The Law and Practice relating to
the International Regulation of Fisheries in Asia
with particular reference to the Korean-Japanese Dispute

by

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INTRODUCTION

The present thesis consists of two parts as follows:

PART ONE is an attempt to trace the history of the law of the sea with reference to fisheries from the ancient times up to the two Geneva Conferences of 1958 and 1960.

At the beginning, the dominion of the sea was mainly the concern of those who sought to exercise it as a symbol of power, thereby to satisfy their territorial ambition. The nature of dominion for this purpose appears to have undergone little change up to the early modern times when man's use of the sea began to be more practical, were it for fisheries or navigation. Nowadays, however, it is no longer the antiquated dominion or the simple use of the sea that matters: the primary interest of man in it is now the exploitation of whatever it has to offer him.

In the course of this evolution, the need to maintain a means to regulate conflicts arising from competitive use of the sea among nations has finally given rise to the distinction between two different parts of the sea, each with a different legal character, the part which can be owned by the state that borders with it and the part beyond it which is open to all. This distinction from which the freedom of the high seas derives its rationale presupposes a uniform breadth of the territorial sea of every coastal state. Unfortunately the practice of states varies greatly and has thus left a fatal problem yet to be solved, if ever.

The prospect of an agreement can hardly be said to be bright, since extra-legal factors are always strongly operative in the attitude of
nations towards this particular problem, especially at the present time when the use of the sea is ever variegating. In the absence of unity, therefore, the tenability of the practice of a particular state relating to the breadth of its territorial sea should, in fairness, be measured with reference to the practice adopted by the majority of states.

PART TWO is an attempt to analyse the Korean-Japanese fisheries dispute of 1952-1965 against the above background and with reference to the historical and geographical relationship of the two nations.

The dispute was over the fishing rights within the Korean coastal waters where the resources had been overfished by Japan almost to the point of exhaustion during her rule in Korea (1910-1945). It was prompted by the development of circumstances under which the return of Japanese fishing vessels to the same grounds would have been possible but for a strong opposition from Korea.

Though, on the face of it, the issue was a legal one, it was in fact so deeply couched in the political resentment against each other that, in the height of the controversy, it assumed the appearance of a 'battle of mouths' being fought in the jargon borrowed from international law.

In 1965, however, there took place a change in the attitude of both countries, which finally led to a compromise in the form of a fisheries treaty, thereby ending the 14-year old dispute. This rather sudden change was, to a large extent, the work of time and circumstances under which both parties found it desirable to restore friendship mainly to their economic benefit. The two Geneva conferences also had an insidious effect on this development.
When a country with serious economic limitations enters a treaty with an advanced maritime power for the regulation of its coastal fisheries, however, there can be a circumstantial reason to suspect the agreed terms to be equally beneficial to both parties. This was exactly the case of Korea and Japan in 1965. In this context, therefore, it would be more appropriate to evaluate the Korean-Japanese treaty in terms of the significance that so acrimonious a dispute was terminated in the form of a negotiated agreement. This would probably be the only way to let the merits outweigh the defects.
PART ONE

THE HISTORY OF THE INTERNATIONAL LAW OF FISHERIES
CHAPTER 1

Dominion of the Sea in Antiquity

1. The Beginning of Maritime Dominion

It seems reasonable to suppose that in the earliest imaginable times man's needs in life were not felt to be so extensive or so pressing as to motivate him to turn for their satisfaction to the unknown expanses of insuperable waters, but were simple enough to allow him to meet them with what was readily available on land. The sea was then an area beyond his immediate interest and beyond the scope of both his experience and his knowledge. Even if he had happened to envisage the need to make some practical use of the sea, the means in his possession would not have enabled him to do so at that time. Thus it can be said that for a period of time much longer than the history of man's use of the sea, his sphere of interest ended for all practical purposes where the land ended.

History provides us with evidence about the inception and the earliest stages of man's exploration and use of the sea which is far from complete or consistent, and it would be out of place here to attempt to present a full or precise picture of these developments. At whatever stage of history it may have taken place, man's initial act of sea-borne enterprise must, with repetition, sooner or later have led to the growth of some rudimentary accepted code of conduct based on the regular features of the pattern of activity which emerged as predominant and encompassing attitudes to the status of the sea and its products. Any such development which proved coherent enough to merit description as maritime law in its simplest form would have been restricted in its effect, and in respect of any binding
quality it was thought to possess, to the community in which it occurred.

Only after a further lapse of time of uncertain duration did man begin to acquire the means to use the sea beyond the limited extent of domestic enterprise and thereby to come into contact with foreign communities at the other side of the sea which were hitherto unknown to one another. By virtue of the gradual advance of navigation under the spur of commercial and military ambitions, such contacts increased to the point at which communities found themselves in opposition to each other because their interests conflicted. As a matter of course, one of the common means they adopted to end such a state of affairs was war, which was not only their instinct but also a normal method of reassuring themselves of their viability. War was, as it still is, at times as much to demonstrate who is the stronger as to decide who is right or wrong - whether on land or on the sea. Hereupon comes the genesis of the concept of 'maritime dominion' and, almost contemporaneously, the beginning of competition for its possession among the sea-faring nations. This was still long before there was felt any necessity to devise any measures or mechanisms of a legal nature, even of the most elementary kind, for the purpose of avoiding conflicts and wars if it was thought desirable to do so. If the history of the international law of the sea is nothing less than the history of successive competitions between the doctrines of *mare liberum* and *mare clausum*, ¹ here began the first swing of the

¹ These two terms, especially the former, are employed here simply as useful short expressions to indicate approximate analogies with the 'freedom' of the sea in those early days and its antithesis. They should not be taken as bearing the connotations ascribed to them in contemporary international law. It would be more accurate to say that the sea was then 'free' and open to all only in the sense that, since it was virtually unexplored and unexploited and its dimensions unknown, control over any substantial part of it was simply beyond the reach both of men's practical capacity and of his imagination.
pendulum from the state of the former towards that of the latter.

Thus, before the birth of any maritime law of even domestic ambit, there appears to have been in existence for a lengthy period a competition over the dominion of the sea among the peoples of the Levant and of the Middle East. Fragmentary references to the attempts - and, to a certain extent, the successes - of these peoples in exercising a dominant influence over the sea are found scattered in the numerous works of history and literature written by Greek and Roman authors. Grotius, in his *Mare Liberum* and *De Jure Belli ac Pacis*, and Selden, in his *Mare Clausum*, seem to have made an enormous effort to quote as many such references as possible from these writings.¹ Actually most of these writings are so fragmentary and in such discontinuous form that they have often to be somewhat strained in interpretation and amplified by informed conjecture to allow of the extraction of a sensible meaning from them. Selden himself divided into two the ages from which they came, the fabulous age and the historical age, the latter being subdivided into the ancient and the modern parts.² For each of these ages, he relates the historical traces of private dominion of the sea. For the fabulous age, he quotes among others the legend that Jupiter, Pluto and Neptune divided the world among themselves by lot and the sea was allotted to Neptune. He resorts to Lactantius (*De Falsa Religione*, I-II) and Homer (*Iliad*, 15) to defend his belief that "Wee manifest Historical Truth out of the most ancient Historians, though wrap't up in the mysteries of Heathen Priests and Poets", that the brother deities, Jupiter, Pluto and

¹ Cf. *infra*, chap. 5.
Neptune, were said to have been not gods but men, and that "thus it appear's here that a private Dominion of the Sea, no otherwise then of the Land, arose from Humane distribution".  

