of European industries and their need of still larger markets. Until 1870, the vast continent of Africa had been largely unknown. With the exceptions of French Algeria and British South Africa, Europeans had insignificant establishments consisting mostly of seaports and trading stations. With the termination of European slave trade, 38 most of these coastal footholds were virtually abandoned. But as the demands of the Industrial Revolution became more acute, the need for colonies came to be seriously felt in the last quarter of the nineteenth century. The leader of the imperialist drive was King Leopold of Belgium, whose annexation of vast territory in the Congo in 1876–77, ostensibly to help "introduce civilization" into Africa, jolted the other European nations. The French, Germans, Portuguese and the British followed soon after in their scramble for colonies in Africa. In 1884–85, an international conference was held in Berlin to provide for an international code for territorial aggrandizement in the dark continent. Within less than two decades the whole of Africa was partitioned by the European industrial Powers to be fully exploited for their economic and political interests.

Intent upon exploiting their colonies in Asia and Africa, jointly and in cooperation with each other as far as possible, it is not surprising that the European countries wanted the oceans to be as safe as possible to serve as free highways of the world. England, as the strongest maritime Power in an age of laissez
fai re, became the strongest champion of the freedom of the seas. As early as 1848, it felt strong enough, both in maritime and economic fields, no longer to fear any competition and abrogated the navigation acts. In fact, by the beginning of the nineteenth century, England started feeling "embarrassed by the shadow of her claims, but she made no serious attempt to preserve the substance." 39

Ever since its independence from England in 1776, the United States had also been interested in the freedom of the seas. As neutrals during the Revolutionary and Napoleonic Wars, Americans had favoured the right of free trade for neutrals. From the eighteenth century itself they had also been interested in trade with the East Indies. They had been voyaging to China since 1784. In 1844, they also concluded a treaty with China, along with the European Powers, under which Chinese ports were definitively opened to Western trade. In fact after England, it was the United States which sent the greatest number of ships to China. Until the middle of the nineteenth century, American ships made their way to China via the Cape of Good Hope, crossing the Indian Ocean. After the discovery of gold in California in 1848, they started using the Pacific route via Cape Horn and San Francisco. By 1851, Americans were so sure of their maritime supremacy that some of them challenged British shipowners to a race from England to China and back. There is little doubt that the United States played an important role in the acceptance of the freedom of the seas doctrine in the Atlantic Ocean, and in its restoration in Asia and the Pacific. 40

As late-comers on the international scene for acquiring colonies in Africa for their growing industries, Germany and Italy were equally interested in keeping the oceans free and safe for navigation. Apart from acquiring colonies in Africa, France had revived its activity in the Indian Ocean by consolidating its conquest of Indo-China in 1887, occupying Djibouti in 1888 and conquering Madagascar in 1895. In this mood of free movement for all in Africa, even Portugal experienced a colonial renaissance by acquiring Angola and Mozambique in 1878–79. With everyone busy exploiting the colonies, there was no need to keep the oceans closed.

The invention of the steamship in the beginning of the nineteenth century, and the appearance of big steamship companies after 1842 gave further boost to the acceptance of free oceans, although they discouraged the local native country sailing ships in the Indian Ocean which were unable to compete with the companies. The navigation companies prepared the way for submarine cable companies which began to operate about 1870. In 1865 communication was established by means of submarine electric cables. In 1870, submarine lines came to be laid between Bombay, Aden and Alexandria. In 1901 cables connected South Africa with Australia, passing through Mauritius. 41 The need to protect these submarine cables led to the laying of these cables to be accepted as part of the freedom of the seas doctrine under international law.

In 1856, after the Crimean War, privateering was abolished by the famous Paris Declaration on Maritime Law. The declaration also prohibited the capture of enemy goods except contraband (which was not defined) on neutral ships and of neutral goods except contraband on enemy ships; and required blockades to be effective in order to be legally recognized, that is, to be maintained by a force sufficient to prevent access to the coast held by the enemy.

But even after the "freedom of the seas" came to be accepted as an incontrovertible principle, Denmark continued to exploit her geographical advantage by collecting the Sound dues till 1857. A solution was reached only after the principal maritime Powers of Europe agreed to buy the Danish rights for three million pounds. 42

Modern International Law Develops

It is important to note that not only freedom of the seas and other norms of maritime law, but most of the important rules of what is known as the modern system of international law came to be formulated and developed in the second half of the nineteenth century and later, according to the needs of the European business interests. Thus, while classical jurists, like Grotius, the Spanish fathers, Puffendorf, Vattel and others, had never questioned the legal personality of the Asian states in the seventeenth and eighteenth centuries, in the nineteenth century, as their political fortunes dwindled, these states came to be considered not "civilized enough" to be members of the international society and mere objects of international law. 43 As Professor Alexandrowicz has persuasively shown, "while European-Asian trade was... expanding, European egocentricity left the sovereigns of the East Indies, which had largely contributed to the prosperity of the European economy, outside the confines of 'civilization' and international law shrank to regional dimensions." 44 Universal law of nations, based on the natural law ideology of the classical writers, gave place to European international law justified by positivism. A new constitutive theory of recognition reduced the "non-European entities which had enjoyed a full legal status within the pre-nineteenth century family of nations to the position of candidates for admission to its membership or for recognition by the founder members of the European community of states." 45

The result of the non-recognition of Asian states was that hardly any conduct towards their peoples or aggression of their territories, could be questioned according to the European law of nations. Under the new imperialism, Europeans were by no means content simply to purchase what native merchants provided. They moved into "backward" countries more thoroughly. They invested capital in them, setting up mines, plantations, docks, ware-
houses, factories, refineries, railroads, river steamships. Taking over the productive life of the country, they transformed large elements of the local population into wage employees of foreign owners. Or they lent money to corrupt native rulers — the Khadive of Egypt, Shah of Persia, or the Emperor of China — to enable them to hold up their tottering thrones or sometimes just to help a shah or a sultan to build a new palace. Their missionaries went out to preach the gospel of peace, but many a time got into trouble with the natives; sometimes they were killed. Wealthy persons and businessmen travelled more, now that travel was so easy. All these needed protection. Investments had to be secured and all “civilized” persons, wherever they chose to go, should enjoy the security of life and limb. The whole law relating to responsibility of states — expropriation of alien property and rules relating to compensation, protection of nationals in foreign countries, “minimum standards of civilization” that must be met by each country in their dealings with foreigners, the right of intervention for the protection of rights of nationals, etc. — were developed during this period to protect the European countries’ interests in Asia, Africa and newly independent Latin America or their nationals who were living there.

To secure these investments, and for other reasons, the Europeans demanded political and territorial domination. Some areas were simply annexed and made “colonies,” outside the pale of international law, and were directly governed by white men. Others became “protectorates,” where a native chief or king was maintained and guaranteed against internal upheaval or external conquest. A European “resident” or “commissioner” usually told him what to do. In other regions, like China or Persia, where no single European state could make good its claims against others, they arranged to divide the country under their “spheres of influence,” each Power having certain privileges, and investment and trade opportunities within its own sphere. 44

In how many cases the Europeans intervened in Asia and Africa on the flimsiest of grounds and came to acquire wide powers, we need not discuss here. Nor is it our concern how they exploited their colonies, destroyed their economies, and made them mere appendages to the metropolitan Powers and their industries. 45 But it is important to note that all these aggressions and use of force against Asia, Africa and Latin America were not merely tolerated by other “civilized” nations, but sought to be justified according to international law by the new school of positivism.

The centuries-old Asian custom to permit the foreign traders who lived in Asian countries to apply their own personal laws in their disputes and dealings amongst themselves, degenerated into capitulation treaties, forcibly imposed on some of the Asian countries which had not been colonized and remained nominally independent, granting unique privileges to foreigners residing or doing business in their territories. Without the existence of this custom, Alexandrowicz correctly points out, European merchants arriving in the East Indies would never have been able to embark on their commercial career. Thanks to this ancient custom they got the necessary footholds from the local rulers which they gradually converted into larger administrations. 46 The nationals of the treaty Powers were placed under the consular jurisdiction of their countries giving them self-government in the “uncivilized” and “backward” Oriental countries like China and Siam, Egypt and Turkey, which were said to be unable to treat the Europeans according to the “minimum standards of civilization” as determined by the Europeans. 47

Territorial Waters

As the principle of mare clausum started losing its hold in the later eighteenth and early nineteenth centuries, under pressure of the Commercial and later Industrial Revolution, and that of mare liberum began to be accepted as a more useful principle, it was also recognized that a state must have exclusive jurisdiction and control in a part of the sea adjacent to its coastline for the protection of its security and other interests. In earlier ages in Asia, while the coastal states had exclusive jurisdiction in their ports, closed bays or roadsteads, there is no clear evidence of any maritime zone or territorial waters being accepted within the sovereign jurisdiction of the state. In Europe, however, perhaps because of incessant naval wars, besides the sovereignty of ports, roadsteads and closed bays, there developed along with the freedom of the seas the concept of territorial waters for the protection of coastal states.

...the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today. 48

Even the foremost advocate of the freedom of the seas, Grotius himself acknowledged the need and practice of maritime states exercising jurisdiction over some part of the neighbouring sea. But while the sovereign rights or jurisdiction of a state over a part of the adjacent sea was generally recognized by the usage of nations and the opinions of publicists, 49 there was no agree-
ment as to the extent of these “territorial waters,” or “maritime or marginal
sea,” or “maritime belt,” as it came to be variously called. Different limits
were suggested at various times. Some early Italian jurists suggested 100
miles or a distance from shore as could be covered in two days' navigation. In
several treaties and ordinances of the sixteenth and seventeenth centuries, the
range was determined by visual horizon. Grotius also referred to the range of
vision as a boundary when he said that the controversy regarding freedom of
the seas did not concern a gulf or a strait, “nor even all the expance of the sea
which is visible from the shore.”

The basis of the claim of coastal states to a belt of the sea was the principle of
protection; during the seventeenth and eighteenth centuries another principle
was gradually evolved, viz. that the extent of this belt should be measured by
the power of the littoral sovereign to control the area. Although Grotius had
not mentioned it in his Mare Librum, it is suggested that it was he who pro-
posed it to England in 1610 when he accompanied the Dutch delegation to
London to persuade King James to withdraw his proclamation against un-
licensed fishing. In any case, in his famous book De Jure Belli ac Pacis,
published in 1625, he said that sovereignty over a part of the sea could be
“acquired in the same way as sovereignty elsewhere, that is, ...through the
instrumentality of persons and of territory. It is gained through the instrumen-
tality of persons if, for example, a fleet...is stationed at some point of the sea;
by means of a territory, in so far as those who sail over the part of the sea along
the coast may be constrained from the land no less than if they should be upon
the land itself.” This vague principle was given precision and the idea was
translated into a maxim by another Dutchman, Bynkershoek, a judge of the
Supreme Court of Appeal of the Netherlands. In his book on the Dominion of
the Sea, published in 1703, he declared that the territorial dominion of a state
extended as far as projectiles could be fired from cannon on the shore: “the
dominion of the land ends where the power of arms terminates.” This, so-
called “cannon shot” rule, is pointed out by some historians, was not
“invented” by Bynkershoek although he was perhaps the first to introduce it in
the literature of international law. “It was a rule existing in practice, at any rate
for purpose of maritime neutrality in time of war, definitely in France and
most countries with a Mediterranean seaboard, and probably in Holland many
years before the time of Bynkershoek.” The Dutch jurist merely “approved
that rule,” but did not suggest “a uniform maritime belt stretching seawards
along the entire coastline of a state; he deals rather with a series of protected
zones, in the ports and places covered by the actual guns of fortresses placed on
the shore.” According to Fulton, there was a rule in England “that ‘the sea
should salute the land’, and the range of guns determined the limit within
which the salute ought to be rendered.” It was this rule which, in his opinion,
prepared the way for the acceptance of the Bynkershoek’s doctrine. “It was a
recognition that the vessel had passed within the sphere of territorial authority
of the particular state.” Be that as it may, the doctrine seemed to be attractive
as a compromise between the security, fishery and other economic interests of
the coastal state and the need of European countries in the eighteenth and nine-
teenth centuries to keep the oceans free and open. But there is a difference of
opinion among scholars about the connection of “cannon shot” rule with the
“three-mile” limit of the territorial sea. In the eighteenth century the range of
guns, actually in place on the shore, was approximately one marine league or
three nautical miles. According to some scholars this range was adopted as the
extent of the maritime belt by some of the big maritime Powers, such as Britain
and the United States. Others believe, however, that the “cannon shot” rule
“did no more than place under the protection of the territorial sovereign all
ships lying off the coast covered by the actual guns of actual ports or fortresses.
It was not a doctrine of maritime belt” and no cannon in the days of
Bynkershoek had a range of three miles, but much less. On the other hand,
“the true origin of three-mile rule is to be found not in Holland of the days of
Bynkershoek but in the Scandinavia of the latter half of the eighteenth
century.”

By that time measurement in leagues was the principle prevailing in several
European countries in matters relating to customs control, sanitary
regulations and fisheries. Denmark claimed its maritime belt as one league
which contained about four miles. According to Walker, “there is no reason to
believe that Denmark ever claimed four miles, as against the three miles
accepted by other Powers, on account of the superior range of [the] Danish
cannon.” In 1782, however, an Italian jurist, Gallani, suggested for the
purposes of neutrality a three-mile maritime belt as coterminus with a “cannon
shot” range as a convenient formula. In 1793, on the outbreak of war between
England and France, President Washington issued instructions that, provi-
sionally and for purposes of neutrality, the United States proposed to adopt a
maritime belt of three miles. Jefferson, as U.S. Secretary of State, communi-
cating this decision to the British Minister stated:

The greatest distance to which any respectable assent among nations has
at any time been given is the extent of human sight, estimated upwards of
twenty miles, and the smallest distance, I believe, claimed by any nation
whatever, is the utmost range of a cannon ball, usually stated at one sea
league.

Thus, the “cannon shot” rule was absorbed into a wider limit measured in
miles, which resembled closely the limits claimed by Scandinavian countries. In
any case, it furnished the legal foundation of several decisions by the courts in
England in the early nineteenth century, and was expressly introduced in the
Customs Consolidation Act of 1876 and the Territorial Waters Jurisdiction Act
of 1878. It was also adopted in a number of agreements or treaties which Great Britain concluded with other European countries and the United States, especially after 1876. Although the range of the cannon extended much further through the years, the three-mile rule came to be accepted and adopted by other maritime Powers, like Belgium, France, Germany, Poland and Holland, as a convenient compromise between conflicting interests.

But despite the attractiveness and simplicity of the cannon-range limit and then the three-mile belt, which had "originated in connection with neutral rights," it was not acceptable to several smaller countries and was not the universally recognized limit of territorial waters. Writers and states differed in their views as to the limit of the jurisdiction that a state might exercise in the neighbouring seas in the interests of its security. Thus, the Scandinavian countries, Denmark, Norway and Sweden, claimed four miles, Spain and Portugal six miles, Italy between three and ten miles and Russia 100 "Italian miles." This disagreement continued throughout the nineteenth and into the twentieth century with countries adopting various limits as suited their interests or whims. Russia declared in 1912 a 12-mile territorial sea and Italy ten miles, Spain and Portugal continued to claim six miles and Scandinavian countries four miles. In 1911, Fulton said: "There are very few writers...who are of the opinion that the three-mile limit has become established in international jurisprudence as the legal limit, notwithstanding that it is commonly adopted."

It was "commonly adopted" by The British Commonwealth of Nations and other smaller states "due in great measure to the prepondering influence of Great Britain and America in maritime affairs, the lesser states following their example, willingly or with reluctance." But in spite of this, as late as 1919, another English writer of authority, W.E. Hall, said:

It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent of which marginal seas may be appropriated, of the lateness of the time at which more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of the territorial waters has come into international question, whether the three-mile limit has even been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, (i.e. the range of cannon) it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety that as state has, theoretically, the right to extend its territorial waters from time to time at will with the increased range of guns. It is not surprising that at the League of Nations' Codification Conference at The Hague in 1930, despite strong support to the three-mile rule by the big maritime Powers, like Great Britain, United States, Germany and Japan, it could not be accepted as a general rule of international law. Twenty countries were in favour of a three-mile territorial sea, but eight of them would accept this limit only on the condition that a contiguous zone of some kind should be recognized. Only Great Britain, supported by other Commonwealth countries (Australia, South Africa, Canada, India and the Irish Free State) and Japan, supported the three-mile limit and expressed opposition to any contiguous zone. Twelve states demanded six miles, the Scandinavian states four miles, while some were in favour of not fixing a uniform distance for all purposes and for all countries. Summarizing the position after the Conference, Professor Manley Hudson said: "The history of the last century has failed to invest the 'three-mile limit' with any particular sanctity, and recent conquest of distance makes it seem in many respects archaic."

Contiguous Zone

One reason for the lack of agreement on territorial waters has been the diverse needs of the coastal states to have some authority in an area of the sea beyond a comparatively narrow maritime belt for the protection of their special interests, and for the prevention of infringement of their customs, fiscal and sanitary regulations within their territories or territorial seas. While the "cannon shot" limit had come to be adopted in connection with neutrality in eighteenth-century Europe, various other maritime boundaries were agreed for other purposes, such as fisheries and navigation, or in connection with smuggling, public health and slave-ships. In 1736 and later, Hovering Acts were passed in England by which vessels with certain cargoes on board, destined for British ports, could be seized within four, eight and, in one case, one hundred leagues of the British coast and forfeited for illicit trade. Lord Stowell justified the passing of "Hovering Acts" on the ground that maritime states were allowed by "the common courtesy of nations for their convenience to consider those parts of the ocean adjoining to their shores as part of their dominions for various domestic purposes and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare." But in 1876, having become a great champion of the freedom of the seas, Great Britain completely reversed its policy and repealed the long series of Hovering Acts. By the Customs Consolidation Act of that year, it declared that under general international law states were not entitled to exercise customs jurisdiction against foreign vessels on the high seas and that a state which wanted to have such right must acquire it by concluding special agreement with other states. This volta-face of Britain may also be explained by the facts that smuggling in the English Channel had been brought under control, hovering laws
were encouraging other states to claim wider jurisdictions, and there was a
danger that a 12-mile customs zone might sooner or later be converted into a
12-mile territorial sea.81

The other countries, such as the United States, Spain, Norway, Sweden and
others, had also started assigning boundaries at three to four leagues for
customs jurisdiction, or against the importation of slaves, or quarantine purposes.82 Following the British lead, in 1799 the U.S. Congress passed a legisla
tion which enabled the U.S. revenue officials to board any vessel, bound for
the U.S. coast, within four leagues of the coast, to examine and search. Although the Act did not authorize seizure of the offending vessels outside the
three-mile limit, it provided that if any part of the cargo should be unladen
within four leagues of the coast, or transferred to another vessel without
permit, the masters of the respective vessels "should be guilty of a penal
offense." In Church v. Hubbart, the U.S. Supreme Court held that the authority
of a nation to assure itself from injury might certainly be exercised beyond
the limits of its territory and that it had the right to use any means necessary for
its prevention.83 In 1922, the Tariff Act extended the scope of U.S. jurisdiction
by permitting the boarding, examination, arrest and forfeiture of vessels at any
place in the territorial waters or within four leagues of the American coast
committing any breach or violation of U.S. laws. This Act sought to enforce
the provisions of the "Volstead Act" of 1919 forbidding the sale and
consumption of any intoxicating liquor in the United States. Since application
of the 1922 Act evoked protests from foreign countries, the United States
concluded a series of treaties for the enforcement of its prohibition laws.
Although the Volstead Act was repealed in 1933, the United States enacted in
1935 the Anti-smuggling Act for effective enforcement of its revenue laws.
This Act empowered the President to declare "a custom-enforcement area"
which might include any waters within 100 nautical miles "from the place or
immediate area where the President declares such vessel or vessels are hovering
or are being kept."84

The other countries followed the lead taken by Britain and the United States
and exercised jurisdiction in contiguous zones beyond territorial waters for the
enforcement of their fiscal and health regulations throughout the nineteenth
century. It also came to be supported by several jurists on practical grounds.85
The British change of policy gained the support of Germany and Japan, but the
United States and a number of other countries adhered to the view that it was
an accepted customary right.86 At the 1930 Codification Conference, conti
guous zone is said to have been "the key question."87 Even before the Confer
ence, the draft convention, prepared by the eminent German jurist, W.
Schuking, suggested a territorial sea of six miles and another six miles imme
diately beyond that over which the littoral state would be entitled to exercise
"administrative rights." The Schuking Report noted with good reason that an

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 inter
ference with its security by foreign ships.

Such control may not be exercised more than twelve miles from the coast.88

Many countries, including France, Germany, Italy and the United States,
supported the concept. But the greatest maritime Power of the time, Great
Britain, strongly opposed it and said that "she made no claim to exercise rights
over the high seas outside territorial waters, and that claims by foreign states to
exercise rights of jurisdiction or control over the waters of the high seas adja
cent to the belt of territorial waters of those states had never been admitted and
had always been objected to by her."89 According to Brierly, "Great Britain's
refusal to yield on the contiguous zone was the primary cause of her failure to
secure the adoption of the three-mile limit as a general rule of international law
at the 1930 Codification Conference." He believed that the required two-thirds
majority of the Conference was prepared to accept the three-mile limit of terri
torial waters, but several of them would not favour that limit "unless their
right to a contiguous zone up to twelve miles from shore for customs, revenue,
and sanitary jurisdiction was also recognized." This, in his opinion, was "a
major blunder, since a golden opportunity was lost of settling the issue of the
three-mile limit on favourable terms, while the collapse of the Conference on
that very issue undermined the claim of the three-mile limit to be an absolute
rule."90 Professors McDougal and Burke also feel that "the suggestion for a
contiguous zone was not made in a vacuum... and was very closely related to
the bitter division on the width of the territorial sea."91
There is little doubt that the concept of contiguous zone was dictated by a proved practical need. It was “not an artificial conception of jurists.”94 It was suggested by some well-meaning scholars that “the law of nations, if it is to retain its authority, must show itself capable of responding to practical needs, and in one form or another the principle of the contiguous zone must therefore obtain recognition.”95 Others felt that it had already become part of customary international law.96 In fact, in the post-World War II period, as we shall see later, there was never any doubt about the acceptance of contiguous zone which was being claimed by a large number of states for the protection of their special interests.

Zone of Security

At the 1930 Codification Conference, the Portuguese representative said:

I think that in time of war the neutral states require a much greater breadth of territorial sea than three miles to defend their integrity, and to carry out to the full duties of neutrality, imposed on them by international law. ... We all recognize that the greater speed of ships and aircraft, and increased range of modern artillery, render a breadth of three miles insufficient to safeguard the territory of a state from the harmful consequences of acts carried out beyond that limit.97

There was a strong difference of opinion at the Conference whether or not a state was entitled to extend its powers to areas of the high seas for its security interests. While some states felt that granting powers to a coastal state for declaration of such a security zone was a matter of primary importance, others thought that such a power would seriously endanger freedom of navigation. No doubt states had claimed such jurisdiction and under the St. Helena Hovering Act of 1816 England itself had declared 24-mile security zone around its territory. In 1939, at the beginning of hostilities in Europe, President Roosevelt ordered American war ships to patrol up to 200 miles from the coasts of the United States to keep the activities the belligerent vessels under surveillance. At the First Meeting of Foreign Ministers of the American Republics, the U.S. delegate, Sumner Welles, said that:

the time has come when the 21 American republics must state clearly...to all of the belligerents...that they cannot agree that their security, their nationals, or their legitimate commercial rights and interests should be jeopardized by belligerent activities in close proximity to the shores of the New World. This assertion of principle, I believe, must be regarded as constituting a declaration of the inalienable rights of the American republics to protect themselves, so far as conditions in this modern world make it possible, from the dangers and repercussions of a war which has broken out thousands of miles from their shores, and in which they are not involved.98

In the Declaration of Panama that followed on October 3, 1939, the American Republics resolved and declared:

As a measure of continental self-protection, the American republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American Continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.99

The Declaration demarcated “a zone of security including all the normal maritime routes of communication and trade between the countries of America,” averaging some 300 miles around the American continents, except off Canada.100 In the Preamble to the Declaration, it was stated that “the nature of present conflagration...would not justify any obstruction to inter-American communications which, engendered by important interests, call for adequate protection;” and the governments of the American Republics “insist that the waters to a reasonable distance from their coast shall remain free from the commission of hostile acts or from the undertaking of belligerent activities by nations engaged in war in which the said governments are not involved.”101

Although the legality of the Declaration of Panama was later questioned by a few jurists,102 the United States and other American Republics continued to patrol the extended waters of the high seas until their entry into the war.