As for the period which belongs to the ancient part of the historical age in Selden's division of the times, the reference and quotations about the dominion of the sea are relatively more precise and abundant than those about the fabulous age which was said to have preceded it. Minos, the King of the Cretans, is described by many of the outstanding authors and historians of Greece whose writings are extant, as the first to have maintained a powerful naval force and become master of the sea. For example, Thucydides mentions that "Minos held the greatest part of the Greek sea as Lord thereof". Phaedra, in Seneca's Hippiolyte, calls "O mighty Crete, thou mistress of the main". Diodorus Siculus, Strabo, Herodotus and Aristotle give in their works descriptions of similar effect about Minos. Selden lists a number of other authors in this connection and goes on to amplify the discussion to the point of indicating the discrepancy between the Greek text and the Latin translation of Eusebius's Chronicle. On the authority of some of these Graeco-Roman writers, Müller-Jochmus summarises the Cretan dominion of the sea as follows:

Die Rechtmässigkeit der Herrschaft des Minos, der das Meer von Räubern reinigte und in entfernten Gegenenden Colonien gründete,

Minos's dominion of the sea is said to have been followed successively by seventeen other nations, one after another, from different regions of Asia and Europe, for a period of 560 years without intermission (though there was an unaccounted-for period of 175 years from the beginning of Minos's dominion to that of the above period). Drawing mainly from the Chronicle of Eusebius, and giving different views of his own on some minor points, Selden records a fairly detailed account of each of them, specifying the respective periods of their dominion over the sea. The sources on which these accounts are based may, however, be open to doubt, because Eusebius himself is said to have relied for this matter on - if not to have simply repeated - what was ascribed to a Rhodian author by the name of Castor, who is believed to have lived at the time of Cicero. A further ground for criticism, and perhaps for suspicion, lies in the unsatisfied expectation raised by a chronology such as that of Eusebius, elaborated with so great a wealth of detail. There is little doubt that it would have been accepted as more reliable if the 175-year gap in the narrative had somehow been explained, even if it was not satisfactorily filled in. Even though his work has been regarded as lacking in sufficient description with regard to certain particular events (and it is by no means without omissions so far as the question of maritime dominion is concerned), it nevertheless deserves to

2. Mare Clausum, I-10.
be evaluated in terms of its great contribution in recognising the existence of such dominion among the ancient community of nations and thus establishing the matter beyond the point of controversy.

Despite the weaknesses noted above, the conclusions of Eusebius do not lack external support. They may be confirmed by reference to information contained in the works of other great historians and geographers of Greece such as Herodotus and Strabo. In this connection, it is of interest to note the remark by Müller-Jochmus regarding the chronology of the above seventeen masters of the sea:

Was die obigen Zahlenbestimmungen betrifft, so sind sie fast durchweg nur approximativ; es kommt uns indes hier nicht so wesentlich auf die Zeitdauer, als auf den Nachweis von der Existenz der bestimmten Rechtsansicht, welche sich über das dominium maris gebildet hatte, an.¹

Among the various references and quotations which describe the beginning of maritime dominion in the early days, some are found which are merely mythological, poetical, ceremonial, or even rhetorical, rather than documentary, in their tones. They are nevertheless cited by many jurists and historians in support of their various lines of argument or discussion. Phillipson, for instance, quotes an epitaph on the grave of some Greek exiles in Persia as depicting the Greek love of the sea,² and a line from the work of a Roman author as an example of the Roman horror of the sea.³ Such generalisations should not be accepted as authoritative without extensive

2. Op. cit., vol. II, p. 368: "We who once left the deep roaring waves of the Aegan lie here in the heart of Ecbatana's plain... farewell, thou beloved sea!"
3. Ibid., p. 369: "One who has not been to sea cannot realise the dangers one has escaped."
enquiry into the background of the work or event to which such lines are ascribed. Apparently it is open to some doubt and debate how representative these lines were of the respective attitudes of the Greeks and Romans towards the sea.

Epiphanes, the King of Syria, is said to have asked in 176 B.C. "Are not both the Sea and the Land mine?" Presumably this question was prompted by his uncertainty regarding the proprietorial status of the sea, and the response would have been different according to whom the King asked the question, that is, whether to one of his own subjects or to another King with comparable power on land and sea. The symbolic nature of such fragmentary traces of evidence of the existence of maritime dominion begins to decrease in importance as the documentary character of customs and laws increases with the growth of maritime transactions among the different nations of antiquity.

2. The Ancient Sea Law

Thus, from the various ancient documents, legal and historical, and from the considerable quantity of writings by subsequent jurists, it can be gathered that the existence of maritime dominion among the sea-faring peoples of the ancient times, claimed and exercised in turn by different ones over the others, was an established fact in the history of humanity. On the authority of Eusebius again, Schomberg records that it was in the year 1406 B.C. that the Cretans under Minos began to enjoy dominion of the sea through their possession of a strong navy, believed to be the first in history, as has been mentioned above, and that their overlordship of the sea

1. Mere Clausum, I-12
2. Above, p. 4
was succeeded by that of each of seventeen different nations, including the Lydians in 1179 B.C., the Thracians in 1000 B.C., and the Rhodians in 916 B.C. Among these four masters of the ocean, the Rhodians are specially noted for their fondness of sea life and, as a consequence, for the greater prosperity they are said to have achieved in commerce and navigation. This they owed, it is said, to the geographical advantage of being situated on a major route connecting commercial centres such as Alexandria, Byzantium, Salonika, Tarshish, and Tyre. The intensity of transactions depending on traffic by sea among these areas appears by this time to have engendered the growth, or rather the birth, of a maritime code in a crude although definite form. It is at this point in the history of the sea that we hear about the famous Rhodian Sea Law. In other words, the Rhodians were the fourth to dominate the sea but the first to formulate a code to regulate maritime affairs. In fact, as the first maritime code known to posterity, this law has been attributed a place of primary importance in the history of the law of the sea, not only for the signal contribution it made towards the facilitation of subsequent developments but also for the meticulous scholarship devoted to it by prominent jurists, as will be seen later.

On the assumption that the above chronology is generally accurate, therefore, it can be said that the dominion of the sea by one nation or another was of approximately five centuries' standing before it witnessed the advent of a legal code sufficiently methodical and mature to furnish a basis for regulating maritime conduct in general. In the absence of any record to the contrary, however, it would be unwise to assume that the other three nations

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peoples whose mastery of the sea had been particularly worthy of note — the Cretans, the Lydians and the Thracians — were completely destitute of any legal institution comparable to the Rhodian Sea Law in their maritime intercourse. In this respect, it would be more appropriate to recall in general terms that no law is a wholly artificial creation, but is rather a crystallisation of deep-rooted customs that have been derived from long-standing habits of action slowly developed by common consent. For reasons such as the foregoing, we should not entirely preclude either the possibility or the probability that the Rhodian Sea Law was preceded by a body of accepted customs or a code or codes of maritime conduct which simply failed to reach our possession but which may actually have existed and been resorted to by the earlier masters of the sea, thereafter to be received, improved and recorded by the Rhodians. From the viewpoint of the international law of the sea, however, especially for an enquiry into the early part of its development, it is not so important to trace the precise beginning of maritime dominion as to define the extent to which, or the consciousness with which, it was exercised, as well as the attitude which other contemporary nations adopted in their reactions to its exercise. If an acceptable conclusion on the nature and extent of such dominion were ever to be reached through a perusal of the prolific works of scholarship, it would then, to be properly evaluated, have to be assessed in the context of the times at which it was actually exercised, not in the possibly different context of the time at which it was discussed. ¹ One of the difficulties in assessing a rule or institution which has its origin in the darkness of ancient history often

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arises from the unwitting tendency to look at it without being duly conscious of the distance of time that has elapsed.  

Regarding the legal and political nature of maritime dominion by the ancient masters of the sea, it seems that the question is still open and may never be answered definitively. The opinions of many jurists on it, highly elucidative as they are in defending their own line of argument, vary so widely, due to the meagreness of the information available from the rudimentary legal documents, that it is virtually impossible to draw from them a common and clear conclusion without being in conflict with one or the other of opposing views on it. In most cases an attempt to develop a conclusion definitive enough to preclude a contrary argument is doomed to invite more arguments because of the lack of means for clarifying the hypotheses on which it appears to be founded. Phillipson expresses a surprisingly firm view on this question when he states that "the maritime ascendency of this or that conquering nation was not regarded from a merely comparative point of view as to the predominance of interests, but was asserted and exercised rather in the sense of absolute proprietorship".  

Of course he seems to have found it necessary to modify this opinion to some extent, when he goes on to say that such expressions in the works of Greek historians as 'to rule the sea', 'to be lord or master', 'to become lord of the sea', and 'to have command of the sea' "have different shades of meaning according to the circumstances of time and place, and are seldom used in the literal sense of complete ownership". The opinion of M"uller-Jochmus on this matter is somewhat less assertive in its substance, but should be

3. Ibid., p. 377.
considered to be as vulnerable to refutation as that of Phillipson, because he makes an attempt to impose a conceptual method of analysis upon the ancient maritime practice which was largely premature. Apart from this, it can be seen from the passages below that, unlike Phillipson, his view of the legal and practical nature of this dominion is not so categorical. About maritime proprietorship he says: "Eine Eigentumserwerbung am Meere wurde fast durchgehends als möglich betrachtet...";¹ and about its exercise as a legal right: "... übte eine fakultative Souverainität aus, die häufig auch stillschweigend oder ausdrücklich von anderen Staaten als eine rechtliche anerkannt wurde."² Potter compares the opinions presented by different authors, including the two quoted above, and gives his own by aptly adding that "the attempt to establish a legal character for the maritime dominion obtained and exercised by these Levantine peoples seems doomed to failure."³ In the nature of the matter, it would not be very wide of the mark to assume on the basis of various pieces of evidence that the legal concept of maritime dominion, at least up to the time of the Rhodians, was not significantly established, still less the growth of any custom and law relating to interstate maritime intercourse.

The foregoing discussion may usefully be amplified by taking into account some of the opinions of a few prominent jurists regarding the authenticity of the Rhodian Sea Law, as well as by noting the situation of piracy which had been prevalent prior to the dominion of the sea by any nation. The sea law of the Rhodians is believed to have originated at some

² Loc. cit.
indefinite point of time between the third and the second centuries B.C., that is, if the chronology noted earlier is taken as accurate, some seven to eight centuries after the Rhodians obtained their maritime supremacy. This should not, however, be taken to mean that their mastery of the sea lasted as long: the same source from which the chronology was borrowed indicates that the Rhodians ruled the sea only for 24 years. The actual compilation of it is believed to have taken place in imperial Rome sometime between the seventh and the ninth centuries A.D., according to Ashburner. It should be pointed out here that the chronological data vary not by decades but by centuries, according to different enquirers. In other works, it is not possible to find any concurrent general opinion about either the period of origin or the date of the actual compilation of this sea law. On the authority of many jurists who found particular interest in it and devoted much scholarship to it, it can be safely asserted, aside from the chronological ambiguity, that this law of the sea, known to us to be the first of its kind, exercised great authority in the Mediterranean, was resorted to by the Greeks in their maritime commerce, and was adopted by the Roman Emperors in their compilations of legal codes. Further, many of its principles were incorporated in, or borrowed by, subsequent maritime codes such as the Basilika, the Tabula Amalfitana, the Assises of Jerusalem, the Rolls of Cleron, the Laws of Wisby, the Consolato del Mare, and the Black Book of the

2. Mare Clausum, I-10.
4. See, e.g., Schoenberg, op. cit., p. 25; McFee, op. cit., p. 40;
Admiralty. Thus, alongside wide disagreement in point of chronology is found general agreement in point of reality.

As a matter of interest and as an example of the degree to which scholarship can disagree in its discussions relating to antiquity, brief mention should be made of the extremes to which some jurists — not inconspicuous ones — were prepared to go in regard to the authenticity of this sea law as a whole. In the 20 page long article noted above Benedict bends his efforts to demolish the Rhodian Sea Law beyond the normal bounds of destructive criticism. The only point he admits as authentic, and with a rather wry remark, is one relating to contribution, and this he calls a "little piece of Rhodian wreckage, thrown upon the shores of time". He enlists the support of two prominent 18th century jurists: Bynkershoek is quoted by him as having said that "some hungry little Greek or other fabricated" it, and as having asked "What a Rhodian ever wrote such Greek?"; and Heineccius is quoted as having accused the alleged author of the 'fiction' of having "made a deception for learned men". After a lengthy and detailed analysis of the dates and the facts, he concludes: "I do not hesitate to say … that the statement that Rome was indebted to Rhodes for her maritime law, outside of that one principle applicable to the case of jettison, is without solid foundation"; and "We must recognise the wisdom which led to the adoption of that principle into the jurisprudence of Rome. Aside from that, let us give to the jurisconsults of Rome the credit for the Maritime Law of Rome". McFee, on the other hand, provides a

3. Loc. cit.
subtle vindication of almost all that is so seriously discredited by Benedict as historically unfounded. It would take a thorough scrutiny of every point on which the opinions of writers on this aspect of the history of the law of the sea differ to be able to refute either argument convincingly.