Fisheries Jurisdiction

Another and even more important reason for lack of agreement on territorial waters has been the need and desire of coastal states to protect the fisheries adjacent to their coasts from depredation by fishermen from other states. As we have noted earlier, in 1613 William Welwood sought to justify the British claim of sovereignty of the British sea for the protection of fisheries off the coast of England and Scotland. He relied “on the primitive and exclusive right of the inhabitants of a country to the fisheries along their coasts; one of the principal reasons for which this part of the sea must belong to the littoral state being the risk that these fisheries may be exhausted as a result of the free use of them by
Several countries, including international agreements. Russia, Great Britain, Sweden, Norway, Germany and Holland, in their efforts to protect the banks which were "still productive along foreign coasts." In 1889 and North Pacific Ocean and a zone of 30 miles round the Commander Islands and Robben Islands were closed to sealing for the fur-seal.

In the last quarter of the nineteenth century, the development of trawl fishing, increase in the numbers, size, speed and storage capacity of trawling vessels, improvements in the means of catching the fish and bringing them to market, substitution of steam power and steam vessels for the sailing smacks, revolutionized the fishing industry. The exhaustibility of fishery resources became all the more evident. These developments also showed the utter inadequacy of the three-mile limit for the protection of coastal fisheries. As the North Sea became more and more exhausted, the vessels started going farther and farther away near other coasts, in order to maintain the supply. The Dutch coast and the coasts of Schleswig, Norway and Iceland, infrequently visited earlier, became important for British, French and German trawlers. To these were added from about 1902 the coasts of Portugal and Spain, and the next year even the coast of Morocco. In some cases trawlers went as far as Mauritania in French West Africa, and even beyond. Larger and more seaworthy vessels were specially built for fishing, which became most important for English and other markets of maritime powers. The native fishermen of smaller countries like Norway, Iceland, Portugal, Spain, were unable to compete with the most powerful and efficient fishing machines which, supported by large capital, enabled them to exploit all available grounds from beyond the arctic circle to the tropics. They found their traditional fishing grounds invaded and exploited by foreigners, wholly unprotected by "the ordinary three-mile limit," and their own livelihood threatened. Many of the smaller countries in Europe and Russia started enforcing strictly their wider limits for the protection of their fisheries or passing legislations prohibiting steam trawling in coastal areas. Even some English publicists agreed that "the resources of the sea were not inexhaustable," and restraint was necessary to protect the banks which were "still productive along foreign coasts." British insistence on acceptance of fisheries jurisdiction as co-terminus with territorial waters, and its refusal to concede any contiguous zone beyond the three-mile limit, made it extremely difficult for any agreement to be reached on territorial waters. Ever since it concluded a treaty with France in 1839 it con-
sistently adhered to the three-mile limit for fisheries. This position was particularly emphasized in the Act of July 6, 1895. In 1896, the Netherlands Government sent a note to the other European governments to ascertain their views on the desirability of extending the width of the territorial sea to six miles for all purposes. Russia supported the proposal and other states were prepared to discuss it. But the British Government was strongly opposed to it. As a Dutch minister, referring to his discussion with the British Foreign Minister, Lord Salisbury, reported:

When I remarked to Lord Salisbury that Great Britain, in view of the extent of her coasts and her fisheries had more than any other nation an interest in the extension of territorial waters, he answered in his usual playful manner: "But then we could no longer come and fish near your coast, for however extensive ours may be, the fish are found on yours."

This summed up the British position. It was repeated by the Lord Chancellor, Lord Loreburn, in the House of Lords during the discussion on the "Act to Prohibit the Landing and Setting in the United Kingdom of fish caught in prohibited areas of the sea adjoining Scotland or Ireland." He said:

I shall forbear from saying anything about the three-mile limit. ... Many of our best fishing districts are within ten miles of the coast of our neighbours. The question is not merely one of what is to happen to our fisheries within ten miles of our coast, but of how many of our own fishermen may be prevented from going to their present fishing grounds within ten miles of a foreign coast, if we seek to extend our jurisdiction beyond the three-mile limit.

In 1907, Sir Thomas Barclay calculated that an extension of territorial waters to 12 miles would exclude British fishermen from 135,000 square miles in Western Europe, while an extension to nine miles would exclude them from 80,000 square miles. He felt "that since the British fishing fleet was over seven times the size of all other fishing fleets put together, the problem could certainly not be considered solely in its legal aspects."

Great Britain "spared no efforts to prevent certain states from extending their fishing limits." In 1901, it concluded an agreement with Denmark limiting the Danish exclusive fishery rights around Iceland and the Faroe Islands. In 1902, it dissuaded Iceland from extending its fishery jurisdiction from three miles to seven miles. In 1909, it persuaded Portugal to limit its fishery jurisdiction to three miles, although it had earlier claimed wider jurisdiction and seized British trawlers. In 1913, Czarist Russia withdrew its draft legislation to extend its fishery jurisdiction to 12 miles in the White Sea as a result of British protests. In the Pacific, where British interests were not infringed, Russia extended its fisheries limits to 12 miles. When Russia extended her fisheries in the White Sea again in 1921, a Russia and Great Britain came to a modus vivendi in 1930 according British subjects the right to fish within the 12-mile limit, excluding the territorial waters of three miles.

At the 1930 Hague Codification Conference, "there was much insistence on the part of many on the necessity of a broader width for the conservation of fisheries insuring to the benefit of the littoral state." But Britain's rejection of any contiguous zone beyond the three-mile territorial waters, as we have seen above, resulted in complete failure of the Conference. In the period between 1930 and 1945, several states claimed wider jurisdictions for the protection of their fisheries which met with protests from the United Kingdom and, in some cases, from the United States.

The inadequacy of selective and ad hoc regulations adopted through several international conventions for solving the problem of fishery conservation was quite evident and had led states to extend their jurisdictions. In 1943, a conference of European fishing nations was held in London which adopted a draft convention relating to the policing of fisheries and measures for the protection of immature fish. But it is significant to note that several states remained dissatisfied with these measures and some countries refused to accept this convention altogether. Dissatisfied with the international measures to protect Alaska Salmon fisheries, President Truman issued a proclamation on September 28, 1945, as we shall see in the next chapter, claiming a right to establish fishery conservation zones for the protection of its coastal fisheries.

By the Geneva Conferences in 1958 and 1960, as we shall see later, fisheries assumed a far greater importance than they had done in 1930, and it was fisheries, together with purely political cross-currents, not the contiguous zone, that prevented any agreement being reached at Geneva on the width of the territorial sea.

Innocent Passage through Territorial Waters and "Rules of the Road" on the High Seas

As we have noted earlier, by the beginning of the nineteenth century, it came to be universally accepted amongst the maritime states of Europe and America that the sea, constituting the great highway for commerce and communications between "civilized" nations and the remotest regions of the earth, should remain unrestricted during the continuance of peace for the complete enjoyment of every nation. Although a small part of the adjacent sea was deemed essential for the security of the coastal state and was accepted as being under its dominion, even this part, it was felt, should be subject to the right of innocent passage by foreign ships. The right of innocent passage was, therefore,
the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral states a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas.121

The passage included the right to stop and to weigh anchor, but to the extent that it constituted the ordinary incident of navigation or was rendered necessary by stress of weather or damage to the ship. Since it was the natural consequence of the freedom of the seas, no state was entitled to levy tolls or require the payment of any dues in respect of innocent passage, nor could it exercise civil or criminal jurisdiction, even in respect of an act committed in violation of its criminal law in the course of such passage through its territorial waters, unless the act had consequences outside the vessel or tended to disturb the peace, order or tranquility of the state. Since the chief, or perhaps sole, reason for the acceptance of a right of innocent passage was "because of a recognition of the freedom of the seas for the commerce of all states,"122 this right came to be confined to merchant vessels or other non-governmental vessels, and did not extend to warships. As the Harvard Law School Draft on Territorial Waters declared in its commentary on the eve of the 1930 Hague Codification Conference:

There is...no reason for innocent passage of vessels of war. Furthermore, the passage of vessels of war near the shores of foreign states and the presence without prior notice of vessels of war in marginal seas might give rise to misunderstandings even when they are in transit. Such considerations seem to be the basis for common practice of states in requesting permission for the entrance of their vessels of war into the ports of other states.123

Jessup confirmed this opinion:

As to warships, the sound rule seems to be that they should not enjoy an absolute legal right to pass through a state's territorial waters. As Mr. Root has said: "Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten."124

The right of innocent passage, it may be added, did not exist in internal or inland waters, or when the vessel of another state was "approaching the port of a state through its marginal seas or when she is entering or leaving a port of that state."125 These rules, forming part of customary law, came to be codified for the first time in 1958 in the Convention on Territorial Sea and Contiguous Zone.126

High Seas

Beyond the territorial waters, where the coastal states could exercise sovereign jurisdiction, and a limited though controversial area of contiguous zone where most of the states claimed to exercise limited jurisdiction, the vast oceans came to be accepted as free in nineteenth-century Europe, and declared as open or high seas. As Lord Stowell declared in 1817: "all nations have an equal right to the unappropriated parts of the ocean for their navigations."127 The American Judge Story elaborated the right further in 1826: "Upon the ocean, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there."128 All the states came to enjoy the unrestricted right of use and enjoyment of the high seas not jointly but severally. Not only was navigation unobstructed, but no state had a preferential right of fisheries near other states' shores. In several areas, as we have seen above, high-sea fisheries came to be exploited by more distant states. As regards jurisdiction, the high seas were not a condominium with all states exercising concurrent jurisdiction over all vessels and persons on the high seas. Each state's jurisdiction was limited to its own vessels and nationals. Even a treaty for the abolition of slave trade was held not to justify the arrest of a vessel of the other party, unless the treaty specifically conferred such a right upon the contracting parties.129 Only the case of piracy was recognized as an exception to this rule. A pirate ship lost the protection of its flag and was regarded as an offender against the law of nations, hostis humani generis, and could be punished by any state.130 In one other case, "hot pursuit," a vessel could be pursued and arrested on the high seas if it committed a violation of the laws of a coastal state within its territorial waters and was detected there. The general law in this regard was well summarized by the Permanent Court in the Lotus case:

Vessels on the high seas are subject to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them.131

Apart from this general law on the subject, under the lead provided by Great Britain, certain "rules of the road" came to be adopted by the international community so that collisions might be avoided at sea. So also a commercial code of signals came to be accepted and widely used. But while all these rules applied in time of peace, during war the belligerents claimed the right to obstruct neutral trade with the enemies, and neutral rights of navigation and commerce had to yield to the legitimate demands of the belligerent states.132
Legal Vacuum

It is well known that law always develops according to the needs of a society. International law was also developed, or left undeveloped, according to the changing needs and dominating interests of the international society. For a long time, in Asia maritime practices and law had developed to serve the needs of free navigation and commerce amongst Asian states and other countries in Europe and Africa. As European countries came to dominate the international scene, that law gave place to European traditions of *mare clausum*. Even after *mare clausum* gave place to *mare liberum*, it was not the old law as practiced by Asian or Arabs. Asians were generally land powers and the ocean was of secondary importance, to be used for maritime commerce and navigation. The European law of the sea was the special concern of a few seafaring nations, and the shape and content of this law was determined largely by the dominating interests of the big maritime Powers. They adopted the doctrine of *mare liberum* not because they were convinced of the arguments of Grotius, but because it became necessary and useful in the wake of the Industrial Revolution. Since then it came to be accepted as an incontrovertible, almost “scared,” doctrine, which no one dared challenge. Indeed, the pith and substance of the law on and about more than five-sevenths of the globe could be summed in the simple slogan, “freedom of the seas.” The hallmark of this law, ever since its acceptance in the early nineteenth century, has been, in accordance with the spirit of the time, “freedom,” meaning essentially non-regulation and *laissez faire*. Beyond a limited area near the coastline, the vast oceans remained free to be used and abused, explored and exploited by the maritime Powers according to their own interests. Freedom of the seas was not only used for the perfectly legitimate purpose of navigation, but also interpreted by the militarily powerful states to move across the wide open sea to threaten small states for their own ends or to subjugate and colonize other peoples. After the defeat of Napoleon in 1815, for sixty years there neither were significant rivalries in Europe, nor was there overt conflict among Europeans, and all of them jointly exploited Asia and Africa. With the oceans free and comparatively safe, there was no hindrance. There is no dearth of cases of trigger-happy naval commanders using naval ordnances against “backward” peoples on the smallest excuse or no excuse at all. It was the classic age of punitive or minatory bombardments. Often a show of naval strength was enough. It is well known how in 1853 American Commodore Perry forced his way with a fleet of naval vessels into Yedo Bay, insisted upon landing, and demanded of the Japanese Government, some­what pre-emptorily, that it engage in commercial relations with the United States and Western Powers. It was not long before the Japanese began to comply.133 In 1856, the British consul at Canton called upon the British admiral to bombard that city to punish acts of violence against Europeans. In 1863, the British bombarded Satsuma, and in 1864 an allied force bombarded Choshu, triggering revolution in Japan. Similarly, Alexandria was bombarded in 1882 and Zanzibar in 1896. Generally, after these punitive expeditions, the local ruler signed a treaty surrendering his independence and protecting European interests.134 In the last two decades of the nineteenth century, “the advanced countries partitioned most of the earth among themselves.”135

Moreover, freedom of the high seas was transformed into a license to over­fish, especially near the coasts of other countries. We have already seen how in the nineteenth century the invention of the steamship and new trawling methods for catching the fish led to the establishment of big fishing industries threatening the smaller countries’ fisheries at long distances. Fisheries were no longer accepted as inexhaustible and the smaller countries started making des­parate efforts to protect their coastal areas from depredation by long-distance fishing trawlers, which triggered numerous fishery disputes. Freedom of the seas has always meant unequal freedom or only freedom for the few. It came to be used by the maritime Powers, especially during the wars, to close large areas of the ocean. In fact, by the Second World War, with advancing technology and continued misuse of the absolute freedom by the big Powers, it had become an anathema for smaller states even in Europe. The conditions became even more acute after the Second World War, as we shall see in the next chapter, and the long-established freedom of the seas came to be found utterly inadequate and was seriously challenged.

Notes

2. This included the United States which since its independence from England in 1776, embarked on East India and China trade and began to send many vessels round the Cape of Good Hope. In 1788, the English Company granted “most-favoured foreigners” treatment to Americans. By a treaty of 1794, U.S. citizens were granted trade and other necessary facilities in British seaports and harbours of the British territories in India. See William Milburn, *Oriental Commerce*, vol. I (London, 1813), pp. 136–38.
7. Ibid., p. 170.
8. Ibid., p. 175.
17. Ibid., p. 334.
21. Ibid., p. 11.
25. See for a comprehensive review of European forcible penetration into China, Panikkar, ibid., pp. 120–38, 166–99.
30. Ibid., p. 85.
32. In 1770, G.T.F. Reynal, a French writer, wrote that, “if we had introduced to the Indians dealings based on good faith, if we had made them understand that commerce was based on mutual benefits, if we had encouraged their culture and their industries through exchanges equally beneficial for both them and us, then gradually we could have gained the good will of the peoples” of the Indies. See quoted in Alexandrowicz, op. cit., pp. 138–39.
34. Ibid., p. 7.
37. See Palimer and Colton, op. cit., p. 655.
39. See Hall, quoted in Calvo, op. cit., p. 69.
51. Although the sovereignty of the coastal state over these waters was widely recognized ever since the sixteenth century in Europe, some jurists, like A. de la Pradelle of France, argued that the littoral state was neither the sovereign nor owner of territorial waters, but merely possessed “a bundle of servitudes over them.” See for various opinions and practices of states, C. John Colombos, *The International Law of the Sea*, Sixth Edn. (London, 1967), pp. 87–91.
52. See Fulton, op. cit., pp. 539–41; Colombos, ibid., p. 92.
55. Fulton, op. cit., p. 549.
57. According to Fulton, Grotius could not express it in a more definite form because he was at that time in the service of the Queen of Sweden to whom such a doctrine would have been no more attractive than to James. See Fulton, op. cit., pp. 549–50.

59. Fulton, op. cit., pp. 556—57. Walker also refers to the practice of France and other Powers as to neutrality in wartime, based on cannon range of actual cannon. Ibid., p. 216.


62. Ibid., p. 213.

63. Ibid., p. 228.

64. Quoted in ibid., p. 228; see also Jessup, op. cit., p. 6.

65. In Anna (1803), Lord Stowell, paraphrasing Bynkershoek’s doctrine, declared that, since the introduction of firearms, the boundary of territorial waters "has usually been recognized to be about three miles from the shore." See quoted by Colombos, op. cit., pp. 92—95; see also ibid., other cases like Whitestone Fisheries, The Alleganian to the same effect.

66. Fulton, op. cit., p. 567. Despagnet, a French writer, wrote in 1910 that although the three-mile rule had been adopted in several conventions "we must not conclude that constitutes the normal limit outside special conventions." See quoted in Calvo, op. cit., p. 55.

67. See Colombos, op. cit., pp. 94—106; see also discussions at the Institute of International Law (1894) quoted in Crocker, op. cit., p. 109ff.

68. See discussion at Paris session of the Institute of International Law, 1894, in Crocker, ibid., pp. 111—33. In 1894, the Institute of International Law suggested six marine miles as the limit of territorial waters. See Crocker, ibid., p. 148; see also 1912 Report of Sir Thomas Barclay, Reporter of the Sixth Committee of the Institute on Territorial Waters, ibid., pp. 149ff, 170ff. For views of several other publicists, see ibid., p. 3—481.


70. Ibid., p. 681.


72. Australia, Belgium, Canada, Chile, China, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, India, Irish Free State, Japan, Netherlands, Poland, South Africa and the United States.

73. Belgium, Chile, Egypt, Estonia, Finland, France, Germany and Poland.


75. Brazil, Colombia, Cuba, Spain, Italy, Latvia, Persia, Portugal, Romania, Turkey, Uruguay, Yugoslavia.

76. Norway, Sweden and Iceland.

77. See Colombos, op. cit., pp. 104—5.


79. See Fulton, op. cit., pp. 572—73.


82. Fulton, op. cit., pp. 593—603.


84. See Colombos, op. cit., pp. 143—44.

85. See several writers quoted in Shigeru Oda, "The Concepts of Contiguous Zone," International
I. New Challenges to the Freedom of the Seas and Extension of Coastal State Authority

Present Law Cast in European Mould

Ever since its inception, modern law of the sea has developed, as we have seen earlier, in response to the needs of the European countries or countries of European origin, and for the protection of their economic, political, or strategic and military interests. Despite all the doctrines propounded by classical jurists like Grotius, Gentilis, Puffendorf, Wolff, and Vattel and others, the modern law of the sea did not really develop until the emergence of England as the supreme naval Power in Europe and Asia in the first half of the nineteenth century. Before that, European countries had rejected the Asian maritime practices of freedom of the seas and maritime trade and each country was busy protecting its narrow national interests resulting in serious disputes and almost continuous warfare. After British supremacy was established in the post-Napoleonic era, Europe’s interests in Asia came to be identified with those of England and European maritime practices came to be generally accepted and consolidated under the patronage of Great Britain. The latter not only abandoned its traditional policy of mare clausum and became the strongest champion of the freedom of the seas, but helped in the development of other maritime rules.

It is important to note, however, that although the basic principle relating to freedom of the seas was universally recognized, there was little uniformity in regard to several other rules of maritime law. Thus, as we have mentioned in the previous chapter, despite the overbearing influence of Great Britain, the United States, France and other maritime Powers, several smaller countries of Europe adopted different limits relating to territorial waters. Similarly, there was no agreement or uniform practice about contiguous zone and fisheries jurisdiction. It may also be mentioned that many times the big maritime Powers modified, stretched or interpreted the rules as suited their immediate interests or purposes and the law was supposed to change following their lead.

118. See UN Memorandum, op. cit., pp. 43—45.
121. Jessup, op. cit., p. 120.
124. Jessup, op. cit., p. 120.
126. The rules relating to innocent passage through territorial waters are far from being non-controversial and have been the subject of numerous disputes. See for a discussion of some of these controversies R.P. Anand, “Freedom of Navigation through Territorial Waters and International Straits,” Indian Journal of International Law, vol. 14 (1974), pp. 170—89.
127. Lord Stowell quoted in Colombos, op. cit., p. 64.
128. Ibid., p. 64.
129. See Brierly, op. cit., p. 307.
130. However, what constituted piracy remained a subject of intense dispute amongst Europeans. France considered an armed vessel, navigating with irregular papers in peacetime, as piratical, and British regarded its subjects engaged in slave trade as pirates. See for these and other controversial cases Brierly, ibid., pp. 311—14.
134. Ibid., p. 617.
135. Ibid., p. 615.
If the interests of naval Powers conflicted, the practices also conflicted and law naturally remained controversial and uncertain. Thus, in 1876, Britain repealed the long series of Hovering Acts and protested against the exercise of jurisdiction by other coastal states beyond the narrow three-mile territorial sea. The United States not only refused to accept the British lead in this respect, but extended its jurisdiction to four leagues by 1922 Tariff Act to enforce its prohibition laws. In 1935, by an Anti-Smuggling Act, it further empowered the U.S. President to declare a “custom-enforcement area” up to 100 nautical miles from the place where the President declared such vessels were hovering. Although there was some doubt about the validity of the 1935 Act under international law and several countries protested against it, the United States insisted on enforcing it. During the First and the Second World Wars, the belligerents, led by Great Britain, vastly extended their authority over the sea by such controversial doctrines as “ultimate enemy destination” and “long-distance blockade” over the strong protests of the neutral Powers and the infringement of their rights of neutrality.

Besides these conflicting maritime practices of states, a large part of the law of the sea connected with naval war, such as contraband, blockade and neutral service, was developed by eminent judges of Admiralty Courts in England, the Supreme Court of the United States, and prize courts of these and other European maritime Powers. A few international conventions were held to settle numerous controversies between belligerents and neutrals during long periods of naval warfare in Europe. The first such convention was the Declaration of Paris drawn up at the Congress of Paris in 1856, following the Crimean War. The Declaration laid down four fundamental rules: (1) on the abolition of privateering, (2) on the immunity of neutral goods in enemy vessels (other than contraband), (3) enemy goods in neutral vessels (with the exception of contraband) and (4) on the effectiveness of blockades. In 1899, and later in 1907, several conventions were held codifying many of the rules of naval warfare and maritime neutrality. The Declaration of London in 1909 sought to further codify rules of naval warfare and contraband, but could not be ratified because Great Britain refused to accept it. In 1921, two conventions and statutes relating to “freedom of transit” and the “regime of navigable waterways of international concern” were concluded in Barcelona under the auspices of the League of Nations, and in 1923, another important Convention on the “International Regime of Maritime Ports” was signed. But in spite of these limited efforts, most of the rules of international law of the sea were based on usages or customs which remained conflicting and ambiguous. An attempt was made in 1930 to codify the law relating to territorial waters at the first Conference on the “Progressive Codification of International Law,” convened under the auspices of the League of Nations, but it was unable to reach an agreement.

No doubt the central core of this maritime law as developed by the European states, viz., freedom of the seas, was similar to the maritime practices of the Asian states. In a sense, the concept of freedom of navigation and trade in the Indian Ocean and Southeast Asia, which had been practised for centuries, was the precursor of the modern law in that it provided the impetus and example to Grotius in formulating his doctrine of Mare Liberum. But the freedom of the seas, as it came to be accepted and practised in the nineteenth century and later, was cast in the mould of European interests and was used for their purposes to the detriment of the interests of Asia and indeed for the joint exploitation of Asian countries. The other rules of maritime practices were developed according to the needs and interests of European Powers at various times since the last half of the nineteenth century.

Post-1945 Era: A New World

If a divided Asia could not withstand the European pressure, a divided and warring Europe could not permanently dominate Asia. The world as it emerged from the Second World War was a different world altogether. The whole balance of forces had changed and Western Europe had ceased to be the pivot of power. The European Powers, which had dominated the world scene for nearly three hundred years, had been pushed aside and were no longer at the centre of the world stage. Out of the ruins of the world holocaust of 1939–45, emerged the United States and the Soviet Union with enough strength to dominate the international scene and seriously challenge each other. Since then the world, divided into two groups, plunged into a bitter cold war and a most dangerous armament race.