3. Ancient Piracy

The relevance of a discussion of piracy, albeit a brief one, at this point is justified by the proposition that its history forms an integral part of the history of the sea law. It does not take an exhaustive enquiry into the latter to gain the general impression that piracy dates back to the beginning of man's use of the sea on a practical scale and that this overt act of plunder on the high seas was committed as a matter of course by the sea-faring peoples of antiquity. Under this state of affairs in which the freedom of the sea was in practice identified with the freedom of piracy, the maritime supremacy of any nation simply meant that that nation was successful in clearing the sea of the sea robbers. Minos, the King of the Cretans, is also said to have obtained his first lordship of the sea by no other means. If, in the beginning, the condition of mare liberum prevailed owing to man's inability to use the sea, the history of maritime dominion can be said to have begun with the attempt to maintain mare clausum. Acts of "highway robbery" by the ancient mariners appear to have become so prevalent with the advent of developed means of navigation that a pirate was eventually considered, by necessity, an enemy of the human race - hostis humani generis - even before international law in the modern sense of the term came into existence. This offence is nowadays regarded as one of the two

undoubtedly international crimes — the other being war crimes — which are subject to universal jurisdiction, and therefore liable to punishment everywhere. Although the concept of piracy has now undergone a substantial change from what used commonly to be meant by the act of open depredation on the high seas, it is still so much a matter of concern in international law, and has such serious implications, that the 1958 Geneva Convention on the High Seas contains no less than eight articles on it as a consequence of rather exhaustive discussions at the Conference.

What should be properly considered for a better understanding of the legal status of the sea in the ancient community of nations is, however, not the modern concept of piracy as defined in the above Convention, but the attitude towards piracy of the ancient peoples and their rulers. The universality of piratical practice as evidenced in the various works of historians and legal scholars leads to the conclusion that the sea was an open ground for the unlimited exercise of wild anarchy and that any nation which obtained maritime supremacy only did so by virtue of its own band of pirates being dominantly stronger than those of the others, or by means of "setting a thief to catch a thief". Due to the difference in the criteria of value judgments between then and now, therefore, it is rather meaningless to consider ancient piracy in terms of the social or legal ethic as conceived in the modern community of nations. Those who could practise piracy seem to have just done so, because it simply happened to be another means of

livelihood or even of enrichment. There does not appear to have been any community of sea-faring people which could have profited from the practice of piracy and yet refrained from doing so on the ground of inhumanity, illegality, or in deference to reciprocity. In consideration of the ever-present temptation to piracy and in view of the insignificant presence of international legal concepts in those distant times, there seems to be little exaggeration in the assertions of some writers¹ that piracy among the ancient nations, especially among the early Hellenic peoples, was never looked down on as disgraceful but was rather regarded as creditable and even honourable by the peoples and their chiefs alike. It is noteworthy, however, that for no less than five centuries preceding their maritime supremacy, the Romans had a different attitude towards piracy, in contrast with that of the Greeks, due to their own experience of submission to piratical exploits and to their national character which was less sea-faring, as will be seen later.²

² Cf. infra chap. 2
CHAPTER 2
The Graeco-Roman Period

The ancient nations, particularly those around the Mediterranean Sea, appear to have been constantly motivated to endeavour to achieve maritime dominion by the pressing need to secure their military and commercial interests. The geography of this area, which engendered the growth of commercial intercourse and military conflicts, also attests the inevitability of the rise and fall of different nations as well as the rampage of piracy to an uncommonly high degree. The advent of sea law centuries before the Christian era but the absence of any legal evidence in documentary form regarding marine fisheries up to the earlier part of the history of imperial Rome may be regarded as supporting the view that, under the pressure of military necessity and the strength of commercial spirit, the use of the sea was confined mostly to these two purposes and that fishery was still only a domestic enterprise of no significant scale, except in areas particularly favourable for this activity. From what has been attempted in the preceding chapter and from the long history of fishing by man, therefore, it can be seen that fishery, with its simple and crude means in the ancient days, was nevertheless the first factor to have prompted him to venture into the sea, though it can not claim credit for having occasioned him to establish the legal means by which he might regulate his own sea life.

1. Radcliffe, op. cit., Introduction.
1. The Greeks

As far as the development of the law of the sea and fisheries is concerned, the Greeks apparently enjoyed more favourable conditions than the Romans in that, at least up to the time of the Macedonian conquest, they were divided into small independent city-states and shared a common origin and language and that, from a geographical point of view, they did not have to concern themselves with so wide an area of the sea as the Romans, with the result that navigation and maritime commerce developed among them to a level of some significance. But these favourable conditions appear to have failed to survive the eventual growth of the conflict of interests among them. As a matter of fact, unlike in the case of Rome, the competition for supremacy on land and at sea among the stronger city-states, mainly between the outstanding states of Athens and Sparta, seems to have heavily handicapped the development of the freedom - or the dominion - of the sea as a legal doctrine, as will be seen below. The Athenians are said to have favoured the freedom of the sea, 1 and yet their exercise of such freedom could have hardly been based on a definite consciousness of legal right, but rather on their military or naval dominance over any rival against whom their freedom of the sea had to be defended. In other words, any state that coveted this freedom first had to be strong enough to maintain it, whereupon the freedom and the dominion of the sea appeared to be two different sides of an identical concept.

In spite of the development of navigation and maritime commerce among the Greek city-states, there is little evidence to support the existence of legal doctrines regarding these affairs, except some fragmentary non-legal

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references relating to the sea and fisheries, which are sparsely dispersed in the numerous classical works of history, geography and literature. Unless considerably amplified and liberally interpreted, these references are not very helpful in forming reasonable inferences or opinions on the Greek law of the sea and fisheries. That the Greeks adopted the sea law of the Rhodians* for the regulation of their affairs of the sea may be regarded as supporting this view.

About the legal status of the sea and fisheries, therefore, the Greek law seems to have left much less to be discussed in any significant detail than did the Romans. The basic conception of *terra* as held by both the Greeks and Romans is said to have been substantially identical as far as these matters are concerned, the difference being that the former lacked much of the specificity and refinement developed by the latter. For example, the Roman terms *dominium* and *proprietas* are not found in the legal language of the Greeks. 2

2. The Romans

It is in the great treasury of the Roman law, the Corpus Juris Civilis of Justinian, that the first extant record regarding the legal status of the sea and its products can be seen. The actual text, which is found in the Digest published in 533 A.D., is ascribed to Marcianus, one of the Roman jurists of the second century A.D., and provides that by the law of nature the sea is common to all; in the same category are included the air, running water and the seashore.

1. Cf. supra chap. 1, 2, para. 4.
Et quidem naturali iure omnium commnia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.1

Another source from which legal principles to the same effect are quoted as often as they are from the Digest is the Institutes of Justinian. As a matter of fact, there is some unavoidable overlap between them, because of their common sources, their closeness in time and the purpose of compilation of the latter. Naturally passages which are ascribed to other jurists but are substantially identical or very closely related to the one above are found elsewhere2 in the Digest and in the Institutes3 as well.

The principles which are found dispersed among the innumerable items of the legal codes in these two monumental works, therefore, form a body of law which states, clearly but not very specifically, the general principles of the Roman law relating to the sea and fisheries. At this point, therefore, the pendulum swings back to mare liberum from mare clausum4. Further, the shore extends, according to them, to the limit of the highest tide in time of storm or winter.