Expansion of International Society

There was another significant change. With the weakening of Europe colonialism collapsed and there emerged numerous independent countries in Asia and Africa which for a long time had had no status and played no role in the formulation of international law for they were considered as no more than its objects. After 1955 their number increased sharply. Having achieved their political independence, the “new” states of Asia and Africa naturally wanted to improve their lot and increase their political influence. The existence of an international forum, such as the United Nations, where they could make their voices heard and where they had scope for concerted action, enhanced their power and helped them in pursuing their purposes. They were further helped by the rivalry between the big Powers, since it had increased the influence of the General
Assembly, the stronghold of the smaller and weaker countries, where they enjoyed formal equality with the big Powers and, of course, numerical superiority. Comprising a large majority of the new, extended world society, the Asian and African states, along with the disgruntled Latin American states—the so-called Third World—acquired a new influence in this divided post-war world society. Even if weak and underdeveloped, they could no longer be ignored or by-passed. They could make their voices heard in the world forums and hardly lose an opportunity to air their views. Non-aligned to any power group—as most of these countries were to be, as we shall see later—they aligned themselves to take concerted action and to play an important role in the international structure in the pursuance of their interests. It was only to be expected that the new majority should try to mould the law according to its own views and for the protection of its interests.

Development of Technology and Change in the Uses of the Sea

There was another development. For a very long time, the uses of the ocean had been few and were generally confined to navigation and to fishing, or occasionally fighting. Even during the modern period, or during the past two or three hundred years, the main concerns of the coastal states were the security and protection of their near-shore areas for their seafood supply and their commercial fleets. There was no need for an elaborate or intricate law for an area which, though covering nearly five-sevenths of the globe, was but of limited use. No wonder, for all these centuries, this area was what can be described as a “legal vacuum” expressed in the doctrine “freedom of the seas.” Vast areas of the ocean were kept open and free for all, subject to minimal rules to maintain a minimum public order in the high seas.

But the widening horizons of scientific inquiry and tremendous developments in marine technology revealed a new world under the sea with a “landscape” not much different from man’s known world on land. It had valleys and mountain ranges, sea-mounts and deep-sea trenches, and a continental margin (shelf and slope) extending from land to the abysmal depths, all complete with animal and plant life. Apart from huge quantities of fish, oceanographers revealed that at least nine times as much vegetation was available in the seas as was cultivated on land which could be used for the benefit of mankind. Apart from huge quantities of fish, oceanographers revealed that at least nine times as much vegetation was available in the seas as was cultivated on land which could be used for the benefit of mankind. But, even more important, it came to be discovered that natural resources and minerals in quantities beyond anyone’s imagination were present not only in the water of the sea but also on the ocean floor and in the underlying layers. Already in 1945, geologists had confirmed that huge quantities of sorely needed oil and gas resources lay buried under the seabed off the shores of various countries, outside the territorial seas, and technology was making them economically accessible. These invaluable resources could not be left there or risked being exploited by other distant water states, as had been the case with fisheries for centuries.

The development of technology also revolutionized the fishing mechanics. Significant technological breakthroughs in the ability to detect, concentrate and harvest fish on the high seas and even in the deep ocean increased the capacity of a few technologically advanced states to indulge in massive overfishing threatening the whole fishery resources near the coast of other states. Some countries, especially Japan and later the Soviet Union, developed and expanded their world-wide fishing fleets which included hundreds of “factory ships” which were “complete mass production operations which can catch, clean, fillet and can or freeze great quantities of fish without entering or clearing the ports of the adjacent coastal states.” Such fleets operated “to the detriment of small native coastal fishing vessels, and many countries, such as Iceland, the new states of Africa and Asia and the west coast countries of South America” became “alarmed at the actual or possible effect of such large-scale operations of foreign origin in high seas areas off their coasts.” The freedom of the seas, including freedom of fisheries, was supposed to be based on the arguments of classical jurists that oceans were vast and inappropriable and its fishery resources inexhaustible. Thus, following Grotius, Vattel had argued:

It is clear that use of the high seas for purposes of navigation and fishing is innocent in character and inexhaustible; that is to say one who sails the high seas or fishes therein, injures no one and the sea in both these respects can satisfy the needs of all men. Now, nature does not give men the right to appropriate things the use of which is innocent and the supply inexhaustible and sufficient for all.

This simplistic reasoning, never quite true, had become meaningless after the Second World War. In fact, the protection of coastal areas and its fishery resources, never sufficient to satisfy the needs of all, had led to numerous disputes through the centuries and to the development of a large part of the law of the sea. The need to protect coastal resources—both living and non-living—had become all the more evident.

Truman Proclamations and Their Aftermath

Law could not remain unaffected by these changes. It is an indication of the changed times after the Second World War that the initiatives to bring important changes in the law of the sea came not from Europe but from the new continent. In a proclamation made on September 28, 1945, the U.S. Presi-
dent, Harry S. Truman, said that, "since the effectiveness of measures to utilize or conserve" the natural resources of the continental shelf "would be contingent upon cooperation and protection from the shore," it was "reasonable and just" that the coastal state should have exclusive jurisdiction and control over them. He, therefore, declared "the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States."

Although the presidential proclamation specifically stated that this assertion of jurisdiction and control over the continental shelf in no way affected "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation," this was certainly a novel claim in the erstwhile common domain and a modification, if not violation, of the generally accepted freedom of the seas doctrine. Indeed, the Truman Proclamation triggered a phenomenal change in the law of the sea when several other countries, as we shall presently see, followed the United States in claiming wide jurisdictions in their coastal areas for the protection of their natural resources which, in many cases, were not confined to oil or gas and other mineral resources of the continental shelf.

On the same day, President Truman issued another proclamation providing for the establishment of conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the United States. Following fisheries disputes with Japan in Alaskan waters, and threat of over-exploitation of fisheries near the United States' coastal waters by some other countries, the United States sought to protect living resources near its territorial waters. But it was made absolutely clear that "the character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

Despite this disclaimer, it was well understood that "the adoption of this policy is a new step forward in the development of international law" and that the traditional law confining the coastal state jurisdiction to territorial waters was sought to be changed. But it was thought to be "a reasonable and logical development of existing general principles."

The international community was already prepared for this change irrespective of its effect on the freedom of the seas. The United States assumed the "jurisdiction and control" over its continental shelf, which was accepted by the international society without demur. Numerous other states followed the American lead and issued proclamations asserting jurisdictional or sovereign claims over their continental shelves and reserving to themselves exclusive rights to the exploration and exploitation of resources of the seabed and subsoil adjacent to their coasts. By 1958, nearly a score of countries as well as Great Britain as to a dozen of its territories, had made proclamations claiming sovereign rights over their continental shelves. But the contents of these proclama-

tions and the nature of rights claimed under them varied considerably. While most of the declarations claimed "jurisdiction" or "sovereignty" over continental shelf and its resources, some of them combined such announcements with a claim to jurisdiction and sovereignty over the superjacent waters and air space. Thus, claims proclaimed by Chile (1947), Peru (1947) and Costa Rica (1948) were extremely comprehensive and far reaching. These Latin American states took benefit of this movement in the law, stirred by the greatest maritime Power, the United States, to claim wide jurisdictions for the protection of their coastal fisheries always threatened by distant water fishing states.

The maritime Powers were prepared to concede the rights of limited continental shelf jurisdiction or conservation of off-shore fisheries on the basis of agreement between states which had been fishing in those waters which they had claimed for themselves and which they believed had become essential because of the latest technological developments. Yet, they could not tolerate wide-ranging claims of sovereignty over 200 or even 12 miles of offshore areas with outsiders being excluded from fishing in those waters. Thus, in somewhat identical notes sent to Argentine, Chile and Peru on July 2, 1948, the United States protested against extensions of their wide jurisdictions, and questioned the legality of declarations made by Ecuador and El Salvador.

The British Government also protested to the Governments of Peru, Chile, Ecuador, El Salvador and Honduras, against extending their jurisdictions to wider areas of the seas and superjacent waters over their continental shelves which, it said, were "irreconcilable with any accepted principle of international law."

It is also a reflection of the changed times that, in spite of protests and objections by the two big maritime Powers, the Latin American states not only refused to withdraw their claims but continued to reiterate and enforce them.

Nascent Custom

In any case, there was no dispute or objection to the development of law in regard to the continental shelf which was considered by several writers as of phenomenal importance. In fact, the Truman Proclamation in regard to the continental shelf was described "as one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny."

As early as 1950, on the basis of state practice, as described above, some eminent publicists asserted that "the doctrine and practice of the continental shelf...has...now become part of international law by unequivocal positive acts of some states, including the leading maritime Powers, and general acquiescence on the part of others."

Even if the coastal state jurisdiction on the continental shelf amounted to a violation of the traditional doctrine of the
freedom of the seas, said Lauterpacht, “the principle of the freedom of the seas cannot be treated as a rigid dogma incapable of adoption to situations which were outside the realm of possibilities in the period when that principle first became part of international law.” 18 He had the support of no less an authority than Gidel, who also pleaded for the acceptance of the continental shelf doctrine and said that, “the principle of the freedom of the high seas need not remain absolute should the satisfaction of legitimate interests require that freedom to be waived. If the freedom of the seas had had to remain sacrosanct, the suppression of piracy would never have been accepted.” 19

But although some jurists shared this optimistic view of Hersch Lauterpacht, others thought that it was “premature to say that a generally recognized rule of customary law exists” although it might be “well on its way to develop into a recognized custom.” 20 In 1956 Professor Kunz wrote:

The so-called, “doctrine and practice of the continental shelf,” hardly more than ten years old, through many unilateral proclamations different in character and contents, led at this time to a situation which can only be characterized as one of confusion and abuse. 21

Territorial Waters

The “confusion and abuse” were, of course, not confined to continental shelf jurisdiction. As we have seen, some of the Latin American states, like Chile, Costa Rica, Ecuador, El Salvador, Peru and Nicaragua claimed sovereignty over an area extending up to 200 miles, although they stubbornly denied the zone to be territorial waters. But in regard to territorial waters, the Inter-American Council of Jurists declared in 1956:

1. The distance of three miles as the limit of territorial waters is insufficient, and does not constitute a general rule of international law. Therefore, the enlargement of the zone traditionally called “territorial waters” is justifiable.

2. Each state is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defence. 22

By early 1958, on the eve of the First Conference on the Law of the Sea, at least 27 of the 73 independent coastal states claimed specific breadth of territorial sea in excess of the so-called “traditional” three-mile limit. These claims ranged from five to two hundred miles; one (Cambodia) claimed five miles; ten (Ceylon, Greece, Haiti, India, Iran, Israel, Italy, Libya, Spain, Yugoslavia) claimed six miles; Mexico nine miles; Albania ten miles; ten (Bulgaria, Colombia, Ethiopia, Guatemala, Indonesia, Romania, Saudi Arabia, USSR, U.A.R., Venezuela) 12 miles; and five (Chile, Ecuador, El Salvador, Korea and Peru) 200 miles. Six others (Honduras, Lebanon, Portugal, Thailand, Uruguay and Yemen), while rejecting the three-mile rule did not specify their limits. 23

Fisheries Jurisdiction

Breaking tradition with the past, when territorial waters were also accepted as the limits of exclusive fisheries jurisdiction by the coastal state, several countries, encouraged and inspired by the Truman Proclamation, sought to extend their control over coastal fisheries. Thus, while some countries extended their territorial seas to 200 miles, as we have seen, others sought to achieve the same purpose of protecting their fisheries by claiming rights over the living resources of the “epicontinental sea” (Argentina) or superjacent waters of the continental shelf (Costa Rica, Honduras, Mexico and Panama). 24

In 1948, in order to protect its fisheries, Iceland adopted a law concerning the scientific conservation of the continental shelf fisheries and, in 1952, extended its maritime jurisdiction from three to four miles and adopted straight baselines for delimitation of its exclusive fisheries zone, which met with protests from the United Kingdom and some other European countries, and led to a “cod war” between Iceland and the United Kingdom. 25

Straight Baselines for Delimitation of Territorial Waters

Without saying so openly or formally, some countries, extending their territorial waters or fisheries jurisdiction, sought to achieve the same purpose by adopting a different method for the delimitation of their territorial waters. Thus, in order to exclude British trawlers, which had been fishing in Norwegian offshore waters since 1906, Norway enacted a Royal Decree on July 12, 1935, delimiting its territorial waters and exclusive fisheries zone of four miles with lines running parallel to straight baselines drawn by joining the outermost points of the outermost islands, islets or rocks — called Skjaergaard — lying adjacent to its coastline. The United Kingdom challenged this Norwegian decree delimiting Norway’s exclusive fisheries zone and submitted the dispute to the International Court of Justice. In one of its most important judgments in this Anglo-Norwegian Fisheries case, the Court upheld the Norwegian decree delimiting the extended fisheries zone of Norway. 26
Mid-Ocean Archipelagos and Their Claims

Not to be left behind in this race for wider jurisdictional claims for the protection of their coastal areas were mid-ocean archipelagos, which had recently achieved independence from their colonial status and had begun to play an active role in the international society and the formulation of international law. Described as an ‘‘island-studded sea’’ or a ‘‘sea interspersed with many islands,’’ an archipelago is defined as ‘‘a formulation of two or more islands, (islets or rocks) which geographically may be considered as a whole.’’ Some called coastal archipelagos, are ‘‘situated so close to a mainland that they may reasonably be considered part and parcel thereof.’’ Others, called ‘‘mid-ocean archipelagos,’’ are ‘‘situated out in the ocean at such a distance from the coasts of firm land as be considered an independent whole rather than forming part of an outer coastline of mainland.’’ Examples of such outlying archipelagos may be found in Andaman, Nicobar and Lakshdweep Islands (off the coast of India), Faeroes, Fiji, Galapagos, Hawaii, Indonesia, Japan, Philippines and Solomon Islands. According to traditional international law, each island, whether or not constituting an archipelago, has its own territorial sea. But this rule came to be decried by the newly independent archipelagic states, like the Philippines and Indonesia, as ‘‘destructive of the integrity of the archipelago as one state’’ and as inequitable and unjust. In order to protect their security, and as inequitable and unjust. In order to protect their security, and commercial, fiscal, political and fisheries interests, these island states, taking their cue from the Anglo-Norwegian Fisheries case, which had upheld the extension of territorial waters of a coastal archipelago, sought to employ the method of straight baselines joining the outermost points of the outermost islands of the archipelagos for delineation of their extended territorial waters. Thus, in 1955, in a note verbale to the UN Secretary General, the Philippines stated:

All waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters subject to the exclusive sovereignty of the Philippines.

It added that ‘‘it is the view of our Government that there is no rule of international law which defines or regulates the extent of the inland waters of a state.’’

Extending more than 3000 miles east and west, 1300 miles north and south and composed of 13,677 islands, Indonesia joined her neighbour on December 13, 1957, in adopting the archipelago principle. Asserting in an announcement that ‘‘for the purposes of territorial unity, and in order to protect the resources of Indonesia, all islands and the seas in between must be regarded as one total unit,’’ the national government of Indonesia declared that:

en all waters surrounding, between and connecting the islands constituting the Indonesian state regardless of their extension or breadth are internal parts of the territory of the Indonesian state and, therefore, parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian state. Innocent passage of foreign ships in these internal waters is granted as long as it is not prejudicial to or violates the sovereignty and security of Indonesia.

The announcement evoked protests from Australia, Japan, New Zealand, the Netherlands, United Kingdom and the United States, but interestingly enough, the Soviet Union supported the Indonesian claim as fully in accordance with the rules of international law. Despite all these protests, Indonesia implemented its claim by an Act of February 18, 1960.

Enclosure of Wide High Sea Areas for Testing Modern Weapon Systems

Besides all these claims of extensive jurisdictions, generally by smaller maritime states for the protection of their fisheries or other coastal resources, some maritime and militarily great Powers sought to extend their temporary control over wide areas of the sea for testing modern weapons, like atomic and hydrogen bombs and inter-continental ballistic missiles. The first such nuclear test was conducted by the United States at Bikini in the Pacific in July 1946. Because of the anticipated danger to ships approaching too near to Bikini, this island, and subsequently after 1947 even larger areas, was designated as a warning zone or danger area by the United States for tests conducted at Eniwetok Atoll in the Marshall Islands during the various testing periods ranging from a few days to several months. At times of actual danger, air and surface patrols ensured that no ships or aircraft entered the areas inadvertently. At various times the areas enclosed 180,000, 20,000, 30,000 or 50,000 square miles. After some miscalculations for the test of March 1, 1954, which resulted in injuries to some 27 Japanese fishermen and 82 Marshallese outside the danger zone, an area of 400,000 square miles was set up. By 1958, the United States had established 447 such warning and/or danger areas. It was pointed out that no regular shipping lane lay through any of these areas and only one airline route had to be shifted slightly to avoid them. Other governments also set up similar testing areas on the high seas. Thus, Australia declared a prohibited area of 6000 square miles surrounding one of the Monte Bello Islands in Western Australia where the United Kingdom did some weapon testing. In
1957, an area extending 900 miles by 780 miles around Christmas Island in the Pacific was declared a danger zone from March 1 to August 1 for the British hydrogen-bomb tests.36

Some phases of the testing of long-range missiles (guided missiles, rockets, drones and pilotless aircraft) also required extensive areas at sea, affecting adversely normal maritime activities on the surface and in the air. Thus, in 1950, to facilitate its long-range missiles programme, the United States concluded an agreement with the United Kingdom establishing a flight testing area in the Bahama Islands for guided missiles extending nearly 675 miles from a launching site located at Cape Canaveral in Florida. As the range of guided missiles increased, the United States concluded additional agreements to extend the testing range and to establish facilities on land for tracking, controlling, reporting and warning purposes. Numerous such agreements were concluded with the Dominican Republic, Haiti, United Kingdom and Brazil between 1951 and 1957. Elaborate safety precautions were taken throughout the testing range, warnings were issued to the sea and air traffic, and scout planes warned fishing vessels from danger areas.37

One of the necessary constituents of the freedom of the seas doctrine is that this freedom must be exercised with due regard to the freedom of other states. (Article 2: 1958 Convention on the High Seas.) Although the declaration of danger zones over vast areas of the high seas and prohibition of navigation, fishing and air flights in those areas, even if temporarily, did admittedly affect the rights of other states,38 these actions were sought to be defended on the basis of the needs of security and reasonableness of the measures taken. The United States maintained that its nuclear test activities were “not contrary to the principle of the freedom of the seas. Nor is there any specific rule of international law forbidding the acts in question.”39 It was pointed out that the freedom of the seas “has never been ascribed any fixed content” and that “the conduct of military, naval and air exercises, including weapons testing, has been one of the traditional uses of the high seas.”

Pointing out that military manoeuvres and target practice had become quite common and several other countries like the United Kingdom, Australia and even the Soviet Union were enclosing high seas for such purposes, it was stated:

Most important, however, is the fact that there has been no protest (up to this time) of the United States conduct of its tests in the Pacific. In short the international community has recognized the international validity of the United States position.40

Questioned about the legality of the closure of areas of the Pacific Ocean for hydrogen-bomb tests, the British Prime Minister replied in the same vein:

The temporary use of areas outside territorial waters for gunnery or bombing practice has, as such, never been considered a violation of the principle of freedom of navigation on the high seas. The announcement of danger area on the high seas is made in the interests of safety. In choosing the site for the tests Her Majesty’s Government pay full attention to the importance of avoiding interference with regular shipping route.41

On February 20, 1958, the Japanese Government protested against the announcement by the United States of a series of nuclear bomb tests on Eniwetok and the establishment of a danger zone.42 Rejecting the Japanese protests and request for suspension of tests, the United States said that it appreciated “the deep horror of nuclear warfare,” but pointed out that “it is the clear recognition of actual dangers...which compels the United States to conduct these tests in the absence of any agreement on disarmament.”43

Air Defense Identification Zones

The same considerations of security, affected by modern technology, and the apprehension about the possibility of a sudden massive air attack with nuclear bombs, applied to the promulgation of “Air Defense Identification Zones” (ADIZ) in 1950—51 by the United States and Canada by which they claimed to exercise jurisdiction for security purposes in the airspace overlying vast areas of the Atlantic and the Pacific oceans. On December 27, 1950 the United States established ADIZ and designated airspace “within which the ready identification, location, and control of aircraft is required in the interest of national security.” Flight plans must be filed for both domestic and foreign flights before entering an ADIZ and position reports must be made by foreign aircraft which are bound for the United States, upon entering an ADIZ or “when the aircraft is not less than one hour...cruising distance via the most direct route, from the United States.” Knowing or willful violators are liable to punishment under the U.S. law. The Atlantic ADIZ extends more than 300 miles; but in the case of high-speed aircraft this jurisdiction would be assumed at one hour’s cruising distance, or more than 600 miles.44 In 1951 Canada issued similar regulations.45 The international community may be said to have accepted these claims since no protests were made. It may be noted that earlier, from 1939 to 1941, the United States had supported a “neutral protective zone” extending several hundred miles established by the Declaration of Panama to keep the hostile actions of European belligerents from intruding into the waters adjacent to the American continent.46
Confusion Worse Confounded

If the picture of law of the sea was unclear and confusing before the Second World War because of its haphazard development, the confusion became more confounded after 1945 because of conflicting claims, disturbing practices of questionable legal validity and uncertain developments. The phenomenal changes in the uses of the sea and the wide extension of the international society made the already inadequate law even more intolerable. It was not long before it came to be realized that the whole law of the sea and maritime practices of states needed to be reviewed, re-examined, modified and codified if conflicts were to be avoided in a new and dangerous age. As representative of the international community, the United Nations undertook the task of bringing some order in the utterly disordered situation.

Notes

15. See quoted in Mouton, op. cit., pp. 91–94.
7. FURTHER EROSION OF FREEDOM OF THE SEAS AND UNITED NATIONS EFFORTS TO CODIFY THE LAW

International Law Commission Studies Law of the Sea for Codification

It is not surprising that the newly created UN International Law Commission, at its very first session in 1949, included the regime of the high seas and the regime of the territorial sea in its "provisional list of topics whose codification it considered necessary and feasible." But the Commission decided to give priority to the "regime of the high seas" and appointed J.P.A. François special rapporteur for it. However, the General Assembly itself recommended in 1949 that the Commission also study regime of the territorial waters on a priority basis. After considering reports of Professor François, together with comments of Governments, the Commission drew up drafts on three problems: "continental shelf," "fisheries" and "contiguous zone." But when these drafts were discussed in the General Assembly, Iceland raised the question of the unity of various problems of the law of the sea and stressed the inadvisability of considering any of its various problems separately. The Assembly in a resolution, "having regard to the fact that the problems relating to the high seas, territorial waters, contiguous zones, continental shelf and the superjacent waters are closely linked together juridically as well as physically," accepted this view and decided not to deal with any of the problems until all had been studied and reported upon by the International Law Commission [Res. 798 (VIII)]. At its next session the Assembly re-affirmed the idea of the unity of the subject [Res. 899 (ix)]. But on the problem of the conservation of the living resources of the sea, on which the International Law Commission had already prepared a draft, since it involved technical and scientific aspects beyond the competence of the Commission, the Assembly agreed to convene a technical international conference "to study the problems of conservation of the living resources of the sea and to make appropriate scientific and technical recommendations...." The report of the Conference was to be referred to the International Law Commission "as a further technical contribution to be taken into
account in its study of the questions to be dealt with in the final report... [Res. 900 (ix)]."

The International Technical Conference on the Conservation of the Living Resources of the Sea met at Rome from April 18 to May 10, 1955, and submitted a report which was considered by the Commission at its seventh session in 1955. In its final report in 1956, the Commission recommended that the General Assembly should summon an international conference "to examine the law of the sea, taking into account not only the legal but also the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate."3

First UN Conference on Law of the Sea, 1958

Pursuant to this recommendation of the International Law Commission, the General Assembly called for a conference on law of the sea which met in Geneva from February 24 to April 29, 1958. Eighty-six states were represented at the conference, and most of the interested specialized agencies of the United Nations and inter-governmental bodies sent observers. It was decided to adopt the report of the International Law Commission as the basis for consideration of the law of the sea. It is important to note that, for the first time in history, a majority of the participants, 54 of the 86 states represented, at the Conference called to codify or make new international law, consisted of either newly independent Asian-African countries, which since the seventeenth century had played no role in its formulation and since the nineteenth had been considered merely its objects, or the turbulent Latin-American states which had been forced to play only a subservient role. Supported by the Soviet bloc in their anti-colonial rhetoric, these "dissatisfied" states were determined to change the traditional Western-oriented law of the colonial era under which they felt discriminated against, or at least modify it to suit the changed needs of the expanded international society.4

Emphasizing how freedom of the seas had been used and "abused" by the big maritime Powers to the detriment of the interests of smaller and weaker coastal states, it was pointed out that,

in time of war, freedom of the seas had been curtailed and ultimately totally ignored by the great Powers, out of sheer necessity, and the smaller states had had to accept that situation. It was therefore, unfair to force upon the latter, in time of peace, an exaggerated interpretation of the freedom of the seas merely because that interpretation suited the interests of the great Powers.6

While no one disputed and everyone supported the peaceful freedom of navigation, the smaller and weaker states were bitterly critical of the numerous other activities of the maritime Powers in the name of the freedom of the seas which, they reiterated, must be exercised "subject to the legitimate rights of other states." Under the present system, it was said, "abstract freedoms and rights which in practice gave a privileged position to the great maritime Powers were formulated without any limitation."7 The result was that the maritime Powers "alone...benefitted from the freedom of the high seas; in fact, they were laying claim to hegemony of the high seas."8

The small states insisted that "the old concept of the freedom of the seas could no longer be regarded as sacrosanct or absolute, just as sovereignty itself was not absolute."9 The rights and duties of the coastal states, it was argued, needed protection in the light of new technological developments. Most of the smaller states wanted and demanded wider territorial waters and/or extended coastal state jurisdiction for the protection of their continental shelf, fisheries and other economic interests, although there was little agreement on a uniform limit. Some of them argued that the maritime belt "should vary according to the economic, geographical, biological, technical, political and defence needs of the state concerned."10 Some pleaded for six miles, some nine miles, some 12 miles, and some of the Latin American states wanted to maintain 200 miles.11

International Law Commission Unable to Recommend Uniform Limit of Territorial Waters

The International Law Commission, it is important to note, had not been able to reach any agreement in regard to territorial sea and had merely said in its report, inter alia,

1. The Commission recognizes 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.12

Attempts to Preserve Three-Mile Rule

The maritime Powers, led by the United States, United Kingdom, France, Holland and West Germany, were as determined as ever to preserve their long-enjoyed freedom of the seas without any let or hindrance and to keep the ter-
ritorial sea “at three miles except as modified by reasonably greater historical limits.”14 This is understandable because it was in their interests to maintain the area of the high seas as large as possible. It is admitted even by the strong critics of the so-called “deplorable,” “hostile,” “shocking” and “political” behaviour of the Third World countries that the

key doctrine, freedom of the seas, while theoretically opening the seas to all, in practice can only be exploited by those who have existent navies and merchant fleets. The satisfied states are the biggest shippers, have the biggest surface fleets, have large, important trade and fishing interests.15

The maritime Powers pointed out that any extension of the width of territorial sea limits of a nation would cut down the freedom of all other nations to sail on, fly over or lay cables in, what was formerly the high seas. There was no right for aircraft to fly over another nation’s territorial sea except under a treaty with its consent, or pursuant to Chicago Aviation Convention of 1944, as to the contracting parties thereto. And although the right of innocent passage was accorded to foreign vessels, a state had large freedom in imposing regulations, which the foreign vessel was obliged to respect, designed to promote traffic safety, sanitation, conservation and public policy and fiscal interests of the state. Indeed, innocent passage on a territorial sea was said to be nothing but a poor substitute in comparison with freedom of navigation in the open sea.16

One of the merits of the three-mile rule was, the chief U.S. delegate, Mr. Dean, told the UN Conference, that it was safest for shipping because “many landmarks still used for visual piloting by small craft were not visible at a range of 12 miles; only 20% of the world’s lighthouses had a range exceeding that distance; radar navigation was of only marginal utility beyond 12 miles; and many vessels (which frequently did not wish to enter the territorial sea) did not carry sufficient cable or appropriate equipment to anchor at the depths normally found outside the 12-mile limit.” Extension of territorial sea would mean, he warned the delegates, longer and more costly runs of ships, and for the coastal state an increase in the cost of patrolling the larger areas.17 In sum, he believed that “the harmful effects of any such extension on sea navigation would be great and the effects on air navigation might be catastrophic.”18

The British delegate argued that “all mankind had benefitted” from the policy of maritime Powers to throw the seas open for the common use of all. To advocate a policy to carve up the seas, or very large areas of them, would be a “retrograde step.”19 Other Western maritime Powers supported this view and pleaded for a narrow three-mile territorial waters.

**Lurking Fear of the USSR**

It is important to note, however, that the main concern of the United States and the other Western maritime Powers was “the USSR bloc which was insisting, for military reasons, on a 12-mile or greater territorial sea.”20 Such extension, said the Chairman of the U.S. delegation, Mr. Dean, would “threaten the security of the United States by reducing the efficiency of its naval and air power, and by subjecting it to increased risk of surprise attack.” Yet he explained that any extension of the territorial sea of neutral nations in time of war would dramatically increase the striking power of the Soviet Union which was the greatest underwater Power equipped with submarines of great destructive ability. It would permit Soviet submarines to operate undetected for long periods without surfacing in a neutral state’s territorial waters while U.S. ships could not operate on the surface of those waters without risking charges of violating such state’s neutrality. It would be unrealistic, said Mr. Dean, to assume that Soviet submarines would obey the law in time of war.22

Furthermore, increase in the territorial waters would mean increase in the underwater power of the Soviet Union which has proportionately a much larger number of long-range, nuclear-powered, missile-carrying submarines. Loss of freedom of commercial shipping, said Mr. Dean, would not be of much concern to the Soviet Union because it was essentially a land-locked country, which, along with its satellites, was largely “self-sufficient in time of peace” and was not “as significantly engaged in trade or shipping with other nations as is the free world.” Under these circumstances, Mr. Dean explained, “the United States was, in the interest of the free world, concerned to keep the territorial sea within as narrow limits as possible.”23

The military risk was, of course, not confined to the submarine problem but would also affect the right of navigation of war ships in several areas and flight of aircraft. He thought that it was “part of the Russian purpose in backing extensions of the territorial sea so to hamper the commerce of the free world as a part of its sand-in-the-gear-box technique.”24

But the irony of it all was, in Dean’s view, that “while extension of the breadth of the territorial sea has the effect of exposing the mobility of our warships and aircraft to crippling jurisdictional restrictions, it actually adds to the mobility of a primary Soviet weapon — the submarine.” The Soviet submarines could always transit through extended neutral waters, “even though illegally, and unlikely to be detected by neutral states.”25

**Six Plus Six**

Realizing that the tide of extended territorial waters could not be controlled,26
the United States, supported by other Western maritime Powers, offered a compromise proposal for a territorial sea extending to six miles, with the right of the coastal state to regulate fishing for another six miles subject to certain historical fishing rights. According to the chief U.S. delegate, “U.S. defensive capabilities would be so profoundly jeopardized by our acceptance of a greater than six-mile territorial sea that those responsible for planning for our defense have concluded that we must take a position against such a course in any event.” But this proposal failed to receive the required two-thirds vote for acceptance. Apart from the Soviet bloc, various Asian, African and Latin American countries joined hands to defeat the U.S. proposal and continued to reiterate their claims for wider coastal state jurisdictions or even extend them. While some of the latter assumed and pronounced the three-mile rule “dead and buried” when “two of its traditional champions had withdrawn their support,” the United States made it clear “that the three-mile rule is and will continue to be established international law to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement.” The United Kingdom, France, Japan and Germany held the same view.

Contiguous Zone

But while there was no agreement on the extent of territorial waters, a contiguous zone extending up to 12 miles was accepted without any problem. It may be recalled that the 1930 Hague Codification Conference had failed, at least partly, because the United Kingdom at that time refused to accept coastal state’s claim to a contiguous zone beyond a narrow three-mile territorial sea. But in spite of the British opposition, many countries, including some of the maritime Powers like the United States, Canada, France, Italy and others, continued to claim contiguous zones of varied limits not only for the enforcement of their custom, fiscal and other regulations, but also for their security. While recommending that “the contiguous zone may not extend beyond 12 miles,” the International Law Commission commented in its 1956 report that “international law accords states the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea.” Elaborating the right, the Commission said that it was meant to exercise customs control and to apply fiscal and sanitary regulations, but “the Commission did not recognize special security rights” or exclusive fishing rights in the contiguous zone. It thought that “the extreme vagueness of the term ‘security’ would open the way for abuses and that the granting of such rights was not necessary.”

Although it was a much more narrow view of the practice of states in regard to contiguous zone, the Conference accepted it in its Convention on the Territorial Sea and the Contiguous Zone. It is important to remember that for the first time the right of a coastal state to have a contiguous zone came to be accepted in a multilateral convention [Article 24].

Innocent Passage through International Straits

Straits are important waterways which are vital for international navigation. In terms of geography, a strait is “a narrow passage connecting two sections of the high seas.” If a strait is wide enough, and the territorial sea claims of the riparian states leave a navigable channel of the high sea in the strait, there is normally speaking no problem of navigation for the vessels of non-riparian states. However, if the territorial sea claims of the riparian states cover the whole breadth of a strait so that it becomes territorial waters or if the only navigable channel in the strait lies through the territorial sea, problems do arise as to the nature of the right of passage of the non-riparian states. Since many of the straits are of critical importance for international communication, and some of them are virtually indispensable for ocean transport in the sense that no other route is physically or economically possible, it is generally accepted that straits should be free for navigation and access to them should not be prohibited without any justifiable cause. Ever since the beginning of the nineteenth century, when the virtues of free navigation came to be appreciated, Great Britain and other maritime Powers tried to open various straits through bilateral or multilateral treaties which, in turn, crystallized into an international custom relating to freedom of passage through straits. Prior to the Corfu channel case in 1949, the passage in regard to warships was somewhat uncertain and they were generally treated differently from merchant vessels with respect to passage and required notification and authorization. But the passage of warships was, in Bruel’s words, permitted “in practice by all states in times of peace.”

In the Corfu channel case, rejecting the Albanian contention that the passage of British warships through the Strait of Corfu without its consent was a violation of Albanian sovereignty, the Court said:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage through straits in time of peace.
The Geneva Conference on the Law of the Sea in 1958, in its provision relating to straits decided to add a controversial clause covering the dispute over access to Israel’s territorial waters in the Gulf of Aquaba through the Straits of Tiran. In its final version, Article 16, paragraph 4 of the Convention on Territorial Sea provided:

There shall be no suspension of innocent passage through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

Adopted over the strong objection of the Arab countries and Indonesia, the last sentence, called the Aquaba clause, extended the definition of a strait in law. The 1958 Conference, therefore, not only re-affirmed the broadly conceived right of warships and merchant vessels in the Corfu Channel case to pass unobstructed through straits, but made it even more liberal. As the Court made it explicit in the Corfu decision, the passage through a strait cannot be restricted unless it is a threat to important coastal interests and is not innocent. The Court interpreted the term “innocent passage” fairly widely in this case, because even an otherwise provocative passage of a British force, consisting of two cruisers and two destroyers close to the coast of Albania, was held to be innocent because its purpose was to assert a right against previous, and anticipated forceful attempts to deny it.

The 1958 Geneva Conference declared that a “passage is innocent so long as it is not prejudicial to the peace, good order and security of the coastal state [Article 14 (4)].”

Continental Shelf

Although many states had started claiming wide continental shelf jurisdictions since the Truman Proclamation of 1945, they did not use the term “continental shelf” in the same sense. As Lauterpacht correctly pointed out, “the expression ‘continental shelf’ has become no more than a convenient formula covering a diversity of titles or claims to the seabed and subsoil adjacent to the territorial waters of the state.” The International Law Commission had been convinced as early as 1950 that the rights of the coastal states over adjacent submarine areas could not be limited to the geological concept of the continental shelf. At its eighth session in 1956, the Commission, impressed by the “criterion of equality” and convinced of the reasonableness of the definition adopted by the Inter-American Specialized Conference in 1956, defined continental shelf to include “the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters (approximately 100 fathoms), or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.”

At the 1958 Geneva Conference, several proposals were made to change or amend the definition of the continental shelf as recommended by the Commission. But the only amendment to the Commission draft accepted at Geneva was a proposal by the Philippines to the effect that the rules relating to continental shelf would be understood to apply also to “similar submarine areas adjacent to and surrounding the coasts of islands [Article 1 (2)].”

Article 2, paragraph 1 of the Convention granted to the coastal state “sovereign jurisdiction for the purpose of exploiting its natural resources.” Article 3 made it clear that “the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters.” And, subject to its right to take reasonable measures for the exploration and exploitation of the natural resources of the continental shelf, “the coastal state may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf [Article 1].” Further, such measures “must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication [Article 5].”

Fisheries and Their Conservation

The doctrine of continental shelf, as we have already seen, had also encouraged the claims for wider exclusive fisheries jurisdiction. Not only several Latin American states, but Iceland and South Korea had staked wide claims in this regard. The main objective of these claims was to stop indiscriminate exploitation of the coastal fishery resources and their conservation.

The problem of conservation of fishery resources had been the subject of several international conferences since the end of the last century and numerous commissions had been established to study the issues that arose in various areas and to suggest ways to cope with them. The International Technical Conference, which met in Rome in 1955, pursuant to the General Assembly resolution, to study “the problem of the international conservation of the living resources of the sea and to make appropriate scientific and technical recommendations,” was the biggest international effort in the same direction. While considering the report of the International Technical Conference and adopting its recommendations in the form of draft articles submitted by Garcia Amador, the International Law Commission confirmed “the principle...
of the right to fish on the high seas” and said in its report:

The Commission admitted no exceptions to that principle in the parts of the high seas covering the continental shelf, save as regards sedentary fisheries and fisheries carried on by means of equipment embedded in the sea floor. Nor did it recognize the right to establish a zone contiguous to the coasts where fishing could be exclusively reserved to the nationals of the coastal state. The principle of the freedom of the seas does not, however, preclude regulations governing the conservation of the living resources of the high seas. 13

Conceding the need for conservation measures, “when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination,” in order “to obtain maximum supply of food and other marine products in a form useful to mankind,” the Commission insisted that the problems involved in the conservation “should be solved primarily on the basis of international cooperation through the concerted action of all states concerned.” 14

With slight modifications, the draft submitted by the International Law Commission was adopted by the Geneva Conference in 1958 in the form of a Convention on Fishing and Conservation of the Living Resources of the High Seas. In Article 1 of the Convention it added a paragraph declaring that “all states have the duty to adopt, or to cooperate with other states in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” However, no conservation measures could be taken by any state unilaterally in any part of the high seas beyond territorial sea unless, of course, its own nationals and nationals of no other state were fishing in that area. In case of a dispute, the Convention provided for a compulsory arbitration procedure by a special arbitration commission of five members [Article 9].

What Was Achieved?

The Conference concluded four conventions 55 which, on the whole, re-asserted the traditional freedoms of the sea. Although each of the conventions constituted a general code of law, several holes were left in the codes. No agreement could be reached on the extent of territorial waters or fisheries jurisdiction, and agreement on the definition of continental shelf was vague and uncertain. The 1958 treaties in short, codified what had been accepted, and left unsettled what had not, including where the high seas began. Although the Western maritime Powers were in a minority they dominated the Conference and, through their political influence and divisive power, controlled a majority of the votes taken and proposed most of the amendments accepted. But despite all their political strength and smart diplomatic manoeuvres, they were unable to get the required two-thirds majority on some of the key issues, such as breadth of the territorial sea and fishing rights in areas beyond the territorial sea. 16

On the other hand, while the dissatisfied countries of the Third World were not very effective because of their numerous weaknesses, conflicting interests, divisions and vulnerabilities, they did succeed in blocking passage of various proposals by the maritime Powers, such as the proposal made by the United States for a six-mile territorial sea and a twelve-mile contiguous fishing zone, and a British proposal for a fifteen-mile limit on the use of straight baselines. They also succeeded in enlarging 24 miles the baselines to be drawn from headland to headland in delimiting bays, acceptance of “sovereignty” rather than “jurisdiction and control” over continental shelf, in widening the extent of legal continental shelf, and in gaining majorities for several of their proposals which increased the authority of the coastal states in waters off their coasts.

On several issues on which the law was uncertain or disputable, but the legality of the several current activities on the high seas had been questioned by several states, the Conference adopted a series of resolutions recommending to various UN organs further study of the matters or suggesting further cooperation among states. The Conference adopted such resolutions on “nuclear tests on the high seas,” “pollution of the high seas by radio-active materials,” “fishery conservation conventions,” “special situations relating to coastal fisheries,” “humane killing of marine life” and “regime of historic waters.”


Prior to its adjournment, one of the resolutions adopted by the 1958 Conference requested the United Nations General Assembly to study the advisability of convening a second international conference for further consideration of the questions left unsettled by the present Conference. 17 The General Assembly acted upon this request and at its thirtieth session in 1958, by an almost unanimous vote, requested the Secretary-General to convene a second conference in March or April of 1960 “for the purpose of considering further the questions of the breadth of the territorial sea and fishery limits.”

Within a few months of the termination of the 1958 Conference, it is important to note, several countries, like Iran, Iraq, Libya, Mexico, Panama and Sudan, discarded the three-mile rule and extended their territorial sea beyond the three-mile limit, generally to 12 nautical miles. 18 They believed, as the Foreign Minister of Mexico declared right after the close of the Geneva Conference that “the old concept of three miles as limit of the territorial sea has generally been abandoned and repudiated and has disappeared forever from
the juridical world as a standard of international law."61 Protests by the maritime Powers, such as Japan, the United States and the United Kingdom, merely strengthened their resolve to maintain their new wider limits.62

United States Proposal

Looking at the growing defection from the three-mile rule, after considerable consultation with numerous countries in the interim between the 1958 and 1960 Conferences,63 the United States concluded that “it is generally recognized that the next Conference will accept no proposal which limits the territorial sea to three miles, nor will it accept any proposal providing for a territorial sea of 12 miles or greater.”64 When the Second United Nations Conference met at Geneva from March 17 to April 26, 1960, the United States proposed a six-mile fishing zone beyond a six-mile territorial sea, subject to ‘‘historic’’ fishing rights in the outer six miles for vessels of states which could prove a practice of fishing in the area during a five-year period of time, which was referred to as the ‘‘base period’’ (five years preceding 1 January 1958). Unless modified by subsequently negotiated agreements, those ‘‘historic’’ rights were to be perpetual. A similar proposal had earlier been made by the United States in the 1958 Conference65 except with one limitation which was added in 1960, viz. that such ‘‘historic rights’’ would only permit fishing

for the same group of species as were taken therein during the base period to an extent not exceeding in any year the annual average level of fishing carried out in the outer zone during the said period.66

Support for the U.S. Proposal

This proposal was later modified as a joint United States-Canadian proposal to suggest a six-mile fishing zone beyond a six-mile territorial sea, with ‘‘historic rights’’ for a period of ten years from October 31, 1960, in the fishing zone in favour of those states ‘‘whose vessels have made a practice of fishing in the outer six miles of the fishing zone’’ for the five-year ‘‘base period,’’ January 1, 1953 to January 1, 1958.67

The United States, and other maritime states which supported the United States-Canadian proposal, pointed out that the ‘‘joint proposal had been put forward at considerable sacrifice’’ for their ‘‘interests in a sincere effort to meet other points of view, and with the sole purpose of achieving international agreement. It tried to reconcile the diverse and often conflicting interests of coastal states seeking a larger share of the resources of the sea off their coasts with the interests of those states which wanted the greatest possible freedom of the seas.’’68 The United States representative said that the joint proposal ‘‘involved a sacrifice of fundamental principle and large economic and human proportions for those states...whose nationals for generations fished areas of the high seas up to three-mile limit,’’ but emphasized that without sacrifice by both groups of states no agreement could be reached.69 The British representative stressed that ‘‘the Conference should be under no illusion about the exceedingly severe loss to the fishing states.’’ Similar sentiments were expressed by Japan, France, the Netherlands, Australia and several other states.70

Other Proposals

While the maritime Powers were determined to keep the territorial waters as narrow as possible and to permit extension of fisheries jurisdiction with due regard to their ‘‘historic rights,’’ the coastal states of the Third World, supported by the Soviet Union, wanted to extend their exclusive sovereign jurisdiction to at least 12 miles. On March 21, 1960, the USSR proposed a flexible rule permitting each state to choose for itself any limit to its territorial sea from 3 to 12 miles, and an exclusive fishing zone out to 12 miles, if the breadth of its territorial sea was less than this limit.72 Mexico submitted a similar proposal73 but later decided to cosponsor a proposal made by eighteen of the most powerful countries on April 11, 1960, providing for a flexible territorial sea of 3 to 12 miles and an exclusive fishing zone of 12 miles.74 The United States, the United Kingdom, France and other maritime Powers strongly opposed this proposal permitting extension of territorial sea and/or fisheries jurisdiction to 12 miles for the same reasons they had given in 1958 which they repeated even with more vehemence in 1960. It was a ‘‘misconception’’ to imagine, the maritime Powers advised, that the national security of coastal states ‘‘would be increased if they had wider territorial waters.’’ In fact, a wide belt of waters would not be ‘‘a suit of armour that would isolate these states from danger’’ in modern warfare; would be ‘‘difficult and costly to police and control;’’ would make ‘‘hard to fix precisely the position of ships at sea;’’ and would ‘‘increase the likelihood of incidents and so jeopardize the safety of coastal states.’’75

The United States and other Western maritime Powers were convinced that, as in the 1958 Conference, the Soviet Union was the villain of peace and ‘‘it was the purpose of the USSR and its satellites to fix the breadth of the territorial sea at 12 miles and to deny the right of aerial overflight and the right of innocent passage not only to warships but also to the merchant ships of commerce of the free world through such wider territorial seas in many crucial areas of the globe.’’76 The Soviet Union’s own proposal having been defeated, according to
this view, it even prompted the Third World countries to submit proposals (e.g. on fisheries) which could not be acceptable to the Western maritime Powers to create dissensions among them. 77

Developing Countries Demand Change

None of these arguments could convince the developing coastal states, more than they did in 1958, to change their minds and to desist from trying to modify and change the traditional law. During the six weeks of the largest international Conference held until then (with 87 states participating), there was a continuous struggle between numerically strong but poor, newly independent, dissatisfied Asian-African nations and their allies in Latin America, supported by the Soviet group of countries, on the one hand, and politically dominating, rich, satisfied, Western maritime Powers and some small Asian-African-Latin American countries under their influence and within their orbit, on the other.78 While the maritime Powers recounted and re-asserted the virtues of the freedom of the seas as a “time-honoured” principle, the dissatisfied states of the Third World thought it was a “time-worn” and old doctrine which could still serve and be useful but only if modified and adapted according to changed needs of the changed international society.