Est autem litus maris, quatenus hibernus fluctus maximus excurrat.5

And, by the law of nations, the fish in the sea belong to whoever catches them; wild animals, birds and all the creatures are also included in this category.

Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in terra maric caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt.6

1. Digest 1-3-2-1.
2. Digest 41-1-14, 50; 43-8-3; 47-10-13.
3. Institutes 2-1-1, 5.
4. Cf. supra chap. 1, par. 2; infra chap. 3, 1, par. 2.
5. Inst. 2-1-3.
6. Inst. 2-1-12.
Besides these, there are other provisions such as on the use of the sea, the shores, rivers and their banks, all of which are found in the above two works, being ascribed to other jurists of Rome such as, among others, Celsus, Neratius, Paulus, and Ulpian. For the purpose of a brief discussion of this period, however, it is not deemed necessary to reproduce the provisions here; even the more fundamental principles of the Roman law of the sea and fisheries have been little more than sketched in, which seems to be sufficient at this point.

Though the Digest assumed its statutory force soon after its publication in 533 A.D. as one of the three exclusive authorities over earlier laws of Rome, together with the Code and the Institutes of Justinian, the above text of Marciarius actually dates back to the early part of the second century A.D., when he lived. The Digest was only a comprehensively codified version of various legal writings by Roman jurists of authority of earlier times, whose statements are said to have been so authoritative as to be actually binding on the judges in their exercise of legal authority. On the basis of these facts, it can be said that the Roman legal doctrine on the status of the sea and its products originated as early as the beginning of the second century of the Christian era, if not earlier. In support of his assertion in this connection, and in the course of his discussion of the proposition that fish was a food staple to the

1. Inst. 2-1-4.
2. Digest 43-8-1.
3. Digest 41-1-14.
Mediterranean peoples and a source of income to the Athenian and Roman states, Fenn quotes some incidental passages from the works of such non-legal authors as Strabo, Plutarch and Livy. But he makes it fairly clear that his conclusion does not rely on them unduly. Such references may be helpful as historical evidence to strengthen the inference or deduction which has been reasonably established on other grounds; but they should not be relied on without full awareness of the wholly peripheral nature of many of them.

The theoretical ground of the Roman legal doctrine regarding the sea and fisheries is based on the classification of res, under which the sea is res communis and its products res nullius. Apart from whatever it may be based on, this doctrine as a whole apparently leaves many matters of substance to be worked out subsequently without precise criteria, compared with other branches of the Roman law which were highly developed, precise and specific with regard to important matters. In other words, it does little more than define on a broad basis the legal status of the sea and fisheries as well as of incidentals such as the shores, rivers and their banks. It does not display the detailed treatment of points of substance which could quite reasonably be expected to exist in a system of law which, by virtue of the soundness of its principles, has so long and so gloriously survived the fall of the empire that had maintained it. So far as the law of the sea and fisheries is concerned, therefore, there is naturally aroused in inquisitive minds an impulse to undertake a further inquiry on this imbalance which stands in contrast to the immense contribution of the great jurists of Rome towards the advancement of other branches of legal

discipline. A few points can be properly considered in this connection.

Firstly, the basic doctrine of the Roman law regarding the sea, that it is common to all and is therefore open to free use by all men - be it for navigation, for fisheries, or for the acquisition of salt, embodies the regime of the seas in a perfect state of mare liberum. Because of the historical and social background of the times to which this doctrine dates back in the history of Rome, however, it should be noted that its character is substantially different from what is meant nowadays by the very controversial and elastic term, the freedom of the sea. As has been mentioned earlier, this Roman doctrine is said to have originated some two centuries after the Roman victory in the third Punic War of 149-146 B.C. over Carthage, their fatal enemy, as a result of which the maritime dominion of Rome was appreciably and decisively strengthened. At the time when the Digest and the Institutes of Justinian were promulgated, Rome had become so strong that its supremacy was not to be disputed or challenged by any nation in the whole area of the Mediterranean Sea by which was identified the Roman concept of the sea. From various sources, legal and historical, it can be seen that the Romans were not great sea-farers by nature, and were even exposed to the depredations of pirates for a considerable period of time in the earlier days. In fact, it was not until the time of their victory over Carthage that they were significantly encouraged to maintain the level of naval strength by which Carthage was permanently destroyed. Once they obtained the dominion of the sea, however, the absence of any conceivable obstacle in the way of their exercising this hard-won status appears to have engendered among their sea-farers such confidence that it was not even considered necessary to assert that the sea was theirs. The great empire could enjoy the tribute of the provinces beyond the sea without having to make
any direct effort to reach across the sea. By virtue of being a 'super-power' on land, they seem to have successfully coped with the need of what would have been indispensable - an all-powerful navy - to any other nation under similar circumstances but with a lesser magnitude of land power.

In view of what has been said above, therefore, the freedom of the sea as evidenced in the Roman legal codes can be regarded as implying a shade of meaning that is removed in substance from what is generally meant by this term today. If the sea was common to all, this "all" can be interpreted to have meant in practice "all under Roman rule". A broader interpretation would have to face the difficulty of explaining how imperial Rome with its insatiable ambition for conquest on land could have so generously tolerated freedom of the sea and allowed "their sea" to be shared by those from outside their sphere of influence which extended as far as their knowledge of geography reached. It is interesting to note, at this point, the comment made by Grotius with regard to the Roman concept of the freedom of the sea: "Need should not be paid to those who think that when, in the Roman law, the sea is spoken of as common to all, the meaning is that the sea is the common possession of all Romans". 1 Given his doctrine of mare liberum it is understandable that Grotius should have favoured such an interpretation. Bynkershoek, however, came to a very different conclusion and one which carries much more conviction. 2 There seems to be little reason to doubt

2. De Dominio Maris Dissertatio (Magoffin's translation), pp. 49-50:
"That this sea (the Mediterranean) once belonged to the Romans, can not, I suppose, be doubted, for they embraced in their own empire all the regions where it washes upon Europe, Africa, and Asia; so that there was thus no one who shared the possession with them, and could therefore claim any right in it because he controlled the land. Now with those (four) fleets

Continued
that the Roman concept of the freedom of the sea was a by-product of the strength of this world empire and one which owed its origin more to the accidents of history than to any time-honoured custom or to the theoretical elaborations of their ingenious jurists.

The social system of Rome, under which the occupations of traders, fishermen and seamen were held in little esteem and came low in the social hierarchy, appears to have been one of the factors underlying the laggard development of the law of the sea and fisheries. The attitude of the Romans towards maritime ventures and commercial intercourse is said to have implied contempt, although this was later mitigated by the stimulus of wealth and prosperity obtainable by means of extended use of the sea. In this respect, it seems reasonable to say that this social factor was a natural consequence of Roman history, first 500 years of which was interrupted by a series of wars until the nation had reached the stage of achieving a reasonably solid foundation by virtue of highly advanced, popular and successful military adventures. This historical and social background explains the consequence that Rome, with its legal ingenuity, not only had to borrow the maritime law of the Rhodians, but also had to suffice itself with an undeveloped set of legal principles relating to the sea and fisheries. This view is further supported by the silence of all the Roman legal codes — from the Twelve Tables to those in force before the promulgation of the Digest and

the Romans could not only sweep from the sea all the foreign ships there were, but also close in and crush them like so many hunted beasts; and this was done so thoroughly that at length the Mediterranean Sea was not navigated except by the subjects of Rome and by her state fleets, and in fact there was no one to disturb their possession either lawfully or unlawfully."