Rejecting the “three-mile” rule for territorial sea as a “fallen idol,”79 the new members of the international community said that “agreement among the maritime Powers alone was not law,”80 and that “rules should be based on general state practice, not on that of a handful of states that had repeatedly been challenged and now finally rejected.”81 Pleading for a 12-mile limit for territorial waters, they said that “it would be consistent not only with state practice and security, with political and psychological considerations, but with the needs and interests of humanity.”82

Soviets Support the Extension of Territorial Sea

The smaller coastal states got powerful support from the Soviet Union which had itself been claiming a 12-mile territorial sea for a long time. Thus, indirectly defending his country’s claim, the Soviet representatives joined hands with the newly independent countries in attacking the Western maritime Powers for their conservative attitude.83

Although the Soviet Union had itself been a long-distance fishing state, it attacked the Western marine Powers even on that issue:

While the development of technical fishing methods had created new possibilities for the rational exploitation of the resources of the sea, large monopolies were using their well-equipped fishing fleets to cause depletions of the fish resources near the shores of foreign countries, where fish usually abounded. The coastal state could best be protected from such forays by the extension of their territorial sea to twelve miles.84

In fact a Soviet delegate, Tunkin, advised that “any state which wished to help under-developed countries could do so by recognizing their right to expand their fisheries within a twelve-mile limit.”85

The Conference Fails

The basic reason for all these diverse attitudes by various states was well summed by the Chilean delegate who said:

The rise and development of the law of the sea had been prompted by one single factor: interest. Political or economic interest had always prevailed in defining the law of the sea through the centuries. Grotius had not argued for the freedom of the seas simply as an intellectual concept, but to defend the interests of the Dutch East Indies Company. Selden’s sole aim in refuting Grotius had been to defend England’s interests

Things had changed very greatly since that time. The rule of law had been extended, but it was impossible to overlook the fact that the reason for the existence of law was interest. Law had been created by man for the use of man. Hence, it was impossible to make a law of the sea without considering the interests that such legislation must defend.86

Since no formula could be found to reconcile these conflicting interests which must be protected, the Conference failed to adopt any proposal on territorial sea and fisheries jurisdiction. The 18-Power proposal, sponsored by the under-developed states and supported by the Soviet group, did not even receive a majority vote in the Committee of the Whole and was rejected by 39 votes to 36, with 13 abstentions.87 The influence of maritime Powers was too strong to overcome. But even the Maritime Powers failed to achieve their purpose. The joint United States-Canadian proposal, although accepted and recommended by the Committee of the Whole,88 received in the Plenary Session 54 votes in favour, 28 against with five abstentions, and could not be adopted having failed to obtain the required two-thirds majority of those present and voting.89

The determined opposition of the under-developed states led to disappoint-
ment for the maritime Powers. In his closing statement, Arthur H. Dean, Chairman of the U.S. delegation, said that "although the joint proposal had failed to obtain the required two-thirds majority by a single vote, it had received considerably greater support than any other proposal before either of the two Conferences." He pointed out that the U.S. proposal to agree on a six-mile breadth of territorial sea on certain conditions "had been no more than an offer; its non-acceptance therefore left the pre-existing situation unchanged." His country, he said, was satisfied with the three-mile rule and would continue to regard it as established international law. Three miles was the sole breadth of territorial sea on which there had been anything like common agreement, and was a time-tested principle which offered the greatest opportunity to all nations without exception. Unilateral acts by states claiming a greater breadth of territorial sea were not sanctioned by international law, and conflicted with the universally accepted principle of freedom of the seas. In his Government's view, there was no obligation on the part of states adhering to the three mile rule to recognize claims of other states to a greater breadth.98

Other maritime Powers had earlier expressed similar opinions.99 But all these efforts to stop the tide of expanding coastal jurisdictions came to nought, as we shall see in the next chapter.

Notes

10. Ibid., p. 610.
11. Ibid., p. 611.
12. Ibid., p. 611.
13. Ibid., p. 612.
15. Ibid., p. 109.
16. Ibid., p. 110.
18. Ibid., pp. 614—15. Thus, Iceland extended her fisheries jurisdiction on June 30, 1958 to 12 miles soon after the Conference closed. Ibid., p. 615.
19. Garcia Amador, UN Doc. A/CONF.13/39, 53rd Meeting, p. 165; Ba Han, ibid., p. 166. See also Friedheim, op. cit., p. 391.
23. Thirteen states, including the United States, France, Italy, Greece and Poland, claimed such jurisdiction. Ibid., pp. 31ff.


38. Some examples of such straits are the Strait of Gibraltar, the Straits of Bosphorus and the Dardanelles.

39. See McDougal and Burke, op. cit., pp. 197ff for various agreements in regard to international straits.


47. Anand, ibid.

48. See Amador, op. cit., pp. 70–75.


51. Forty-five states were represented in the conference and six sent observers. FAO, UNESCO and 11 intergovernmental organizations were also represented by observers. See Whiteman, op. cit., p. 1099.


56. See Friedheim, op. cit., p. 393 for details.

57. Ibid., p. 386.


60. Ibid., p. 119.

61. See note of July 24, 1958 by Mexican Chargé d’Affaires at Tokyo to the Japanese Minister of Foreign Affairs in Whiteman, ibid., p. 114.

62. See such protests to Mexico and other countries in Whiteman, ibid., pp. 114–20; see also protests by the United Kingdom to Iceland and the latter’s determination to withstand the British pressure. R.P. Anand, “Iceland’s Fisheries Dispute,” Indian Journal of International Law, vol. XVI (1976), p. 45.

63. Members of the U.S. delegation travelled during six months prior to the Conference to East Asia, to Southeast Asia, to Latin America and to Europe “to confer and to reach agreement beforehand on keeping the areas of the high seas as extensive as possible and, hence, the territorial sea as narrow as possible.” See Arthur H. Dean, “The Second Conference on the Law of the Sea: The fight for freedom of the seas,” American Journal of International Law, vol. 54 (1960), p. 752.

64. See Whiteman, op. cit., p. 120.


69. Ibid., pp. 121–22.

70. Ibid., p. 57.

71. See Riphagen (Netherlands), ibid., p. 59; see also Sir Kenneth Bailey (Australia), ibid., pp. 81–82; Quentin-Baxter (New Zealand), ibid., pp. 95–97; Gros (France), ibid., pp. 152–53.

72. A/CONF. 19/C.1/L.1, ibid., p. 64.

73. A/CONF. 19/C.1/L.2, ibid., p. 64.


75. Hare (United Kingdom), ibid., p. 56; see also Quintin-Baxter, ibid., p. 96.


77. Ibid., pp. 777–78.

78. Ibid., p. 752.


80. Shukairui, ibid., p. 74.

81. Hassan (U.A.R.), ibid., p. 102.

82. Shukairui (Saudi Arabia), ibid., p. 120.

83. Koretsky (USSR), ibid., p. 116.

84. Ibid., p. 116–17; see also Tunkin (USSR), ibid., pp. 38–39; 146–47.

85. Tunkin, ibid., p. 147.

86. Melo Lecaros (Chile), ibid., p. 94.

87. See Whiteman, op. cit., p. 130.

88. The Committee of the Whole adopted it by 43 votes to 33, with 12 abstentions. Whiteman, ibid., p. 130.

89. Ibid., p. 134.

90. Arthur Dean, Second UN Conference on Law of the Sea, op. cit., p. 34.

91. See Gros (France), ibid., pp. 152–53.
8. COMMON HERITAGE OF MANKIND: NEW PRINCIPLE FOR A NEW AGE

Tide to Expand Coastal Jurisdiction Irresistible

All the resistance of the maritime Powers could not withstand the pressure of events, as we shall see below, to expand the coastal state jurisdiction. It is significant to note that the 1958 Conventions were never generally accepted by all nations. Most of the newly independent Asian and African or Latin American countries failed to ratify these conventions which they criticized as inimical to their interests. Since then, under the continuing strong current of the principle of self-determination, many new nations acquired independence and emerged as full-fledged members of the international society. Despite all the differences in their political, social, cultural, religious and historical backgrounds, the under-developed countries of Asia, Africa and Latin America had enough in common to form a more cohesive group (than they had in 1958), if not a bloc, and took concerted action in pursuance of their interests. Realizing the effectiveness of concerted action, the under-developed countries organized themselves into the so-called “Group of 77,” containing actually more than 119 members today.

Apart from this change in the geography of international law and the need of the expanding new society to change and readjust the law according to the preponderant interests of the changing society, the developing technology upset the balance arrived at the 1958 Geneva Conference. Fishing metamorphosed even more and the advanced fishing technology of a few countries—a computer-run industry making use of sonars, helicopters and even satellites for spotting fish, automatic gutting machines and deep freezing at sea—further upset the balance between fishing fleets of the developed distant-water fishing states, and poorly equipped sailboats of a large number of coastal countries. Vacuum cleaner fleets of less than half a dozen states were indulging in massive over-fishing taking away half of the total catch of fish, threatening thereby the already inadequate protein and foreign exchange resources of the poor countries.1

Although some members of the International Law Commission,3 and some delegates at the Geneva Conference,4 did warn of the danger of limitless expansion of the shelf regime under the vague and flexible definition in Article 1 of the Continental Shelf Convention, it was generally believed that it would not be possible to exploit the natural resources beyond 200 metres depth “for a long time to come.” Contrary to these expectations, technology soon made it feasible to exploit the vast resources of the seabed, especially oil and gas, at depths beyond 200 metres or the geological shelf or even beyond the continental margin which extended to a depth of 2500 metres. Indeed, exploitation became technologically feasible at any depth. It also came to be known that beyond the continental margin, generally referred to as the deep seabed, there lay intensive deposits of incalculable manganese nodules, rich in metals that are essential for a modern industrial economy.5

Seabed Beyond the Limits of National Jurisdiction

There is little doubt that in some respects the 1958 conventions had become outmoded by the time they were written. On November 1, 1967, in a very comprehensive, well-documented and forthright speech before the First Committee of the United Nations, Ambassador Arvid Pardo of Malta referred to the rapid technological progress made by a few advanced countries which had made it possible to exploit the tremendous resources, which are far greater than the resources known to exist on dry land, of the seabed and the ocean floor. The area, he pointed out, was also of vital and increasing strategic importance and technology permitted its effective exploitation for military and economic purposes. Some countries might be tempted, he apprehended, “to use their technical competence to achieve near-unbreakable world dominance through predominant control over the seabed and the ocean floor.” Indeed, the process had already started, he informed the committee, “and will lead to a competitive scramble for sovereign rights over the land under the seas and oceans, surpassing in magnitude and in its implication last century’s scramble for territory in Asia and Africa.” In order to prevent the situation from becoming grave, leading to sharply increasing tensions, he suggested that “claims to sovereignty over the seabed and ocean floor beyond present national jurisdiction...should be frozen until a clear definition of the continental shelf is formulated,” and acceptance of this area as a “common heritage of mankind” to be used for peaceful purposes and its resources “exploited primarily in the interests of mankind, and with particular regard to the needs of the poor countries.” The establishment of an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction, he felt, was the only alternative by which the international community could
avoid the escalating tensions that would be inevitable if the present situation
was allowed to continue. 10

Pardo's internationalist approach was almost universally welcomed. 10 The
General Assembly responded by establishing in December 1967 an "ad hoc"
Seabed Committee composed of 35 members, which was made permanent in
1968 and enlarged to include 42, and later, in 1970, 86 and in 1971 91
members. 11 This Committee on the Peaceful Uses of the Seabed and Ocean
Floor Beyond the Limits of National Jurisdiction became for nearly five years
(1968—73) the most important forum for preliminary negotiations on a new
law of the sea. It was not long before an atmosphere of confrontation emerged
between the poor, under-developed countries of the Third World expecting and
demanding a share in the new-found riches of the seabed, on the one hand, and
developed maritime Powers with a real technological capacity to exploit and
acquire those riches, on the other. Although nobody had yet developed the
technology to recover or smelt the manganese nodules, there was a lurking fear
among the under-developed states that the technologically advanced states
would soon develop such technology and then quickly exploit the wealth of the
seabed leaving nothing for the latecomers. In fact, there was a feeling that the
lot of the poor countries, which largely depended on the export of unprocessed
minerals for their foreign-exchange earnings, would worsen if large quantities
of minerals were allowed to be extracted from the seabed. In 1968, on the sugges-
tion of the Seabed Committee and over the strong objections of the technol-
ologically advanced countries, which wanted to maintain their legal right to
exploit the new-found resources of the seabed under the vague freedom of the
seas doctrine, the General Assembly adopted a "moratorium resolution" [Res.
2574D (XXXIII)] which expressed the conviction that exploitation of seabed
resources must "be carried out under an international regime including appro-
priate international machinery." Until such a regime was established, it
declared that

(a) States and persons, physical or juridical, are bound to refrain from
all activities of exploitation of the resources of the area of the seabed
and ocean floor, and the sub-soil thereof, beyond the limits of national juris-
diction;

(b) No claim to any part of that area or its resources shall be recognized.

On December 17, 1970, on the initiative and recommendation of the Seabed
Committee, the General Assembly adopted a Declaration of Principles Gover-
ning the Seabed and Ocean Floor which declared, inter alia, that the seabed
beyond national jurisdiction was not subject to national appropriation or
sovereignty but was "the common heritage of mankind"; that it must be "ex-

ploited for the benefit of mankind as a whole, and take into particular con-
consideration the interests and needs of the developing countries"; and "that a
regime applying to the area, including international machinery, shall be estab-
lished...for the orderly and safe development and rational management of the
area and its resources and ensure equitable sharing by states in the benefits
therefrom [G.A. Res. 2749 (XXV)]."

Comprehensive Conference

How far these resolutions of the General Assembly are binding on states and
declare the law is a moot question. While the maritime Powers generally denied
any legal force of the Declaration, 12 there was a clear indication that the new
majority had started asserting itself. The under-developed Asian, African and
Latin American states often criticized the 1958 Geneva Conventions which,
they felt, had jeopardized their economic development. The practical applica-
tion of the four Geneva conventions, it was pointed out, had brought to light
their gaps, deficiencies and imprecisions. While participating in the develop-
ment of a common law for the exploration and exploitation of the deep seabed
and its resources, the new developing countries wanted to revise the old
maritime law which had been developed by a few maritime Powers to protect
their interests in a very different age and which needed total revision and re-
casting. Besides the opportunity it would give to many of them, which had not
participated in the 1958 Conference, to review the law and to participate in its
codification, they would be able "to analyze, question and remould, destroy if
need be, and create a new, equitable, and rational regime for the world's
oceans and the deep ocean." 13 To the overwhelming majority of states, the
status quo was unsatisfactory. Most of the developing countries contended
that the problems relating to the territorial waters, contiguous zone, the conti-
nental shelf, superjacent waters and the high seas were all linked together jurid-
ically, and no one "problem should be considered in vacuo — that is, to the
exclusion of others however expedient it seems at the moment to do so." 14

This approach for an "omnibus conference" was strongly opposed by the
industrialized countries of the West and the Soviet bloc who said that it would
take many years to prepare for such a Herculean task.

But in spite of this opposition by industrialized Powers, the 24th General As-
sembly adopted a resolution in 1969 which, "having regard for the fact that the
problems relating to the high seas, territorial waters, contiguous zones, the conti-
nental shelf, the superjacent waters, and seabed and ocean floor beyond
the limits of national jurisdiction, are closely linked together," requested the
Secretary-General "to ascertain the views of member states on the desirability
of convening at an early date a conference on the law of the sea to review" the
various issues. 15
Next year, on December 17, 1970, in another resolution adopted by 108 votes to seven, with six abstentions, the General Assembly decided to convene in 1973 a comprehensive conference on the law of the sea which could discuss anything and everything relating to the law of the sea. The General Assembly also instructed the enlarged Seabed Committee to prepare for the proposed conference a draft treaty embodying the international regime, including an international machinery for the deep seabed area, and a comprehensive list of subjects and issues relating to the law of the sea which should be dealt with by the conference and to draft articles on such subjects and issues.

The under-developed countries continued to emphasize the need for a conference "broad in scope" and warned against "artificially" isolating "narrow and specific topics" and running "the risk of confining the discussion to incomplete concepts." In accordance with this approach, the "Group of 77" introduced a very comprehensive list of subjects and issues relating to the law of the sea to be submitted to the proposed conference. Some of the land-locked and shelf-locked countries, and some maritime Powers, not satisfied with the list on the ground that it failed to emphasize their special problems, submitted amendments to the list. But it is important to note that no one objected any more to the comprehensiveness of the list of subjects that might be discussed at the forthcoming conference.

Trend Toward Wider National Jurisdictions

Territorial Sea

As the Seabed Committee was preparing these lists of subjects to be raised and discussed at the forthcoming United Nations Conference or compiling various proposals by countries on different subjects between 1970 and 1973, there was already discernible a clear trend toward extensions of national jurisdictions. Between 1967, when Pardo spoke out, and 1973, when the Third United Nations Conference on Law of the Sea (UNCLOS III) formally opened, the speed and frequency with which the nations asserted unilateral claims to the sea were almost dazzling. Thus, it has been pointed out that "during that period no less than 81 states asserted over 230 new jurisdictional claims of varying degrees of importance." While the number of states claiming territorial sea up to a distance of 12 miles was just 13 in 1960, on the eve of the 1974 UN Conference at Caracas, it was 54. Another 17 states claimed territorial jurisdiction up to distances varying from 15 to 200 miles of sea.

Exclusive Economic Zone

At least ten Latin American states had long since extended their maritime zones to 200 miles. In 1970, Canada extended its jurisdiction to a distance of 100 miles in the Arctic archipelago in order to control the dangers of pollution. Several Asian-African countries also extended their fisheries jurisdiction between 20 and 200 miles, and following the Latin American concepts of a patrimonial sea, most of them favoured and supported an exclusive economic zone of 200 miles to keep the developed countries away from their shores and to have the exclusive right to exploit marine resources, both living and non-living. If they did not have the technological capacity to exploit the resources of this zone, they said, they might employ contractors, enter into joint ventures with foreign states or companies or make their bilateral arrangements for the exploitation of this zone. But they should have the exclusive right to regulate resource exploitation activities in the area. As the representative of Kenya, Njenga, explained:

The exclusive economic zone concept is an attempt at creating a framework to resolve the conflict of interests between the developed and developing countries in the utilization of the sea. It is an attempt to formulate a new jurisdictional basis which will ensure a fair balance between the coastal states and other users of the neighbouring waters.

Justifying the introduction of this novel concept, Njenga contended that "if we go to the 1973 Conference steeped in the old concepts of the law of the sea, we are bound to fail. We must find new concepts to resolve existing conflicts of interests in the sea, so that a fair and equitable framework for the exploitation of the seas is created." Referring again to the need for such a right for the coastal state in Subcommittee II of the Seabed Committee, Njenga pointed out that "in 1970 the developed countries with less than one-third of the world's population, had taken 60 per cent of the world catch of fish, while only 40 per cent had gone to the developing countries." "A system which permitted such inequality," he said, "was clearly imbalanced and should be changed."

On May 8, 1970, nine Latin American states — Argentina, Brazil, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay — all of whom had extended their "sovereignty or exclusive rights of jurisdiction" to a distance of 200 miles, adopted the Montevideo Declaration on the Law of the Sea declaring as one of the six "basic principles," "the right to establish the limits of their maritime sovereignty and jurisdiction in accordance with their geographical and geological characteristics and with the factors governing the existence of marine resources and the need for their rational utilization." They also expressed "their intention to coordinate their future action with a view to defending effectively the principles embodied in this declaration." At another
meeting in August 1970 in Lima on Aspects of the Law of the Sea, attended by representatives of 20 Latin American states and observers from Canada, Costa Rica, Iceland, India, Senegal, South Korea, U.A.R. and Yugoslavia, a "Declaration of Latin American Countries on the Law of the Sea (adopted by 14 votes to three, with one abstention and two absentees)," declared as one of the five "common principles":

The right of the coastal state to establish the limits of its maritime sovereignty and jurisdiction according to reasonable criteria, keeping in mind its geographical, geological and biological characteristics, and the need to make rational use of its resources.

In June 1971, the Council of Ministers of the Organization of African Unity, meeting in its seventeenth session in Addis Ababa, strongly supported the extension of fisheries jurisdiction by African states to the limits of their continental shelf. In a resolution, the Council of Ministers confirmed:

The inalienable rights of the African countries over the fishery resources of the continental shelf surrounding Africa...urges the governments of African countries to take all necessary steps to proceed rapidly to extend their sovereignty over the natural resources of the high seas adjacent to their territorial waters and up to the limits of their continental shelf.

Stretching the Continental Shelf Jurisdiction

The limits of national jurisdiction in the seabed prescribed in the 1958 Continental Shelf Convention were based on the assumption, as we have mentioned earlier, that there was little possibility of finding oil and gas beyond 200 metres and, in any case, it would not be possible to exploit them for a long time to come. A definition of legal continental shelf which adopted, therefore, which said that although it could extend national jurisdiction beyond 200 metres "to where the depth of superjacent waters admits of exploitation of natural resources," it was supposed to be quite narrow and "adjacent to the coast." However, no sooner came it to be found that beyond the continental shelf the continental slope and continental rise contained a substantial amount of oil at depths greater than 200 metres, and no sooner came technology to be developed to make it feasible to produce undersea hydro-carbon resources at ever-increasing depths and distances, than the commentators started stretching the 1958 continental shelf definition to cover the whole of continental margin, including the geological shelf, slope and rise, at depths ranging from 2500 to 3000 metres and covering distances in some cases up to 600 to 800 miles. Thus, the Interim Report of the Committee on Deep Sea Mineral Resources of the American Branch of the International Law Association stated in 1968:

As a general rule, the limit of adjacency may reasonably be regarded as coinciding with the foot of the submerged portion of the continental land mass. There is strong support for this view in the drafting history of the Convention, although other interpretations have been advanced.

This interpretation was adopted by a U.S. Senate Subcommittee on Outer Continental Shelf in 1970. The National Petroleum Council of the United States reached the same conclusion in its report in 1969.

A line coinciding approximately with the outer limit of the submerged continent as the limit of the legal continental shelf was further supported on geological basis and by the fact that "this is the most distinct, the most profound, and the only natural boundary which can be utilized for this purpose." The continental slope, it was argued, geomorphologically divided the continental platform from the ocean basin, and its base was recognized by experts as a far more fundamental feature than the edge of the continental shelf and should be used as a guide to the outer edge of the continental block.

This interpretation got powerful support from the International Court of Justice by its judgment in the North Sea Continental Shelf cases in which the Court said that the continental shelf of a state "constitutes a natural prolongation of its land territory into and under the sea." The physical fact and relationship of the continental shelf with coastal state, or "the notion of appurtenance," or "natural prolongation," or "continuation of the land territory or domain," were emphasized by the Court several times in the judgment. The idea of "an extension of something already possessed" was, in the Court's opinion, "determinant." It said:

The institution of continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal states into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists.

It is important to note that the Court rejected the notion of "proximity" or "absolute proximity" as a condition for a particular area being included in the continental shelf of a coastal state. "More fundamental than the notion of proximity," the Court insisted, was the principle "of the natural prolongation of the land territory or domain, or land sovereignty of the coastal state, into
and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that state."

The strong reliance of the International Court on the physical character of the prolongation of the landmass led to the general conclusion by commentators that the whole continental margin being "geomorphologically and geologically a part in physical fact of the land mass, must in general international law be deemed already vested in the coastal state." This interpretation was not only accepted by scholars, but, in practice, adopted by 1970 by at least 31 states which granted off-shore concessions in areas which included waters deeper than 200 metres, or issued decrees, or made announcements of national policy, or concluded agreements with neighbouring countries without eliciting any opposition or protests from other states. It may be noted that among the largest beneficiaries of this extension are Australia, New Zealand, Norway, Indonesia, Canada, Soviet Union, United States, Japan, Argentina and Mexico.

Mid-Ocean Archipelagic Claims

The problem of wide territorial sea claims of coastal archipelagos, joining outermost points of their outermost islands, as we have seen above, had been dealt with by the International Court of Justice in the Anglo-Norwegian Fisheries case. In 1956, the International Law Commission in its draft articles embodied for coastal archipelagos the principles laid down in this judgment which were finally adopted in Article 4 of the 1958 Convention on the Territorial Sea. But while the problem of coastal archipelagos was thus solved, the problem of mid-ocean archipelagos was side-tracked on the pretext "of lack of technical information on the subject." Although an excellent preparatory document on archipelagos, including mid-ocean archipelagos, was prepared by a Norwegian jurist, Jens Evensen, on the eve of the first UN Conference on the Law of the Sea in which he supported the archipelago concept, and Philippines and Yugoslavia initiated the matter, the 1958 Conference failed to consider the issue because it was thought to be too complex for solution. The 1960 Conference also did not think it important enough to deal with the matter despite proposals by both the Philippines and Indonesia. Though the failure of the two Conferences to accept or even seriously consider the archipelago concept somewhat discouraged the newly independent archipelagic states, it did not stop them from pursuing their claims and vigorously seeking support for their cause from other members of the international community.

After the setting up of the Seabed Committee in 1968, the Philippines and Indonesia were joined in their claims by two other newly independent archipelagic states, Fiji and Mauritius. Realizing the sharply changing international atmosphere, these four archipelagic states worked hard in regional groups for political support and world-wide acceptance of the archipelago principle. Indeed, they did get a lot of support in the "Group of 77." In the summer of 1973, the archipelagic states introduced in the Seabed Committee draft articles embodying the archipelago principles and a regime of limited innocent passage through designated sealanes within archipelagic waters. At the same session of the Seabed Committee, the United Kingdom also introduced a "Draft Article on the Rights and Duties of Archipelagic States" which, while accepting the archipelago principle, sought to restrict the rights and powers of archipelagic states and to guarantee freedom of unimpeded passage through archipelagic waters.

"Common Heritage of Mankind": A Rallying Cry

The declaration by the UN General Assembly in 1967 of the seabed beyond the limits of national jurisdiction as "common heritage of mankind," and persistent reiteration of the principle symbolized, as the Indian representative said, "the hopes and needs of the developing countries, which can legitimately expect to share in the benefits to be obtained from the exploitation of the resources" of the deep seabed. "These benefits," they hoped, "would help to dissipate the harsh inequalities between the developed and the developing countries." To the criticism of the skeptics that it was a novel concept, "a neologism," without any specific legal content, which "meant different things to different people," the Chairman of the Seabed Committee, Amersinghe of Sri Lanka, said:

There are, we realize, many who are alarmed by what they consider to be the formulation of a novel concept hitherto unknown, but the traditional legal concepts are not, we feel, applicable to this unique area and its resources. If the area and its resources are to be saved from competitive exploitation restricted necessarily to those with financial resources and the technological power to exploit them — it is necessary for us to abandon those traditional concepts and evolve a new concept.

In an eloquent speech, the Norwegian Ambassador, Hambro, strongly supported the concept of "common heritage of mankind." Refuting the criticism that it was not an established term of international law, Hambro said:

That may be, but the problems with which we are confronted are novel and the solutions we must offer in this area in order to establish inter-
national justice and maintain international peace can hardly be found in the bookshelves of the international law libraries. We must not be afraid of new concepts or of new terms to explain them. New words are needed for new concepts. 43

The under-developed countries called the principle "the very backbone of the entire system that should in future govern the exploitation of and exploration of the sea-bed and ocean floor." 44 For them it served as a "useful rallying cry, for it symbolized the interests, needs, hopes, desires and objectives of all peoples." 45

While the maritime Powers remained skeptical about the meaning and content of the concept of "common heritage of mankind" which, they thought, was "not legal principle" but merely embodied a "moral commitment," 46 the under-developed countries insisted that it was the new consensus which had replaced the outmoded freedom of the seas in that area. It was a general term which had been elaborated in GA Resolution 2749 (XXV) of December 17, 1970 on "General Principles." 47

International Machinery for Common Heritage of Mankind

Although the seabed beyond the limits of national jurisdiction had come to be accepted as the "common heritage of mankind," whatever its exact meaning, there was much dispute and little agreement as to how this area should be exploited for the common benefit of all. Since the industrialized countries of the West had both the resources and the fast-developing technology to exploit the mineral wealth of the seabed they did not want to be hampered in their projects in this regard. 48 They wanted and suggested the creation of an International Seabed Resources Authority which would license and regulate private companies, with guaranteed non-discriminatory access to the resources for a reasonably long period, without strict limits on production and with royalties to be shared for common purposes. They also wanted the regime and the machinery to be structured in such a manner as to reflect realistically the principal interests of different groups of states and permit the technologically advanced countries to exercise a dominant role. In line with this trend of thought, some technologically advanced countries, like the United States, the United Kingdom, France, the Soviet Union and Poland, submitted drafts and working papers regarding proposals for an international regime, including an international machinery, to the Seabed Committee during the 25th and 26th sessions of the General Assembly. 49

These proposals, however, were totally unacceptable to the developing countries. Unable to exploit the seabed resources themselves, and skeptical about the intentions of the developed countries which might soon begin to exploit the resources with their striding marine technology, the under-developed countries wanted the international seabed area to be held in trust by the proposed Seabed Authority and developed as a common resource. They felt that they could be assured of real participation only if the Authority itself carried out deep seabed mining on behalf of the international community as a whole. A regime based on licenses or concessions would not be equitable because it would give advantage to the technologically advanced countries, create a monopoly for them and serve only the interests of individual countries or companies, rather than those of mankind as a whole. 50 They, therefore, pleaded for the creation of a strong international machinery with comprehensive powers, including the power to explore and exploit the deep seabed and its resources. In accordance with these ideas, during the 1971 session of the Seabed Committee, several developing countries submitted proposals for a centralized, democratically structured international regime and an international machinery with comprehensive powers for the exploration and exploitation of the seabed and its resources. 51

Passage through Straits

The confrontation between the technologically advanced maritime Powers – whether of the East or the West – on the one hand, and poor, under-developed coastal states of the Third World, on the other, was not confined to the issues relating to the exploration and exploitation of the seabed beyond the limits of national jurisdiction and its resources. The whole freedom of the seas, as it has been understood and practised for more than 150 years, was undergoing phenomenal change. The maritime Powers were getting increasingly concerned about the numerous unilateral extensions by coastal states under one pretext or another. In fact, by 1973, the much publicized and coveted "common heritage" had shrunk by 65 per cent of the ocean space. The remaining 35 per cent, claimed by states in one way or another and an area almost equal to the landmass of the planet, probably contained virtually all oil and gas resources, 95 per cent of the harvestable living resources and perhaps a significant proportion of the most highly politicized mineral resources, viz. manganese nodules. 52 The maritime Powers were deeply worried about the ever-present danger of "creeping jurisdiction" over the extended continental shelf area and the exclusive economic zone, with coastal states exercising in course of time wider and more comprehensive jurisdiction in these areas claimed in the beginning for limited purposes only, threatening navigation, fishing, the laying of submarine cables and pipelines, and scientific research. This threatening interference with the traditional freedoms disturbed several scholars and statesmen
who saw in it forebodings of a new and unfortunate trend.\footnote{58}

An even more important and serious concern of the maritime Powers related to the extension of the territorial sea to 12 nautical miles and its effect on freedom of navigation, especially through straits, and their security interests. Since the territorial sea of coastal states must be used for transport and communications — all the major maritime routes are said to pass at one place or another through territorial seas — and since many straits are vital for maintaining freedom of navigation, they must be kept open. Although the freedom of innocent passage for merchant vessels and other ships is wide enough during peace time, as we have seen earlier, it does leave a wide discretion in the coastal states to decide whether a particular passage is or is not innocent.\footnote{59} Moreover, the right of innocent passage is not free from dispute for various kinds of ships at various times. Thus, (i) the rules relating to innocent passage for warships are not beyond dispute even under the 1958 Convention on Territorial Sea; (ii) under Article 14 (6) of the Convention, submarines must navigate on the surface and show their flag; (iii) the coastal state is free to decide, at least in the first instance, any particular passage as non-innocent, for instance the passage of nuclear-powered ships or oil tankers; and (iv) there is no freedom-of-innocent passage for aircraft through airspace above the territorial sea. For all these reasons, the trend toward the extension of territorial waters was viewed with a lot of misgivings and disfavour because it would leave wider areas within the coastal states' problematic jurisdiction and discretion. Furthermore, it would affect 116 straits\footnote{60} which under the three-mile rule had a central belt of high seas in which freedom of the seas might be enjoyed. They included such important waterways as the Dover Strait, the Strait of Gibraltar, the Bering Straits, Bab-el-Mandeb (southern entrance to Red Sea), the Strait of Hormuz in the Persian Gulf and the Malacca Strait.

This was clearly intolerable to the maritime Powers, including both the United States and the Soviet Union, because they wanted to maintain their absolute freedom of navigation and maximum manœuvrability. It was for this reason that, while more than 54 states claimed 12 miles of territorial seas and 17 other states asserted jurisdictions between 15 and 200 miles, several maritime Powers, like the United States, United Kingdom, France and Japan, continued to cling to the three-mile rule.\footnote{61} They came to realize, however, that in spite of their power and tenacity to hold on to their traditional position, it was impossible for them to force most states to roll back their territorial seas. To make the situation tolerable in this difficult position, the United States introduced a set of Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries in Subcommittee II of the Seabed Committee, on August 3, 1971. After recognizing in Article I the right of the coastal state to establish breadth of territorial sea at no more than 12 miles, Article 2 provided:

\begin{quote}
In straits used for international navigation...all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight as they have on the high seas. Coastal states may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.\footnote{62}
\end{quote}

The United States representative said in Subcommittee II of the Seabed Committee that "in addition to the importance of sea navigation for their international trade, many states depended upon air and sea mobility in order to exercise their inherent right of individual and collective self-defense."\footnote{63} He made it clear that "the security of the United States and its allies depended to a very large extent on freedom of navigation on and overflight of the high seas. More extensive territorial seas, without the right of free transit in straits, would threaten that security."\footnote{64}

The United States, therefore, made it clear time and again that it would not accept extension of territorial sea from three miles to 12 miles unless the right of free passage through international straits was accepted. The United States demanded freedom of unobstructed passage for warships, including nuclear submarines, on the surface or submerged, without notification and irrespective of the mission. Further, it wanted freedom of civilian and military flights through the superjacent airspace. Another important point to be noted is that all these rights were claimed not only in those straits which until now had a corridor of high seas in their midst, but in all straits irrespective of their breadth or importance. But while insisting on the right of free transit, the United States was willing to accept and "observe reasonable traffic safety and marine pollution regulations," that is to say, regulations which were "consistent with the basic right of transit." These safety standards to be applied in straits, however, "should be established by international agreement and should not be unilaterally imposed by coastal states."\footnote{65}

The United States was supported on this issue not only by the Western maritime Powers, like the United Kingdom, France, West Germany\footnote{66} and others, but also by the Soviet Union and the Communist bloc countries\footnote{67} which also insisted that the limited right of "innocent passage" was not sufficient and "had never been and could never be applied to such straits as those of Gibraltar, Dover, Malacca, Singapore and Bab-el-Mandeb, where freedom of navigation had always been enjoyed."\footnote{68} In accordance with these views on July 25, 1972, the Soviet Union proposed "Draft Articles on Straits used for International Navigation."\footnote{69} This reversal of Soviet policy from its stand in 1958 is, of course, a result of the emergence of the Soviet military capability — naval, fishing and merchant marine — during the last two decades.\footnote{70}
Transit through Archipelagic Waters

Most of the objections to the archipelagic claims, it may be noted, were also raised because of the threat to international navigation. As some archipelagoes, such as for instance the Philippines and Indonesia, lie on major trade routes, their claims would change the nature of transit through some important straits and subject such straits to the jurisdiction and control of these archipelagic countries. Indonesia, which is the most strategic of the archipelagic states, enclosed within its baselines the Java, Flores, Molucca, Banda and Savu Seas and the important straits of Sunda, Sumba, Lombok, Ombai, Molucca and Macassar, as well as numerous other passages.31 Similarly, other archipelagos, like the Philippines, Bahamas, Fiji, Mauritius, the Galapagos, Andaman and Nicobar, and Faeroes islands, enclose important passages and shipping lanes. The extent to which an archipelagic claim is controversial or has been objected to depends upon its location.32 Through the archipelagic waters, which under the archipelago principle, become internal waters subject to the absolute sovereignty of the coastal states, there would be no right of aerial overflight, and movement of fishing vessels, warships and submarines through, over and under those waters would be seriously curtailed. Though all the archipelagic states accept the right of “innocent passage” through their internal and territorial waters, this right is generally denied to warships without permission and, under Article 14 of the 1958 Convention on Territorial Sea, submarines must come up and show their flag. Moreover, the right of “innocent passage” is a rather weak right and leaves wide latitude to the coastal state to interfere with a passage. In fact, through the years, the Philippines have denied the right of innocent passage to warships of Australia, New Zealand and the United Kingdom without prior authorization and in some cases refused to give permission of innocent passage to their warships.33 Indonesia considers “that innocent passage of foreign ships in Indonesian interior (or internal) waters is a facility” which may be withdrawn, unlike the passage through territorial sea which cannot be withdrawn.34 Indonesia’s strategic position between the Pacific and the Indian Ocean led states with important navies and submarine fleets to react vehemently against its claims to close its waters. A sovereign archipelagic regime, therefore, with straits threatening as choke points, could represent a death blow to naval mobility and would be totally unacceptable to the big Powers, especially the United States and the Soviet Union. It is for this reason that the United Kingdom submitted a proposal before the Seabed Committee in 1973 which, while recognizing the archipelagic principle with some limitations, laid down that, where parts of archipelagic waters had been used as routes of international navigation before the treaty was concluded, unimpeded passage, as through straits, would be guaranteed for foreign ships. In all other waters innocent passage would be permitted.35

Third UN Law of the Sea Conference: Role of the Third World

When the Third United Nations Conference on Law of the Sea (UNCLOS III) met in its first substantive session in 1974 (June 20 to August 29, 1974) at Caracas,36 the under-developed countries of the Third World were determined to play an active, indeed aggressive, role in the formulation of a new law in place of the old, time-worn, sparse rules, which had left unlimited freedom to a few maritime Powers to use the oceans according to their own sweet will. It was only the strong countries, they said “that profited most from those unlimited and undefined freedoms.”37 They were convinced that freedom of the seas would have to be regulated in accordance with and balanced against the needs of all nations to safeguard their economic interests as well as their national security and sovereignty. The continuing laissez faire on the high seas had ceased to serve the interests of international justice. It had become merely “a catchword and an excuse for a few countries to exploit ruthlessly the resources of the sea, to terrorize the world and to destroy the marine environment. That type of freedom belonged to the old order and had outlived its time. True liberty struck a balance between rights and obligations.”38 In seeking to establish a new legal order “in a constructive rather than a destructive spirit,” the developing countries would be “seeking not charity but justice based on the equality of rights of sovereign countries with respect to the sea.”39 “There could be no justice,” the President of the Conference said, “if entrenched rights acquired by the major maritime nations merely through custom and usage, without the genuine consent of the over-whelming majority of the international community, were perpetuated.”40 Only a new international law in place of the present “lawless” laissez faire system could establish this because they knew that “between the strong and the weak, it is freedom which oppresses and law which protects.”41 The developing countries were determined, as the President of Venezuela said opening the conference, that the sea could not be permitted to “be used in such a way that a few countries benefited from it while the rest lived in poverty, as had been done with the riches of the land.”42

It is important to note that, compared to 44 countries in the 1930 Conference and 86 and 88 participants in the 1958 and 1960 Conferences, respectively, participation in the Third UN Conference on Law of the Sea became almost universal with 137 countries participating (149 had been invited) in the Caracas session in 1974, which increased to 156 at the New York session in 1976, and 158 in 1980. It may also be noted that “the dominant characteristic of the 1958 and 1960 Conferences was the primacy of the East—West (Communist vs. non-Communist) confrontation and the near complete duplication of the structure of the General Assembly polities (at that time) on ocean issues.”43 However, the alignments at the UN Seabed Committee from 1968 to 1973 and in the Third Law of the Sea Conference are no longer the old alignments of 1958 but
States, more and more, with North–South confrontation becoming more pronounced and dominating on all issues. In other words, the major confrontation in the Conference since 1974 has been, and still is, the opposed interests between the developed states and the developing countries. The former seek to maximize their benefits from the sea and the newly found seabed resources on the basis of their advanced technology, whereas the latter want, firstly, to modify and change the traditional law which, they believe, has not served them well and, secondly, to develop a new equitable law for the exploitation of the seabed resources so that they will be equal partners in the new bounty.

It was because of this confrontation and misgivings on both sides that no agreement could be concluded on the rules of procedure at the first session of the Conference from 3 to 15 December 1973. The maritime Powers felt that there was a great danger of the imposition of majority views on the Conference and that it would be impossible to solve international problems by majority votes. The Conference again devoted the first week of the second session at Caracas on rules of procedure at which the big Powers suggested that all decisions should be taken by consensus and voting should be allowed only after all attempts at formulating consensus had failed. Under a threat from the maritime Powers that they might leave the Conference and over the strong objections of the developing countries, the agreed voting formula adopted at Caracas combined a "gentleman's agreement" on efforts to reach consensus, with a requirement for substantive decisions by "two-thirds majority of the representatives present and voting provided that majority shall include at least a majority of the states participating in that session of the Conference." The gentleman's agreement provided:

Bearing in mind the fact that problems of ocean space are closely interrelated and need to be examined as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance, the Conference should make every effort to reach an agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.9

The President of the Conference, Amerasinghe, emphasized the importance of the gentleman's agreement and said that it was "much more binding than rules or laws, because rules or laws are not always gentlemanly."96

Wider National Jurisdictions Confirmed

Despite some nagging questions, which still remained to be solved, the trend of

Informal Negotiating Texts

It is pertinent to note that, unlike the First Law of the Sea Conference in 1958, at which negotiations began with a single negotiating text prepared in advance by the International Law Commission, there was no negotiating text at Caracas, and numerous countries submitted various proposals on different aspects of the law of the sea. It was during the third session, held in Geneva in April – May 1975, that the chairmen of the three main committees of the Conference were requested to prepare a Single Negotiating Text (SNT) on the basis of proposals submitted by the different delegations and taking into account the formal and informal discussions held until then. The three committee chairmen reduced a wide variety of differing proposals into one three-part Single Negotiating Text (SNT). Although it was not really a negotiated text or accepted compromise, it did reflect an emerging trend and the possible direction in which a consensus might be found. The SNT supported the extension of territorial sea to 12 nautical miles and creation of an exclusive economic zone for the exclusive exploitation of all the resources by the coastal state up to 200 nautical miles was confirmed at Caracas in 1974, and has since been accepted and re-endorsed without any question at the seven formal sessions held since then until July – August 1980. A large number of proposals to that effect were submitted and supported by various groups, including 41 African states parties to Addis Ababa Declaration,7 several Asian states, 22 Latin American states (including 14 signatories to the Santo Domingo Declaration of 1972),8 Australia, Canada and even by the United States, the Soviet Union and other Communist states.9 It is interesting to note that not a single country opposed these extensions. In fact, as the U.S. representatives to the Caracas Conference pointed out, "agreement on a 12-mile territorial sea is so widespread that there were virtually no references to any other limit in the public debate." Similarly, more than 100 countries spoke in support of an economic zone extending to 200 miles, which had acquired an "almost mystical political aspect which was identified with the national aspirations of many states" and was felt to be "a necessity owing to well-known biological and oceanic circumstances."91 It was supposed to "form the nucleus of the future law of the sea" which "was a natural consequence or corollary of the development philosophy, which reinforced the ideals and expectations of the Third World."93
were made in some parts of RSNT, they merely confirmed the SNT on limits of national jurisdiction (Articles 2 and 45). The RSNT was again revised in 1977 by the President of the Conference and the chairmen of the three main committees in the form of an “Informal Composite Negotiating Text” (ICNT) which itself underwent three revisions until August 1980 (in 1978, April and August 1980). After the ninth session, on August 28, 1980, the twice revised ICNT was issued as “Draft Convention on the Law of the Sea (Informal Text)” which merely endorsed the 12-mile territorial sea (Article 3) and 200-mile economic zone (Article 57).

As early as 1975 and 1976 several countries, encouraged by the consensus which had emerged, passed national legislations extending their fisheries jurisdictions or economic zones to 200 miles. Thus the United States, the Soviet Union, Mexico, Norway, Canada and the EEC countries passed such legislations. India, Pakistan, Sri Lanka, Maldives Islands and several other countries followed suit and gave legal imprimatur to their claims of 12 miles of territorial sea and 200 miles of economic zone.

**Passage through Straits Guaranteed**

Although there was no more opposition on the part of the maritime Powers to the extension of the territorial sea to 12 miles and the economic zone to 200 miles, its formal acceptance in a treaty form, it became clear at Caracas, was dependent on the satisfactory solution of other issues, especially the issue of passage through straits, used for international navigation, the outermost limit of the continental shelf and the actual retention of this concept and, last but not least, the aspirations of the land-locked countries and of other countries which, for one reason or another, consider themselves geographically disadvantaged.

The United States, along with other Western maritime Powers and Japan made it clear that these extensions would be acceptable “provided that that was part of an acceptable comprehensive package, including a satisfactory regime within and beyond the economic zone, and providing for unimpeded transit of straits used for international navigation.” In response to this demand of the maritime Powers, the United Kingdom introduced “draft articles on the territorial sea, and straits” which, while conceding 12-mile territorial sea, provided that in straits “all ships and aircraft enjoy the right of transit passage, which shall not be impeded.” Provisions were also made in these draft articles to accommodate the concerns of strait states with respect to security, safety and pollution, including the right of the latter to designate sea lanes and prescribe traffic separation schemes for navigation in the straits to promote the safe passage of ships.

The Soviet Union, consistent with its previous stand, not only supported the Western maritime Powers on this issue, but, along with other Communist states, introduced “draft articles on straits used for international navigation.”

Despite persistent objections by a few strait states and the introduction by four small states of “draft articles on navigation through the territorial sea, including straits,” providing for non-suspendable “innocent passage” regime through straits, an agreement seemed to be emerging at Caracas for the acceptance of unimpeded transit passage through straits. A large number of countries from the “Group of 77” supported this position. The SNT in 1975 reflected this agreement and provided for a right of non-suspendable “transit passage” through “straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone,” except where the strait is formed by an island of the coastal state and a high sea or economic zone route of similar convenience exists seaward of the island. Transit passage was defined as “the exercise in accordance with the provisions of this part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.”

Virtually all the other provisions dealt with the concerns of the strait states and permitted them to designate and substitute sealanes and to prescribe traffic separation schemes after adoption of their proposals by the competent international organization. Article 41 permitted the strait state to make laws and regulations regarding transit passage relating to safety of navigation and the regulation of marine traffic, prevention of pollution, prevention of fishing, and prohibition of taking on board or putting overboard any commodity, currency or persons. These provisions were confirmed by R.S.N.T. in 1976, ICNT in 1977 and the Informal Draft Convention in 1980.

**Status of Archipelagic States Recognized**

Having received wide-spread support, as we have seen above, the four archipelagic states — Fiji, Indonesia, the Philippines and Mauritius — again submitted draft articles on the subject which were largely based on their earlier proposal before the Seabed Committee. Three more nations, Tonga, Papua New Guinea and the Bahamas, aspired to recognition as archipelagic states and Bahamas introduced its own draft articles to suit its own geographical configuration. It became clear at Caracas that the big maritime Powers were prepared to support these claims provided innocent passage was guaranteed everywhere in archipelagic waters, and through normal international navigation cor-
ridors all vessels enjoyed the same unimpeded transit rights as when passing through international straits. The Soviet Union and other Communist states, while generally accepting the archipelago principle, but concerned about the navigation rights through archipelagic waters, introduced amendments to the draft articles of the archipelagic states. The purpose of these amendments was to guarantee "freedom of passage in archipelagic straits, the approaches there-to, and those areas in archipelagic waters of the archipelagic state along which lie the shortest sealanes used for international navigation between one part and another part of the high seas." These provisions were slightly modified through RSNT and ICNT in favor of archipelagos, but without affecting the navigation rights of foreign ships through archipelagic waters. As laid down in the August 1980 Informal Draft Convention, an archipelagic state may draw straight baselines joining outermost points of the outermost islands provided (1) the area of the water to the area of the land is between one to one and nine to one; and (2) the maximum length of baselines does not exceed 100 miles, except that up to three per cent of the total number of baselines may exceed that length up to a maximum of 125 nautical miles (Article 47, paragraphs 1 and 2). These mathematical criteria were much more generous than those proposed in 1973 by the United Kingdom. The water—land ratio provided in the latest draft, it is important to note, would accomodate all major archipelagic states, such as Indonesia, the Philippines, Fiji, the Bahamas and others of a similar configuration. The absolute ratio of 1:1 water—land ratio was added to exclude those island states that were primarily dominated by one large island, like Ireland, Iceland, Japan, Madagascar, the United Kingdom and others, which had the straight baseline option already available to them. So also, some potential archipelagic states, like Micronesia, the U.S. Trust Territory of Pacific islands, made up of widely dispersed small islands, would probably not be able to qualify. It is also significant to note that these provisions apply only to archipelagic states and make no mention of the status of archipelagos which are politically part of a coastal state, such as the Galapagos belonging to Ecuador; and Andaman and Nicobar island groups belonging to India. Although both Ecuador and India claim archipelago status for their outlying island groups, and at least two proposals were introduced at Caracas to apply the same principles to them as provided for the archipelagic states, the Conference was divided on this issue and has so far left their problem unsettled. Articles 52 to 54 of the Informal Draft Convention spells out passage rights of foreign ships through archipelagic waters; they are almost exactly the same as Articles 37 to 45 which define transit passage through straits used for international navigation.