1. Phillipson, on cit., p. 269.
2. Schomberg, on cit., p. 7.
the Institutes of Justinian - on matters relating to the sea and fisheries.

This silence and the meagreness of space given to the law of the sea and fisheries in Roman legal documents are attributed by one author to the jurists of Rome who

when the empire became so large as to embrace all the countries which surrounded the Mediterranean, ... had sufficient occupation in determining the principles, according to which should be decided the numerous questions and disputes among the various classes of inhabitants of Italy, and of the vast provinces; and do not appear to have had any inducement or leisure to discuss what might be the legal rights of the surrounding independent barbarous nations. Accordingly, in the large Corpus Juris of the Romans, we find only a few texts, involving questions, or establishing rules, of international maritime law. 

Strictly speaking, this passage relates to maritime law only, but it is equally appropriate when applied to the law of the sea and fisheries in general. This view appears to be erroneous and based on superficial observations. Two points can be raised here. First of all, it could not have been possible that the Roman jurists failed to produce more in this field of law, simply because their attention was called upon to meet the need of legislation in other areas where it was more pressing. A reasonable inference would be that, had there been maritime enterprises in Rome that required more specific legislation, there certainly would have been more than what is extant in this field today. The other point is that the above author's view is based on an underestimation of the immense effort necessary for the compilation of the Corpus Juris Civilis, apart from other earlier legal codes from which the former was drawn. For these reasons it is probable that little would have escaped the interest and attention of the

Roman jurists if a need for legislation had been justified.

Secondly, the Roman jurists appear to have invented a peculiar method of measuring the seashore, namely from the sea inland, and not from the land seaward. The extent of the shore according to this principle is therefore not fixed and static because, under it, the shore extends to the limit of the highest tide in time of storm or winter. A number of questions present themselves with regard to this method. In the first place, it appears to be very dubious whether the shore could in fact be measured in this flexible way for practical purposes; and, supposing that it were possible, whether the use of the shore by sea-faring Romans was actually so intensive as to justify the adoption of this abnormal principle. An affirmative answer in either case would have to be substantially modified with regard to different sets of circumstances. No other conclusion seems possible than that this was one of the instances in which the legal ingenuity of the Roman jurists happened to undergo an aberration, as a time criterion, that of 'storm and winter' - was introduced where only a space criterion would have sufficed. Further, looked at from another angle, this passive principle under which the extent of the shore was left entirely to the mercy of nature, as is implicit in this method of calculating "from the sea inland", may be a reflection of the Roman horror of the sea that even navigation on the insurmountable barrier of water was considered offensive to the gods.

Thirdly, the provision on the public use of the seashore, as given

in the Institutes of Justinian (2-1-5), is more specific and practical, compared with that which defines its extent and the method to be adopted to decide it; nor does it contain such peculiarities as are seen in the latter. Based on the law of nations, the right of its public use was derived from the physical nature and the legal status of the sea, and included the erection of cottages on it - the right of ownership of a building not surviving its physical construction - drying fishing nets on it and hauling them from the sea. From what has been discussed above regarding the improbability of an intensive use of the sea by the Romans, however, it can be said quite rightly that that part of the Roman law dealing with the use of seashore for the purpose of drying and hauling fishing nets could not have been essential, and may have been superfluous, in a system of law that was wanting further substantiation in its law of the sea and fisheries.

As far as the origin of the law of the sea and fisheries is concerned, the Roman law rightly deserves what credit is due to it as the first written law to have defined, though in its own context, the great principle of the freedom of the sea without any ambiguity. On the other hand, however, it can be said without doing injustice to the ingenious legal authors of Rome that the meagre attention with which the law of the sea and fisheries was treated is by no means proportionate to the vastness, accuracy and refinement of Roman legal literature as a whole, especially in the case of an empire of which the sea was an integral part historically and geographically as well. What is extant of the law regarding the sea and fisheries leaves the reader with the impression that the small amount of attention paid to the law concerning the oceans was no more than incidental to the endeavour of the jurists to maintain exhaustiveness of coverage in the classification and use of property in general.
The contribution of Greece and Rome towards the development of international law is usually rated as meagre, though other appraisals might well yield different conclusions, depending upon the points of view of the observers. Although, as far as the freedom of the sea is concerned, the international law of today owes the origin of this master principle formally to Rome, this alone does not enlarge the extent of the Roman contribution to any significant degree. Indeed, to keep the matter in proper perspective, the further point should be made that even this principle was hardly 'international' in the usual sense in its Roman context. In this connection, Greece has little if anything to offer because of its silence on the law of the sea and fisheries. However, it appears that Greece made its measure of contribution by virtue of the smallness of its city-states, and Rome, in turn, by virtue of the largeness of its empire. It is said that the small city-states developed some rules of conduct among themselves to regulate their interstate relationships, in order to maintain what may be called in modern terms peaceful or hostile co-existence. Compared with Greece, Rome has left much more to be developed further by the legal students of posterity. The gigantic empire is said to have been unwilling to tolerate the existence of any independent political entities in its neighbourhood, almost regardless of their distance, but simply to have embarked on their conquest as soon as their existence became known. When the empire had thus grown so large as to have a great number of aliens under Roman rule, it developed and maintained for them a legal system quite separate and
different from that applied to the Roman citizens proper. The system was
administered by the praetor peregrinus and came to be known as the jus gentium.
But the substantial contribution of Rome lies evidently in the remarkably
persistent influence - direct and indirect - of its law upon the
subsequent development of legal discipline in general, as will be seen below.

From the history of the Middle Ages it can be seen that the medieval political climate did not provide conditions favourable for the development of international law. The fall of the Roman Empire brought important changes in the former Western Empire. In the absence of a strong power with such influence as that of Rome, the Church was the only authority powerful enough to restore order in the West. Thus there began to grow the canon law, out of the comprehensive legal system of the Church, which was developed in the course of centuries as a set of standards applied commonly to all the different post-Roman nations of the West. One of these nations, founded by Charlemagne in the latter part of the eighth century - the Frankish Empire - eventually grew strong enough to impose its authority upon the rest and was finally awarded the status of successor to the Roman Empire, Pope Leo III crowning Charlemagne as Roman Emperor in the year 800. Hereupon the western world was once again placed, at least formally, under a unitary authority, later to be called the Holy Roman Empire, with the Pope as its spiritual and the Emperor as its temporal overlord.