The Economic Zone Accepted

One of the most important innovations of the Third Conference on the Law of the Sea relates to a new concept which authorized a coastal state to establish an exclusive economic zone of 200 nautical miles in which it has:

sovereign rights for the purpose of exploring and exploiting, conserving, and managing, the natural resources, whether living or non-living, or the sea-bed and subsoil and the superjacent waters, and with respect to other activities for the economic exploitation and exploration of the zone, such as production of energy from the water, currents and winds.

Covering nearly 40 per cent of the sea in which most of the known hydrocarbons and commercial fisheries are found, these articles would perhaps "affect more interests of more states than any other aspect of the Single Negotiating Text." It is clearly provided, however, that non-resource uses of the sea, such as navigation and overflight, and the laying of submarine cables and pipelines, would remain free to all (Article 58) and the coastal state, in exercising its rights and performing its duties, "shall have due regard to the rights and duties of other states" [Article 26(2)]. But while there was a general consensus on the concept of an economic zone, there was much dispute about its juridical status. It was suggested in the Conference by several countries that the economic zone was neither territorial sea nor the high seas, but a zone sui generis and must be recognized as such. It was as the President of Mexico said in an address to the Conference, "a new, special, legal concept which reflected the complexity of the new conditions of the sea. It could not be absorbed into any of the traditional categories of sea laws." In his 1976 report, the Chairman of the Seabed Committee agreed with this view.

Virtual Elimination of Freedom of Fishing

An almost "revolutionary" effect of the acceptance of coastal state jurisdiction over a 200-mile economic zone has been the "elimination of freedom of fishing and the substitution of coastal state sovereign rights over the exploration, exploitation, conservation, and management of living resources." Such a "drastic alteration" in traditional law, coupled with the migratory and other biological characteristics of fish stocks, raised a number of practical problems at the Conference which have yet to be solved.
Continental Shelf Extended

By the time the Caracas Conference met in 1974, most of the coastal states with wide geological shelves claimed continental shelf jurisdiction to cover the entire continental margin as already vested in them under customary international law, even if it extended beyond the economic zone of 200 miles. Despite some objections by the 29 land-locked, 20 shelf-locked and some other geographically disadvantaged states with narrow or small margins, this jurisdiction came to be confirmed by the informal negotiations texts (SNT, RSNT, ICNT and the Informal Draft Convention) which define continental shelf as extending “to the outer edge of the continental margin, or a distance of 200 nautical miles,” whichever is more. Since “the outer edge of the continental margin” is no sure guide and is not precise enough to mark the outer end of the legal continental shelf, after intensive and prolonged negotiations, the 1980 draft Convention lays down a complicated procedure for delineation of the outer edge of the margin (Article 76).

An International Authority for Seabed beyond the Limits of National Jurisdiction

While the international society, almost for the first time in history, came to agree on a large part of international law of the sea, and the Third United Nations Conference, despite its cumbersome and time-consuming rules of procedure, settled most of the issues that looked in the beginning unsolvable, one issue that has yet to be finally resolved and which threatened to disintegrate of the entire Conference many a time, is the mining of deep seabed manganese nodules. Although this activity has not started so far and is likely to have less immediate effect on the basic interests of most states than other activities on which agreement has been reached, it has caught the imagination of whole mankind because it contains an unimaginable amount of precious mineral resources. It is sometimes said that unless agreement is reached on this issue — and reached fairly soon — it may lead to the worst form of scramble and “colonialism” in the seabed entailing tensions, conflicts and struggles. In a sense, the current law of the sea conference is in a race with seabed technology. A handful of companies and multinational consortia in the United States, Japan, Canada, the United Kingdom, West Germany and some other technologically advanced countries are already prospecting for the mineral-rich nodules and are developing the technology to recover them from the ocean floor and extract their metals. Some American companies claim to have invested more than 100 million U.S. dollars in these ventures.

Numerous proposals were made in the Conference both by the developed and the developing countries for the exploitation of mineral resources of the seabed, which has been a subject of intense discussions and acrimonious debates. After prolonged negotiations and innumerable bargaining sessions, compromise proposals were put forward and revised again and again in informal negotiations texts (SNT, RSNT, ICNT and Draft Convention). A consensus on most aspects of this difficult issue seemed to have been reached in the August 1980 Informal Draft Convention. It was agreed that the exploration and exploitation of the area, declared as “common heritage of mankind,” should and would be conducted by or under the authority of an International Seabed Authority to be created for this purpose (Article 153). According to the “Basic Conditions of prospecting, exploration and exploitation,” contained in 1980 Draft Convention, the Authority (through its functional organ, Enterprise), states parties and private companies might simultaneously explore and exploit the mineral resources after authorization by the Authority under a parallel or dual system. Each state or company (other than Enterprise), seeking permission to exploit deep seabed mineral resources, must submit two mining sites of equal estimated commercial value out of which the Authority would choose one site to be exploited directly by itself or under contract with private entities, leaving the other site to the state or company for exploitation under certain conditions laid down by the Authority, which would include, inter alia, transfer of technology to the Authority and Enterprise “on fair and reasonable terms and conditions,” and financial guarantees “to enable the Enterprise to engage in sea-bed mining effectively at the same time as the entities.” Agreement was said to have been finally reached on such controversial issues as the powers and functions of various organs of the International Seabed Authority (the Assembly, the Council, the Economic Planning Commission, the Legal and Technical Commission, the Sea-bed Tribunal and the Enterprise), and the procedures for them to take decisions.

But as the goal of a final treaty on the Law of the Sea seemed to be in sight, the newly elected United States administration of President Ronald Reagan put the whole process of negotiations in disarray, at least temporarily, by its surprise announcement on the eve of the tenth session on March 8, 1981, that the United States would want to thoroughly review the 1980 Draft Treaty before deciding any policy toward it. Some of the leading and influential American mining companies were reported to feel that “too many concessions” had been made by previous American negotiators, and that “a better deal” could be extracted for U.S. interests from other participants, most of whom possessed neither the financial nor the technological means to engage in deep seabed mining. Despite this temporary set-back, however, it is hoped that it may not be long before serious negotiations resume to finalize the treaty.
A Package Deal

Although it is impossible to go here into the details of numerous issues which have come to be finally resolved by the Third UN Conference, there is no doubt that it has made tremendous progress in the codification of international law in a comprehensive treaty. Although a few questions still remain to be negotiated, and not all the countries are entirely satisfied, or will ever be, with the final negotiated settlement, the Conference is expected to complete its work shortly. It is generally accepted that most of the issues are interconnected. Several delegations have made it clear that their willingness to accept one or more of the claims and proposals are dependent on the acceptance of their other claims and proposals. That is why there is a general tendency to seek a single comprehensive treaty, or what is called a “package deal.”

Conference Provides Consensus for Change in Law

There is a general conviction amongst all the participants that the Conference must not be allowed to fail, because the alternative would be “conflict and chaos in the ocean.” It would be much better, it is pointed out, “if we have stability of expectations for the investment and business decisions that are going to be needed in the oceans.” It is doubtful if the Conference will be permitted to fail. It would indeed be ironic if it does, because it would not mean failure in the sense in which the 1930 and 1960 Conferences failed. It is readily apparent to the participants and observers that this Conference has already achieved agreement in principle on issues which could not be resolved at the Hague and Geneva Conferences and on fundamental questions of environmental protection that were not even faced at the earlier Conferences. Besides a general consensus in favour of a 12-mile territorial sea, the concept of 200-mile limits of extended national jurisdiction, the old law of sea rights and principles, and the new concept of a legal continental shelf extending to the end of the continental margin. Whether or not there is a formal treaty, many states will try to control the conduct of ship-generated marine pollution. Furthermore, even in areas beyond the limits of extended national jurisdiction, the old law of laissez faire cannot be accepted. Even in the absence of a treaty, that area will continue to be accepted as a “common heritage of mankind” which will influence state practices.

International law is a living discipline which cannot remain unaffected by recent technological, political, economic and sociological changes in international society.

While we cannot go here into the details of numerous changes and developments which have been brought about by the Third Law of the Sea Conference, even a cursory look at its proceedings clearly shows that even since 1967, we have made more changes and more progress in ocean law than in the previous 200 years. Solid, encouraging progress, especially in 1980 and 1981, it may be noted, has led to “a substantially improved prospect of consensus” and the nations of the world are said to be considerably closer today to a law of the sea treaty. New law is taking the place of old dogmas. The sea is no longer a mere navigation route, a recreation centre or a dumping ground. It is the last phase of man’s expansion on earth and must become an area of cooperation for orderly, progressive world development in which all will share equally and equitably.

Notes

1. Until the end of 1978, the Convention on Territorial Sea and Contiguous Zone had been ratified or acceded to by 45 states, 22 of which were Third World countries; the Convention on High Seas had been ratified by 56 states, 28 being under-developed states; the Convention on Fishing and Conservation of Living Resources of the High Seas had been ratified by 35 states, 23 belonging to Third World group; and the Convention on Continental Shelf had been finally accepted and ratified by 53 states, of which 28 were underdeveloped countries. See UN Doc. ST/LEG/SER.D/12, (1979), pp. 549–70.
2. Only about a dozen or so countries have important distant-water fishing interests, viz. Japan, Soviet Union, United States, United Kingdom, East and West Germany, Poland, Spain, Romania, South Africa, South Korea and Republic of China. See Lewis M. Alexander, “Indices of national interest in the Oceans,” Ocean Development and International Law Journal, vol. 3 (1973–74), p. 28.
11. It could also be attended by other countries as observers. See for details how the committee was established and later enlarged and for what purpose, Anand, ibid., pp. 182–87.
12. See several opinions from developed countries quoted in Anand, ibid., pp. 204 ff.

14. See Ballah (Trinidad and Tobago), UN Doc. A/C.1/PV 1708, 2 December 1969, pp. 26–27; see for this and similar views quoted in Anand, op. cit., p. 188.

15. Res. 2574A (XXIV). The resolution was adopted by 58 votes to 13 with 40 abstentions. See UN Doc. A/C.1/PV. 1709, 2 December 1969, p. 46.


20. See Alexander, op. cit., Table VI, pp. 43–47.


22. Njenga (Kenya), ibid., p. 209.


25. Bolivia, Paraguay and Venezuela voted against, Trinidad-Tobago abstained, and Jamaica and Barbados were absent. See Anand, op. cit., p. 150.


30. See Report of the Subcommittee, ibid., p. 3.


33. Ibid., pp. 66–67.


35. Ibid., pp. 29, 31.

36. Ibid., p. 31.

37. Ibid., p. 31.


40. See for these and a list of other countries which benefitted from this extension Alexander, op. cit., Tables III and IV, pp. 40–41.


44. See Anand, ibid., p. 250; also UN Doc. A/AC.138/SC.II/144.


49. See Khanchet (Kuwait), UN Doc. A/C.1/PV.1676/3 November 1969, p. 51.


56. See for a description and discussion of these proposals by Tanzania, 13 countries of Latin America and Malta, Anand, ibid., pp. 224–32.

57. See Swing, op. cit., p. 5.

58. See statement by Louis Henkin in U.S. Senate, Congress 91, Session 1, Committee on Interior and Insular Affairs, Special Subcommittee on Outer Continental Shelf, Hearings on Issues related to establishment of Seaward boundary of United States Outer Continental Shelf, (Washington, 1969), pp. 184–85.


60. Some authors refer to as many as 121 such straits. See Mark W. Janis, Sea Power and the Law of the Sea (Lexington, Mass., 1976), p. 3.

61. See Alexander, op. cit., Table VI, pp. 43–47. Twenty-five countries still claimed only three miles territorial sea. Alexander, ibid. However, several of them extended their maritime zone soon thereafter.


64. Stevenson, UN Doc. A/AC.138/SC.II/SR.43/14 August 1972, p. 65.


68. See Kolesnik (USSR), Subcommittee II of Seabed Committee, UN Doc. A/AC.138/SC.II/SR.69, 24 July 1973, pp. 2–4; also Sapozhnikov (Ukrainian SSR), ibid., A/AC.138/SC.II/SR.71, 8 August 1973, p. 23.


70. See Mark W. Janis, op. cit., p. 31.


74. Ibid., p. 41.

75. UN Doc. A/AC.138/SC.II/144; see also supra.

76. Although the Third UN Conference formally opened in 1973 at New York, the first session was devoted only to procedural issues and the election of various officers for various committees of the Conference. However, no agreement on rules of procedure was reached until the first week of the 1974 Conference when they were approved on June 27, 1974, together with a Gentleman's Agreement, as we shall see below.


79. H.S. Amerasinghe, ibid., p. 218.

80. Raharijaona (Madagascar), ibid., p. 106.

81. Carlos Andrés Perez (President of the Republic of Venezuela), ibid., p. 36.


83. Miles, ibid.

84. See Miles, ibid., p. 184.

85. UN Doc. A/CONF.62/30, Rev. 1.


89. See Draft Articles on economic zone and continental shelf submitted by the United States UN Doc. A/AC.138/89, June 1973.


93. Echeverria Alvarez (President of Mexico), ibid., p. 196.

94. UN Doc. A/CONF.62/WP.8, Pts. I, II and III.


100. It may be mentioned, however, that up to the last minute U.S. naval interests opposed the extension of U.S. fishery limits to 200 miles on the grounds, inter alia, that it would encourage other states to extend their economic zones; it would be a dramatic and highly visible reversal of past U.S. policy; it would undercut the U.S. credibility; and most important, it was against U.S. naval policy and objectives, see George S. Brown, Chairman of U.S. Joins of Staff quoted in Mark W. Janis, op. cit., p. 16.


102. Summary of the Work of Committee II presented by its Chairman on August 28, 1974 in UN Doc. A/CONF.62/1.86; also quoted by Stevenson and Oxman, op. cit., p. 13.


108. SNT, Part II, Article 38.

109. Ibid.

110. Ibid. Article 40.


114. See Articles 117 to 128. For discussion of these articles see Anand, “Mid-Ocean Archipelagos in International Law,” op. cit., pp. 250–52.

115. See Anand, ibid.

116. See Anand, “Winds of Change in the Law of the Sea,” op. cit., and UN Doc. A/AC.138/SC.II/144. The United Kingdom suggested a water to land ratio of five to one and maximum baseline of 48 nautical miles.
Undisputed Rule of the Freedom of the Seas

History of the law of the sea is, to a large extent, the story of the vicissitudes through which the principle or doctrine of the freedom of the seas has passed through the centuries and a narration of the struggles for and against this freedom. For nearly 200 years, freedom of the seas has been the dominating rule of international law of the sea and has expressed its essence. It has been accepted as an indisputable, almost sacred, dogma which was supposed to be in the interest of all mankind and which nobody would dare challenge. All other rules relating to the sea more or less revolved around this doctrine, and their validity or otherwise was to be judged and depended on the touchstone of this incontrovertible principle. Thus, as coastal state jurisdiction and control came to be recognized in a part of the sea adjacent to its coastline as territorial sea for the protection of its security and other interests, its limits were always sought to be kept as narrow as possible to maintain this freedom. But even in this part, freedom of innocent passage to ships of all states was permitted in times of peace. In any case, beyond these narrow limits of territorial waters, even limited jurisdiction for the protection of coastal, economic, health and financial interests was either refused, or reluctantly tolerated, in the name of this freedom by Great Britain, the biggest maritime Power which had ruled the waves all over the world until the end of the Second World War. It is only after 1945 that the wisdom of the undisputed rule of the freedom of the seas has come to be seriously questioned.

It is important to note, however, that while the freedom of the seas as a principle was never challenged as such, its contents were not always the same, nor did they remain unchallenged through the years. As Professor Verzijl points out, "historical research clearly proves, that freedom has no static content a priori, but is subject to continuous, at times even violent, changes." Gidel, the famous French publicist, said that "we are so accustomed to this idea [of the
Freedom of the Seas through the Ages

It is generally believed that a Dutch lawyer, Hught de Groot (Hugo Grotius), propounded this doctrine for the first time in his famous *Mare Liberum* which he wrote and published in the seventeenth century as an advocate of the Dutch East India Company, to defend its right to trade in the East Indies. But contrary to this wide-spread belief, it is submitted here that freedom of the seas not only existed long before Grotius was ever heard of or Europe appeared as a formidable force on the international stage, but that it was actually being practised without any question in the sixteenth century by the Asian countries, the so-called East Indies, where the Dutch were to go and trade. Although we cannot trace its expression in the form of a doctrine as such until much later times, there is no doubt that the freedom of the seas in the form of unobstructed freedom of navigation and commercial shipping was accepted by all the countries in the Indian Ocean and other Asian seas for centuries before history was ever recorded. It was also a recognized rule in Rhodian maritime code, was unequivocally adopted in Roman law and was practised for centuries before the Christian era. From the first century A.D., regular maritime commercial relations were established between Rome and several states in the Indian Ocean which continued for nearly 300 years. During this period, there was a large-scale migration of Indian population and culture to Southeast Asia and several Hindu or Indianized states were established in that area which further increased the maritime traffic. Besides regular shipping services between India and China, maritime connections were established during this period with Japan. All along the coast of Southeast Asia, numerous naval stations and safe havens were established which were regularly used by ships plying between Indian ports, Sumatra, Ceylon and China. By the late seventh century, maritime trade via the Strait of Malacca became increasingly important and contributed much to the rise of the Sri Vijaya Empire which remained an important trade centre for more than 600 years. Commerce converged here from all parts of Southern Asia and China.

All through these centuries, freedom of navigation and commercial shipping was considered indisputable by various countries and peoples in the Eastern waters, which led to the development of a number of entrepôts and trade centres. Although there were several strong Powers in Asia which could control the ocean in their areas, freedom of the seas was never interfered with, controlled or monopolized by anybody. Arabs, Persians, Indians, Chinese and all other peoples used the seas for navigation and trade in perfect harmony and peace, disturbed casually by pirates, who were considered enemies of all and were sought to be suppressed by local kings near their kingdoms. In the numerous entrepôts and trade centres, foreign traders had their colonies, and they engaged in peaceful business according to well-recognized customs protected by local laws.

While the wholesome practices of uninterrupted freedom of navigation and unobstructed maritime trade continued to prevail and prosper in Asia, after the disintegration of the strong Roman Empire in Europe the Rhodian tradition of the freedom of the seas foundered in the turbulent waters of disputes and conflicts of numerous smaller states which emerged from the ruins of Rome, each vying with the other. Maritime commerce died in a “state of wild anarchy” in Europe and even the memory of Rhodian law did not last beyond the thirteenth century. By this time, all European seas came to be more or less appropriated by European states leading to numerous disputes and almost continuous warfare.

Unlike Europe, the salutary practices of free navigation and trade survived in Asia because the Asian states were generally land Powers. The sea was useful for maritime commerce for a few coastal areas on the Asian mainland and some smaller Southeast Asian states, but the hub of Asian activities and relations, their struggles and conflicts, related to vast and fertile areas of land on this largest continent of the world. There were no maritime Powers, no warships and no arms in the sea. The period of Hindu supremacy was an era of complete freedom of trade and navigation. Even the Arabs and the Muslims, who followed them, never attempted at any time to exercise naval control. The vast sea could not be conquered and controlled by anybody, and was found useful for navigation and commerce; therefore it was in the interest of everyone to keep the sea open and free. Asians were not peaceful peoples, yet they felt no necessity to fight for the ocean which was but of limited use for navigation and catching fish.

Portugal Disturbs Peaceful Navigation

In fact the absence of armed shipping in the Indian Ocean helped the Portuguese when they arrived in Asia in gaining a foothold on the mainland and its islands. The Europeans were sea Powers and had been trained in the rough waters of the Atlantic and the North Sea whose challenges had hardened them to become expert navigators and naval warriors. Portugal sought to apply the European custom of controlling the vast Indian Ocean and enforce it by their
armed carracks and galleons against the unarmed Indian shipping engaged in their peaceful trade. It may be mentioned however that, although Portugal was fairly successful in its objective of gaining a fair share of the Asian spice market and in disturbing peaceful navigation in the Indian Ocean, it could not wipe out the Asian maritime trade. But the Portuguese monopoly of the Eastern spice trade and its huge profits aroused the jealousy of other European Powers which began to seriously challenge its authority by the late sixteenth century.

Contest of Wits and Arms in Europe

It was to contest the Portuguese monopoly that Grotius, taking his cue from the prevailing Asian maritime practices of free navigation and trade, propounded his doctrine in a brief he wrote for the Dutch East India Company and his country. His greatness lies in observing and presenting the maritime customs of Asian countries in the form of a doctrine, supported by logical arguments, Christian theology and the authority of venerable Roman law, and recommending it to the European countries which had forgotten these traditions. It is important to remember, however, that neither Holland nor Grotius were in favour of freedom of the seas as a principle. In fact, as soon as the Dutch defeated the Portuguese and seized the profitable trade of the Spice Islands, they sought to create their own monopoly, signed several treaties with local rulers to acquire exclusive trade, and tried to enforce these monopoly rights against the British. Grotius conveniently forgot this freedom of the seas principle propounded in 1609 with a lot of fervour, and went to England in 1613 to argue in favour of the Dutch monopoly. But these contradictions were not unusual or uncommon in the conduct of states or individuals at that time when there were few maritime state practices in Europe to go by and when there was no firm law.

The efforts by each European state to demand freedom of the seas for the lucrative spice trade of the East Indies in the first instance, and later attempts of such a state (as it would get some influence and power) to create a monopoly for itself and keep the others out, along with a similar power game that was being played in the Atlantic, led to a spurt of books by numerous scholars in Europe which were nothing more than apologies for their countries' policies and interests. In this "battle" of wits and books, which continued in the din of actual war, it was not Grotius who won, but John Selden, a brilliant British scholar and statesman whose Mare Clausum, written on the behest of the British Crown, continued to rule the roost and remained the most authoritative book on maritime law in Europe for the next 200 years. Although several other publicists wrote against Selden and countered his arguments, all the European countries continued to follow his advice in controlling as much ocean as their power would permit. These writers, therefore, as Azuni pointed out, instead of solving the issue merely confused the problem. On the other hand, Selden won this protracted "battle" not by the brilliance of his arguments, but by the "louder voice" of the powerful British Navy.

Freedom of the Seas Becomes the Rule

It was only in the nineteenth century after the Napoleonic Wars, it must be noted, that freedom of the seas came to be revived under the patronage of Great Britain which emerged as the colossus of the world. Commercial exploitation, the riches of Asian trade, and the vast colonial empires in America, led to the Industrial Revolution in Europe. The needs and demands of the Industrial Revolution — larger markets, need for raw materials and surplus capital which could not be invested in Europe — led to huge colonial empires in Asia and Africa. As Europeans got more interested in commercial prosperity and free trade, and ever more Europeans needed to travel to Asia and Africa, Selden's Mare Clausum became an anachronism which was no longer necessary. It would be more useful to have free and open seas and jointly exploit vast Asia and Africa which no one nation could exploit alone. Pretensions to sovereignty over the sea and monopoly of trade slowly withered away and Great Britain, as the greatest naval and industrial Power, became the strongest champion of the freedom of the seas. Grotius, the dejected and rejected man in his life and false prophet for 200 years, was proclaimed as the great champion and his, in several respects illogical, arguments came to be chanted as holy mantras. Freedom of navigation and trade became the watchwords and almost "divine rights." As Janis said:

Traditional law of the sea was largely the 19th century creation of British sea power. Unrivalled for most of the period 1815 to 1914, the Royal Navy enforced the 3-mile limit and the freedom of the high seas. Large expanses of the high seas served British naval missions well. These missions were to protect Britain's far flung colonies and trade routes and to project British power ashore throughout Europe and the world.

Law Vague and Uncertain

Unlike Asians, who had maintained these freedoms for centuries for peaceful commercial and cultural relations, the chief purpose of their revival in nineteenth-century Europe was the joint exploitation of Asia and Africa by the Europeans. It may be mentioned, however, that, but for agreement on vague freedom of the seas, implying freedom of peaceful navigation with a few agreed "rules of the road," which benefited all Europeans, there was little
agreement on other rules. Freedom of fisheries, which England had come to accept only after three wars with Holland and other conflicts with its neighbours, continued to be a subject of serious disputes among Europeans. There was no agreement on a uniform limit of territorial sea or freedom of navigation through the maritime belt or straits, especially for warships. The same was true of contiguous zones and England, ever since the repeal of its own Hovering Acts in 1876, continued to question the legality of such jurisdiction exercised by other states. Moreover, a large part of the law of sea, relating to war, contraband, blockade and the rights of neutrals, was always at the mercy of belligerents, generally the big maritime Powers, which stretched their rights according to their free will and the contingencies of war. During the First and the Second World Wars, the belligerents, led by Great Britain, outstretched their authority over the sea on the basis of controversial principles they propounded, such as the “ultimate enemy destination” and “long-distance blockades,” and enforced them, over the strong protests of the neutrals, through “navicert” systems of their own.

Thus, it is important to note that, apart from a few general principles, much of the maritime law, as it developed in the nineteenth and the first half of the twentieth centuries according to the chaotic play of selfish interests, was controversial, uncertain and in several respects nothing more than a panorama of conflicting rules.

Law Helps the Powerful

Even more important is the fact that, beyond a limited maritime belt, the vast area of the ocean — more than 70 per cent of the globe — remained an area of “no law” beyond what are referred to as a few “rules of the road.” Freedom of the seas meant essentially non-regulation and *laissez faire* which was in the interests of big maritime powers. The whole modern law had in fact developed, as we have seen above, in response to the needs of a few seafaring nations and reflected the dominating interests of the maritime European Powers, and later supported by the United States and Japan. It is only natural, as Professor B.V.A. Roling points out:

In all positive law is hidden the element of power and the element of interest. Law is not the same as power, nor is it the same as interest, but it gives expression to the former power-relation. Law has the inclination to serve primarily the interests of the powerful. “European” international law, the traditional law of nations, makes no exception to this rule. It served the interests of powerful nations.¹

This law, or rather lack of law, under the freedom of the seas doctrine, was often used in the nineteenth century by European Powers to threaten small Asian states, get concessions from them or simply to subjugate them. Even later, it gave the European maritime Powers a license to use the freedom in furtherance of their interests — whether for navigation, fisheries or military manoeuvres — irrespective of the rights of others. The protracted and sometimes bitter fisheries disputes throughout the modern period, such as between smaller European countries, Holland, Poland, Denmark, Norway or Iceland, on the one hand, and England on the other, numerous such disputes on the American continent, and almost continuous protests by the neutral states against the violation of their freedom of navigation and trade by belligerent maritime Powers, are continuous reminders of the dissatisfaction of the smaller coastal states. The situation became even more acute during and after the Second World War when the maritime Powers did not hesitate to stretch this freedom even further and took the liberty to enclose even wider areas in the name of security or self-defence for defeating the ruthless enemy during the War, or preparing themselves against a powerful adversary in the post-war era for conducting nuclear and missile tests, threatening the life and liberty of all peaceful users of the sea.

Most of the usages or customs of modern maritime law were based on the practices of a few dominant maritime Powers. Many a time their interests differed and their practices were not uniform, as we have seen above. The situation was tolerated not only because of the over-bearing influence of the maritime Powers, especially Great Britain, along with France, Germany, the United States and Japan, which were helped by this undefined and wide freedom of the seas, but also because the sea was of only limited importance and use. There was no need to provide an elaborate law for an area used merely for limited purposes. But it is significant to note that law for the use of the sea even for these limited purposes, like navigation and fisheries, was imprecise, or not beyond doubt. An attempt to codify the law in 1930 was not successful because the big maritime Powers insisted on a narrow three-mile territorial sea, and the smaller coastal states were deeply concerned about protecting their fisheries and other interests in wider zones.

Challenge to Traditional Law

In an age when law was made by the big maritime Powers, the smaller states had always suffered by the uncertain freedom of the seas which often militated against their interests. Though there were numerous fishery disputes and controversies about other uses of the sea, it was only after 1945 that, with the discoveries of important resources in the sea and sharp rise in ocean uses gener-
ally, the accepted or tolerated norms of behaviour and unlimited freedom of states came to be found utterly inadequate and their validity began to erode rapidly. With the discovery of oil under the sea even prior to the end of the Second World War, and coastal fishery resources increasingly threatened by larger and better-equipped ships of distant-water fishing states, conflicts between wider claims of coastal states to protect their economic interests, on the one hand, and attempts by major Powers to maintain the status quo, on the other, increased.

Another phenomenal development in the post-Second World War period was the complete transformation of the international society. With the collapse and disintegration of European colonialism and decline of European power, Europe lost its pre-eminent position, while scores of nations, with their age-old traditions and new needs, emerged as new and full-fledged members of the international society. International law was no longer confined to European states or states of European origin, but must now serve the interests of other members of the extended world-wide community of states which for the last three centuries had been considered as no more than objects of international law. It was only natural that these Asian-African countries, along with the other disgruntled states in Latin America - the new majority or the so-called Third World - would try to change the law under which they had suffered so much for so long.

**Freedom of the Seas not Immutable**

Law could not remain immune to all these changes. Unlimited freedom of the seas, which served the interests of a few maritime Powers in an age with limited uses of the sea, could no longer remain unaffected. As Professor Gidel said as early as 1950:

The expression "freedom of the high seas" is in reality a purely negative, worn-out concept, nothing more; it has no meaning for us, except as the antithesis of another, a positive concept, which has long since disappeared.

The idea of the freedom of the high seas is, paradoxically, a survival of the idea - long since dead - that the high seas are subject to dominion and sovereignty, just like any territorial dominion.9

The essential idea underlying this freedom was, and still is, as Gidel explained, "the concept of the prohibition of interference in peace-time by ships flying one national flag with ships flying the flags of other nationalities."10 This idea of absolute prohibition of interference has had its disadvantages which, among others, "encourages the disorderly destructive and wasteful use of the high seas. Both as a means of communication and as a source of wealth the sea is liable to suffer prejudice. If a ship on the high seas can only be called to order by its own national authorities as regards the proper use of the high seas, the resulting situation is far from satisfactory and definitely prejudicial to general interest."11

But even a brief glance at its history would show that freedom of the seas had never remained and could not remain unchanged or static.12 The purely negative concept, as it developed in the late eighteenth and nineteenth centuries, was well adapted to the use of the sea as a means of communication. It could not be suitable for the use of the sea as a source of wealth because the resources of the sea were not inexhaustible and it was essential that their exploitation should not cause wastage and destruction. Once this idea was clearly recognized, "the purely negative conception of freedom of the high seas ceased to be sacrosanct."13 As early as 1887, the United States tried to convince the European governments and Japan of the desirability of international cooperation for the "better protection of the fur-seal fisheries in the Behring Sea." In its dispute with Great Britain, it refused to admit that the "fact that the sea at a certain distance from the shore is free," could be held to justify the indiscriminate slaughter and extermination of seals on the high seas at the period of gestation. "There are many things," said the U.S. Government, "that cannot be allowed to be done on the open sea with impunity and against which every sea is a mare clausum."14 Although the United States lost the ensuing Behring Sea arbitration, in which the tribunal decided that it had no right to protect the fur-seals outside the three-mile limit, it initiated the trend for the change in law and protection of coastal fisheries by the coastal states. Despite the strong opposition of Great Britain and some other distant-water fishing states, the trend of littoral states extending their fishery rights beyond the territorial sea continued unabated. The freedom of the seas was also modified to accommodate security, fiscal, custom, health and sanitation, interests of the coastal states in the form of contiguous zones which continued to be maintained over the increasingly mild opposition by Great Britain.

In fact, as Hersch Lauterpacht pointed out, ever since the recognition of the freedom of the seas in modern times, there are two clearly discernible, parallel streams. The first can be seen as "insistence, averse to compromise, on the full right of freedom from any kind of interference," Thus, attempts to extend the right of visit and search by foreign warships in time of peace for the enforcement of international conventions (such as, Brussels General Anti-Slavery Act), or generally accepted laws (like right of hot pursuit; policing of fisheries; or enforcement of custom laws) were strongly resisted. The other stream in the practice of states can be seen as the phenomenon of unilateral...
action apparently or actually in conflict with the freedom of the seas. Thus, assumptions of protective jurisdiction for safeguarding the security of the state in time of emergency, for customs and revenue purposes or for the enforcement of health regulations, have been grounded in unilateral actions which, despite initial criticism but without persistent protests, came to be tolerated and later accepted as parts of international law on the basis of their intrinsic reasonableness. Unilateral act has, therefore, a great significance under international law, since it is one of the means by which international custom is formed. A comparison of these two parallel streams draws attention to the persistent problem of accommodation of divergent interests. Lauterpacht warned that the “authority and continued usefulness” of the traditional conception of the freedom of the seas could “be safeguarded only if it is applied in accordance with its true purpose and ever-valid test of reasonableness.” Its true purpose is, according to Lauterpacht, “to ensure freedom of navigation, unhindered by exclusive claims of individual states, and freedom of utilization of the resources of the sea to a degree to which they can be equitably utilized by all.” Although the force of the freedom of the seas “is far from spent, there is not such immutability about it as to preclude investigation into the possibilities of its adaption to new circumstances and problems.”

**Truman Declarations: Serious Challenge to the Freedom of the Seas**

It may be recalled that the first and most important challenge to the traditional freedom of the seas doctrine in the post-Second World War period came from the United States which had emerged as the strongest maritime power after the War. The twin proclamations by President Truman on September 28, 1945, relating to fisheries and continental shelf, referred to the developments in technology which had necessitated the extension of coastal jurisdictions for the establishment of conservation zones in the areas of the high seas contiguous to the coasts of the United States for the protection of fisheries and exclusive exploitation of mineral resources of the continental shelf. In both cases the littoral state extended its limited jurisdictional powers to areas of the high seas close to its coast, without any claim to an extension of territorial waters and specifically declared that the character as high seas of the areas and the right to free and unimpeded navigation in those waters would in no way be affected. In spite of this disclaimer, no one had any doubt and it was self-evident, as Gidel specifically declared that the character as high seas of the areas and the right to free and unimpeded navigation in those waters would in no way be affected. In accordance with its true purpose and ever-valid test of reasonableness.” Its true purpose is, according to Lauterpacht, “to ensure freedom of navigation, unhindered by exclusive claims of individual states, and freedom of utilization of the resources of the sea to a degree to which they can be equitably utilized by all.” Although the force of the freedom of the seas “is far from spent, there is not such immutability about it as to preclude investigation into the possibilities of its adaption to new circumstances and problems.”

Die-hard defenders of the doctrine of the “freedom of the sea” will derive cold comfort from the closing words of the [Truman] Proclamation. One need not be born cynic to have misgivings as to whether this reassuring conclusion will mean much in practice. When the interests of international shipping come to be weighed against America’s national exploitation of submarine petroleum sources, will shipping come out on the winning side? Is it not inconsistent to suppose that if important oil fields are discovered under the high seas, America’s rights will extend over those fields but not over surface of the sea above those fields? Will America find that she can allow Russian cruisers or Japanese fishing craft to make trips between American drilling derricks erected in the open sea over American oilfields?

The United States proclamations, as we have seen in Chapter 6, led to numerous claims by several other states not only for continental shelf jurisdiction, but for the protection of their fisheries. Practically every proclamation claiming special rights to continental shelf or fisheries contained the statement that freedom of the high seas was fully recognized and maintained. But the UN Memorandum on the Law of the Sea suggested that these disclaimers should not be taken seriously. It said:

> It is well-known...that statements of this kind cannot be taken absolutely literally. It would not be unduly pessimistic to express the fear that encroachments upon the freedom of the high seas, at first of no consequence or even non-existent in certain waters, would become more and more serious and numerous as the industrial exploitation of the continental shelf became increasingly widespread and intensive.

The author of the Memorandum went on to suggest that this should not be the reason “for rejecting the continental shelf theory, any more than acceptance of the theory should cause the principle of freedom of the high seas to be consigned to the lumber room.” He recommended that “the principle of freedom of the seas must be made more flexible so as to allow for the theory of the continental shelf, just as it was adapted to make room for sedentary fisheries in the high seas...”

Strongly pleading for the acceptance of continental shelf jurisdiction, Hersch Lauterpacht also said that the question whether the exploitation of continental shelf resources, “when originating from the surface of the sea, unavoidably necessitates activities which are inconsistent with the freedom of the sea, must be answered in the negative. There is no difficulty in reaching that answer once we abandon a conception of the freedom of the seas which is both rigid and pedantic.” The principle could not “be treated as a rigid dogma incapable of adaption to situations which were outside the realm of practical possibilities in the period when that principle first became part of international law.”
UN Efforts to Codify the Law

The divergent standpoints adopted by different states since the Second World War on territorial sea, fisheries, continental shelf and other issues of the law of the sea made the already ambiguous and uncertain situation "a confused medley of conflicting solutions." In order to reconcile some of the wide-ranging claims of coastal states and settle these controversies, the United Nations entrusted the International Law Commission to thoroughly examine the various issues of the law of the sea and later sponsored two conferences in 1958 and 1960. Four conventions were concluded which, on the whole, reasserted the traditional freedoms of the seas and accepted coastal state's sovereign jurisdiction over its continental shelf and exclusive right to exploit its resources up to a depth of 200 metres — or to whatever depth — the super-jacent waters admitted exploitation of its resources. Although coastal states were permitted to extend maritime zones and adopt fish conservation measures over adjacent waters, no agreement could be reached about the extent of territorial waters or fisheries jurisdiction, and the agreement on the definition of continental shelf was controversial and vague.

Thus, the 1958 treaties only codified the traditional law which had been accepted and left unsettled what had not, and none of them was adequate to cope with the conflicts and challenges of the technological advances of the 1960s. It was not long before fishing metamorphosed from the small sailboats of yesteryears to factory ships harvesting fish stocks aided by sonar and helicopters. Oil was discovered in seabed areas beyond 200 metres in depth, and new machinery was built to tap it. So was technology to retrieve the mineral rich mangane ses nodules lying buried in deep waters ranging from 5000 to 10,000 metres. In fact, the 1958 Conventions were outmoded by the time they were concluded. In 1960, the Second UN Conference on the Law of the Sea tried but again failed to establish a universal agreement on the width of the territorial sea.

It is also important to note that the 1958 Conventions were never generally accepted by all nations. Since then, many states in Asia, the Pacific and Africa have emerged as independent states and the geography of international law has further extended. Although some of these newly independent developing countries participated at the 1958 and 1960 Conferences on the Law of the Sea, they were not yet politically strong as a group to influence their decisions. In fact, these Conferences were characterised by an East-West confrontation between the Communist and non-Communist states, in which the issues were sharply divided and decided between these two groups with the developing countries playing a minor balancing role. The Western maritime Powers were still strong enough to enforce the traditional law of laissez-faire which favoured them. The developing countries did not like this law but could not help it.

Renewed Challenges to Freedom of the Seas

The accelerating pace of technological, economic, social and political changes in recent years have altered man's relation to the sea. Complete freedom of the seas in this age of phenomenal changes in technology and uses of the sea has come to be considered as a "tyranny" which must be replaced. The sea is no longer vast and inexhaustible and is not to be used merely for navigation and fishing by only a few maritime Powers. Even in navigation, the old rule of each ship charting its own route has disappeared and new complicated navigational rules and routes have been devised. Ships can not be permitted to navigate unregulated in high traffic density areas, like the narrow Straits of Dover, through which nearly a thousand ships pass in a day; or in the approaches to large ports, such as New York, where nearly 100 ships enter or depart in 24 hours; or in areas like the Gulf of Mexico, where thousands of oil installations, a large number of them in or near shipping routes, have been erected during the last 25 years. Moreover, navigation, especially crude oil transport by huge tankers, have evoked the danger of steadily growing sea waters pollution which could result in the destruction of biological balance and extermination of many useful species in the sea environment. "Torrey Canyon" and other catastrophies of big oil tankers are constant reminders of the dangers which can be created by the casualties of big tankers transporting crude oil.

New uses have come forward to compete with the old uses which had acquired an aura of sanctity from long-established usage, but which cannot be ignored and need the protection of a body of legal rules. It has become necessary to accommodate the new uses and interests on the basis of "equitable apportionment." The nature of user needs differs in different areas. Navigation has a greater significance in some areas, fishing for others, minerals production for still others, depending upon a great variety of situations. All need protection and accommodation. The choice is not always found through agreements for designating sealanes for maritime traffic in several areas, such as air and road lanes that had been devised earlier. Ships might have to make longer trips and suffer loss of time to comply with these traffic control measures, but "there is little value in a freedom which is rendered academic by a traffic density which makes safe navigation virtually impossible." New law is needed for wise
utilization of the ocean in our crowded, complex and modern world. Moreover, the new majority of the world-wide community of states is generally critical of the traditional law, codified in the 1958 Conventions, and the freedom of the seas which, they believe, had been inimical to their interests. They want to overhaul the old maritime law and develop a new, more balanced, and equitable regime under which they can be equal partners in sharing new-found riches of the sea and deep seabed and hope that the new regime for the sea might help them in augmenting their meagre economic resources.

There is no doubt that the law is changing. Already in 1950, Gidel had said that in "fisheries and mineral resources the Grotian tradition of freedom of the high seas is losing the paramountcy which, generally speaking, had survived fairly well down to the present day." He had no doubt that this freedom had "now lost the absolute and tyrannical character imposed on it by its origin as a reaction against claims to territorial sovereignty over the high seas." With a tremendous foresight, Hersch Lauterpacht had warned:

If the freedom of the seas is interpreted so as to result either in a regime of waste or disorder on the high seas — such as must follow from the absence of effective agreement in the matter of protection of fisheries or of pollution of the sea — or in the stifling of properly conceived interests of individual states, its authority will disappear and it will be increasingly flouted by unilateral assertions of selfish and monopolistic interest.

The trend to curb freedom of the seas by extensions of coastal state jurisdictions for the protection of security and economic interests of the coastal states increased after 1960. The small, weak, poor and under-developed states, getting deeply concerned about the continued exploitation of their coastal areas and worried about their newly won independence, started claiming wider territorial seas ranging between 12 and 200 miles, larger continental shelves including continental margins, extensive fisheries zones and authority to control the dangers of pollution in vast areas of the sea. By the end of 1973, nearly 35 per cent of the ocean, an area almost equal to the land mass of the planet, was claimed by the coastal states. Deploiring this trend, which seemed to them "in essence a return to the concept of the 'closed sea,' whose classical advocate was John Selden," some well-meaning jurists regretfully felt that the era of Mare Liberum "may now be drawing to a close."

However, even these jurists, who were deeply concerned at the erosion of the freedom of the seas, understood and appreciated the fact that "the fishery practices of nations that fish the world over with modern equipment lend considerable justification to the protective measures" of the smaller coastal states. Others, like Lauterpacht, felt that "in so far as the original conception of the freedom of the seas, as it came to full fruition in the nineteenth century, acquired a rigidity impervious to the needs of the international community and to a regime of an effective order on the high seas, the 'loss of paramountcy' provides no occasion for anxiety."

Demand for a New Law

In 1967, a representative of a very small coastal state, Arvid Pardo of Malta, informed the United Nations General Assembly about the inadequacies of the current international law and the freedom of the seas, which could and would encourage the appropriation of the vast areas of the sea which were suddenly found to contain untold wealth by those who had the technological competence to exploit them. The consequences of such a scramble for sovereign rights over the seabed could be "very grave," said Pardo, and result in a dramatic escalation of the arms race and sharply increasing world tensions, caused also by the intolerable justice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations. The strong would get stronger, the rich richer, and among the rich themselves there would arise an increasing and insuperable differentiation between two or three and the remainder. Between the very few dominant Powers, suspicions and tensions would reach unprecedented levels.

He suggested the need for the creation of an effective international regime for the seabed and ocean floor beyond a clearly defined national jurisdiction and acceptance of that area as a "common heritage of mankind" and "not subject to national appropriation in any manner whatsoever," to be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole. Pardo's essentially internationalist approach was heralded by many as an idea whose time had come. The General Assembly in a resolution adopted on December 18, 1967 [Res. 2340 (xxii)] recognized the "common interest of mankind in the seabed and ocean floor" and declared that "the exploration and use of the sea-bed and the ocean floor should be conducted...in the interest of maintaining international peace and security and for the benefit of mankind as a whole." It also established an ad hoc Seabed Committee, which was later made permanent and became a forum for preliminary negotiations on a new law of the sea. On December 17, 1970, on the recommendation of this Committee, the General Assembly unanimously adopted a Declaration of Principles which said, inter alia, that the seabed beyond national jurisdiction was not subject to national appropriation or sovereignty but was the common heritage of mankind and that it must be "exploited for the benefits of mankind..."
New Law Emerges

Whether or not these resolutions are legally and formally binding, they clearly showed the trend toward which law of the sea was developing. The new majority, despite all its weaknesses, had started asserting itself. At the Third UN Conference, organized to regulate new uses of the sea for the new vastly extended international society, it was prepared to play a more vigorous role. While participating in the development of a common law for the exploration and exploitation of the deep seabed and its resources, the developing countries also wanted to revise the old maritime law. Over the objections of the "old guards" and defenders of traditional law, which wanted to have a narrow conference for formulation of law for the exploitation of the seabed beyond the limits of national jurisdiction, they wanted a comprehensive conference to review the whole international law of the sea. The major confrontation at the UNCLOS-III, therefore, has been between the technologically developed states, seeking to maximize their benefits from the sea and new-found seabed resources on the basis of their advanced technology, and the poor and under-developed countries which want to modify and change the traditional law which, they believe has not served them well and to develop new equitable rules for the exploitation of seabed resources.

While the process of reconciling the freedom of the seas with the wider inclusive interests of the enlarged and yet increasingly interdependent international society still goes on, the direction and essence of the new emerging law has already become clear. Even before the Caracas Conference met in 1974, some jurists felt that the Caracas Conference is likely to see the end of the principle of the freedom of the high seas, not so much because the developing countries do not like the principle of the freedom of the high seas, but mainly because of the revolution in our uses of ocean space, which is accelerating and continues to accelerate now.

Although the Conference has yet to be concluded and the final treaty is still taking shape, it has already achieved agreement on a wide range of issues. Besides a general consensus in favour of the 12-mile territorial sea, 200-mile exclusive economic zone and legal continental shelf extending to the end of continental margin, the seabed beyond the limits of national jurisdiction has come to be accepted as common heritage of mankind which must be explored and exploited for the benefit of mankind as a whole. While the exact meaning and content of "common heritage" is still rather vague, like numerous other rules of international law, and the international machinery for the exploitation of its resources has yet to be worked out, the basic premise of the principle is clear and beyond doubt: the sea must be used for the benefit of all and not merely for the interests of a few great Powers. Although navigation is vitally important, the sea is not merely a navigational route, as it has been for centuries, but a new rich still largely unknown world which will be the scene of the next adventure and expansion of mankind. It is generally recognized that the sea offers the greatest promise and poses the gravest threat to the world of tomorrow. It can no longer be a largely "lawless" area or a vacuum. Freedom of the seas will still be necessary to use it, but it will be the same kind of freedom as individuals enjoy in a national society, namely, freedom under the law as it has come to the developed in recent years and is in the process of formulation and codification.

Notes

1. See Chapter 5 for British refusal to accept contiguous zone after 1876 and failure of 1930 Codification Conference to reach agreement on territorial sea partly for this reason.
5. See Chapter 4 for details.
10. Ibid., pp. 3—4.
11. Ibid., p. 4.
13. Ibid., p. 13; see also p. 16.
15. In the Scotia case (1871), U.S. Supreme Court said: "Many of the usage which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation." See Gidel, ibid., p. 90.
16. Ibid., p. 90.
18. Ibid., p. 398.
20. Quoted by Gidel, ibid., p. 83.
21. Ibid., p. 86.
22. Ibid., pp. 86, 87.
24. Ibid., p. 399.
29. Ibid., p. 112; see also quoted in Lauterpacht, op. cit., p. 408.
30. Lauterpacht, ibid., p. 408.
32. Ibid., p. 763.
36. G.A. Resolution 2749 (XXV).
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This work is the first to examine the history of international law, particularly the law of the sea, as it developed in Asia over the ages. Conditioned by the still prevailing Eurocentrism in international law and thinking, the role of non-European countries in this field has been largely underestimated. In redressing this balance the author reveals how Asian maritime practices and customs, which date back to the pre-Christian era, the political confrontation between European countries and Asian rulers and the commercial rivalry between the European East India companies, influenced classical European jurists and contributed to the birth of the modern law of the sea. He discusses the political conditions under which this law has developed since the seventeenth century and defines the political and technical developments that have challenged traditional law since World War II. The study is brought to a close with a review of the efforts of the UN to modify and codify the law since 1958 according to the needs of the newly extended international society.