The example of Rome shows that the presence of a great power, which could impose its own standard upon the others, was by no means favourable - indeed, was detrimental - to the sound growth of international law. The revival of the Western Empire under the name of the Holy Roman Empire, therefore, meant nothing but the repetition of this example. On the other hand, the absence of a giant in the community of nations did not necessarily
change the climate to the advantage of international law, as was proved by what took place during the period of over three centuries between the fall and 'rise' - in that order - of the Western Empire. In this case, however, the absence of a 'super power' was no more than apparent, in the sense that there was present its substitute in the name of the Church, which exercised a virtually equivalent, or even stronger, influence at least in the context of matters spiritual - and the latter embraced a very wide span of the total range of human activities.

It appears to be the opinion of legal historians and other authors that there were three major factors by which the development of international law in the Western world was impeded during the Middle Ages: the Church, the Emperor and the feudal system. Of these, the first two had much in common in that both refused to recognise any other similar authority compatible with theirs, and both forced obedience upon all authorities they could bring under their respective spheres of influence: one was the spiritual and the other the temporal overlord of the West. The third factor, medieval feudalism, was fostered by the attributes of the Great Empire and eventually developed into a vertical hierarchy - a structure-within-structure complex - of political entities forming a 'kangaroo pyramid'.

In the course of time, however, the Empire became so vulnerable to internal division that it eventually failed to maintain the centralisation of power and the singleness of purpose on which Rome had so long and so successfully relied. On the other hand, the far-off nations which were virtually outside the sphere of its influence from the beginning had now reached the stage of development at which the relations among them required some measure of international regulation. As Europe was thus divided into many independent nations, there began to be felt the need of what was later to
become international law. In this respect, Oppenheim gives seven important factors by which the general climate of the time was made gradually favourable for the growth of international law; and among them is the increased use of the sea, mostly for commerce and navigation, which consequently fashioned the development and later the codification of various sea laws.

1. The State of the Sea

The history of law records that it is about 400 years since international law in its modern sense of the term came into existence. This then leads to the natural conclusion that the whole period of the Middle Ages was a period of futility, not fertility, as far as the development of the law of nations is concerned. Of course this should be attributed to the vicissitudes of the history of the period between the fall of the Roman Empire and the rise of nation states in Europe. The fall of this World Empire, whose "idea of maritime dominion practically excluded the discussion of the question of sovereignty", identified itself with the rise of piracy. Taking advantage of the absence of any power strong enough to suppress this overt act of maritime depredation, the pirates once again began to reap where they had never sown. By inference from the political climate of this period of transition in the history of Europe when the Roman civilisation was being destroyed in the course of the Great Migration, the return of the sea robbers can be said to have been indirectly facilitated by the ensuing state of chaos.

1. Oppenheim, op. cit., p. 29.
on land.

It was not until the eighth century, it is said, that trade among independent states began to be resumed, though very slowly, by means of the sea. As no state retained the power to provide security at sea, it was the merchants themselves who had to seek mutual protection from lawlessness and insecurity in their navigation by organising private associations. Where such protection was provided by any state authority in the areas of their passage, they responded to it by paying tribute and, in doing so, both expressing gratitude and recognising the sovereignty of the dominant state in that part of the sea. In the rise of maritime trade despite these adverse conditions, however, several states of the Mediterranean and Europe had at different times succeeded in building up sufficient naval power to exercise sovereignty in their parts of the sea. Foremost among them was Venice, which cleared the sea of pirates at the end of the tenth century and secured the safety of maritime commerce. Eventually it brought the whole area of the Adriatic under its control so firmly that it even succeeded in exacting and collecting tolls for the passage through "its" gulf, and "espoused" the Adriatic to itself through an annual ceremony. This dominion of Venice over the Adriatic was recognised by other states of Europe, Pope Alexander III confirming it in 1177. The claim of Venice was not confined to the Adriatic, but was extended to the other side of the Italian peninsula where Pisa and Genoa had been rivals for control over the Ligurian Sea. The former was conquered by the latter, which was in turn overthrown by Venice.\footnote{For the way in which this famous ceremony was conducted, see T. W. Fulton, \textit{The Sovereignty of the Sea} (Edinburgh, and London, 1911), p. 4. For the collection of tolls by Venice from 1269, see W. R. Hall, \textit{A Treatise on International Law} (Oxford, 1890), p. 141.}

\footnote{Wade, \textit{op. cit.}, pp. 4-8; Fulton, \textit{op. cit.}, pp. 5-4.}
a lesser extent than the case of the Venetian claim, the seas in the north of Europe, such as the Baltic, the Sounds and other areas were claimed by the Scandinavian and other northern European states at one time or another during the Middle Ages.

Thus parts of the sea again began to be closed by different maritime powers at different times, although from a practical point of view the closures at the earlier part of this period were prompted by the relatively unselfish motive of maintaining safety of passage over the trade routes in the face of the increased activities of pirates. For the second time, therefore, the pendulum swings back to _mare clausum_ from _mare liberum._

2. The Revival of the Roman Law

By the beginning of the twelfth century, the Holy Roman Empire itself had undergone a considerable measure of disintegration, so that kings and feudal lords of many provinces could exercise virtually independent authority in the political affairs of their own domain as well as in their transactions with other territories. The development of law as a whole, however, failed to keep pace with the changes that had taken place throughout Europe during the long period of confusion and obscurity, political and territorial, since the fall of the Roman Empire. The Roman law, always regarded as the mainstream of legal wisdom, had to be resorted to, as a matter of course, adapted as necessary to meet particular local situations. The absence of a proper system of secular law suitable for the needs of the times, on the one hand, and the increase of municipal and interstate transactions, on the other, led to the revival of the Roman law sustained by

1. Cf. _supra_, chap. 1, 1, para. 2; chap. 2, 2, para. 2.
the strength of its tradition.

It is to Irnerius, the founder of the law school in Bologna
University, that the beginning of the systematic study of Roman law, mainly of the Corpus Juris Civilis, is attributed. Bologna then became the centre of legal studies in Europe, where students of law from all over Europe studied jurisprudence in the primitive way of following the commentaries on the texts of the Roman codes, which were developed by the group of scholars called the glossators. Nothing new in the way of legal theory was to be expected of them, because they were merely expounding the ancient texts within the strict framework of what had already been in existence for over six centuries. There was to be expected little intrusion of their own theories into the commentaries; nor was there found much departure even in their literary expression from that found in the "glosses" of the Corpus Juris Civilis. So far as the Roman doctrine on the law of the sea and fisheries is concerned, therefore, the glossators neither added to it nor subtracted from it. This classical school of glossators, which persisted till the middle of the 13th century, was succeeded by the holders of a more practical theory of law, called the post-glossators, in the 14th century.

The post-glossators or commentators were represented by Bartolus (1314-1357) and later by his disciple, Baldus (1327-1410). Even though this school also based its fundamental view on Roman law, as its name suggests, it launched a bold departure from it by introducing revolutionary doctrines of law into the Roman principles which had been antiquated to the point of ossification by the passage of time. Fenn remarks in this connection that "Roman law probably could have never become the living law of Europe if this work had not been done. Bartolus saved the Roman law
from becoming only a subject of study for antiquarians."\(^1\) Apart from the general contribution of Bartolus towards improving the study of Roman law to fit it to the needs of the changed times and circumstances, as far as the law of the sea and fisheries is concerned, he was the first to try to end, not unsuccessfully, the antique practice, common to the legal studies of the time, of repeating the dry and impractical Roman doctrines. He gave a completely new impetus to the development of the law of the sea by raising practical questions, and by formulating his own theories on the criminal jurisdiction of coastal states, on the legal status of the waters adjacent to them, as well as on the coastal state’s ownership of islands in such waters. By the former question of maritime criminal jurisdiction he could have meant at that time nothing other than the legal nature of the measures to eliminate piracy. By the latter, he advocated the jurisdiction of coastal states within the limit of up to 100 miles or less than two days’ journey,\(^2\) implying the recognition of their claims and rights based on what may be now called contiguity. In theory, he meant to extend the law into the sea, while in practice, he intended to pull the extravagant claims of Venice nearer to the land.

Baldus also upheld the theory, as might be expected, that some part of the sea was subject to the jurisdiction, not to the right of property, of the coastal state. He further specified the concept of *res communes* and *nullius bona* with regard to the legal nature of the sea, the shore, and the use of them. In the nature of things at the time, it was not thought possible for either Bartolus or Baldus to establish any legal theory relating

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1. Fenn, *op. cit.*, p. 97, and the reference *ibid*.
to property in general without defining the ultimate authority - of the Emperor, the king, or the feudal lord - to which it belonged. It was with Baldus that the legal status of the shore and the bed of the sea as well began to undergo a substantial change in concept. Under his doctrine, the former was regarded as part of the land, not part of the sea; and the latter might be occupied under certain conditions. In this connection, Fenn says that "Baldus may not have been entirely unconscious of the possibility" that his doctrine "would inevitably be, in the course of time, destroying the classic doctrine of the shore by regarding it as within the territory of the maritime state."\(^1\) Whether or not he was conscious of it, he duly deserves the credit for having approached the question in a way at once both practicable and more compatible with the changed times. Furthermore, it is noteworthy that Baldus, as Fulton indicates, reduced Bartolus's limit of 100 miles in maritime jurisdiction to that of 60 miles or one day's journey, though neither of their limits is said to have been actually adopted by any state. It should be said that, with their active method of legal study, the post-glossators made a great contribution towards the development of legal discipline by successfully attempting to rescue law from the rut of Roman doctrines preserved in the hands of passive and anachronistic classicists.

The doctrines which were pronounced by the post-glossators and subsequently advocated by a few later jurists can be said to have marked the beginning of a period of transition from the classicism of the Roman law to its adjustment or reconciliation with the practical needs of the changing times. The birth of the doctrine of mare adiacens at this period can also

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2. Fulton, op. cit., pp. 540 et seq.; Fenn, op. cit., p. 129. Jean Bodin's 60-mile limit is also cited by these authors.
be said to have been a natural sequence from the repeated competition of *mare liberum* v. *mare clausum*, this new doctrine serving as a form of doctrinal buffer zone between them. If these new developments were revolutionary at the time, they were in revolt not against the fundamental principles of the Roman law as a whole, but against that part of it which, due to its antiquity, could not be put into effective use. In this sense, it can be said that, viewed in terms of their contribution towards the development of the international law of the sea and fisheries, the Dark and Middle Ages, despite the lengthy period of historical time they occupied, left only a few sprouts of doctrinal shoots to be cultivated by the jurists of subsequent ages. On a broad basis, two reasons can be given to which this virtual sterility can be attributed. One is historical and was noted earlier: the Roman law itself, which enjoyed universal dominance and eminence throughout Europe during this period, was not productive of doctrines on the law of the sea and fisheries. The other is practical: the use of the sea and its products was not extensive enough for nations to feel, with any seriousness, the poverty or meagreness of its legal context or the lack of law relating to it.
CHAPTER 4
The Early Modern Ages

The doctrine of *mare adiacens* was developed by the champions of post-glossators as a challenge to the classical theories of law on the legal status of the sea and maritime fisheries. From the beginning, it was made clear by these jurists that the doctrine did not concern itself with the right of property, but only with the right of jurisdiction, of the coastal state over some areas of the sea adjacent to it. However, it can hardly be said to have enjoyed such in the nature of a favourable reception among the maritime states of the time. Those which would have profited from it were not strong enough to put it into practice, while, on the other hand, the others whose unlimited claims over vast areas of the sea would have had to be greatly limited by it were not weak enough to be brought to show the slightest respect for it.

In the course of time, however, this doctrine came to be critically tested when there developed the doctrinal conflict between the regalia and the classical doctrines of Roman law on the legal status of the sea and fisheries. Under the principles of the former, the feudal king was thought to have the right to grant his subjects *jus piscandi*, the right of fisheries in the sea, which was incompatible with the community of the sea as pronounced under the classical theory. It was not until the arrival of Gentilis (1552-1608) that this conflict was terminated when he introduced the concept of *territorium* into that of *mare adiacens* and thereby developed
Hereup, the right of exclusive jurisdiction in *mare adiacens* was strengthened to the point of being virtually synonymous with ownership in reality.

This new doctrine of *dominium maris* can be said to be another outgrowth from the controversy between *mare liberum* and *mare clausum*, preceded by the growth of *mare adiacens*. It has been mentioned earlier that in the course of this age-long controversy, the pendulum swung three times between the two conflicting doctrines. By virtue of the outgrowths therefrom, the point of contact between them was somewhat softened, even though the lull thus created was only temporary because of the basically expedient character of the doctrines of *mare adiacens* and *dominium maris*. The culminating point of the controversy was yet to come, as will be seen below, with the advent of the two epoch-making events in the history of mankind, namely, the discovery of America in 1492 and the Reformation in the 16th century, both marking the end of one age and the beginning of another.

1. The Closed Seas

The modern history of the international law of the sea and fisheries begins with a series of charges and counter-charges among the

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1. A. Gentilis, *De Jure Belli Libri Tres*, translated by J. C. Rolfe as Vol. 16, *The Classics of International Law*, p. 384: "The adjacent part of a sea belongs to one's dominion, and the term 'territory' (territorium) is used both of land and water, - a feudal subject is considered a traitor if he permits a hostile nation to pass through his holdings."

2. Cf. supra, chap. 1, 1, para. 2; chap. 2, 2, para. 2; chap. 3, 1, para. 3.

3. In this connection, two other events with which the 15th century closed itself may be cited here as being relevant to the law of the sea: The Papal Bull of 1493 by Pope Alexander VI in favour of Spain and Portugal, and Vasco da Gama's navigation in 1497 round the Cape of Good Hope to the Indian Ocean.
European maritime powers concerning the exclusive jurisdiction or the right of property over the sea. Different states at different times invented various pretexts to justify their maritime claims by means of word or sword. Colombo rightly says that "up to the end of the 18th century there was no part of the seas surrounding Europe free from the claims of proprietary rights by individual Powers, nor were there any seas over which such rights were not exercised in varying degrees". So the closure of the sea during the early centuries of modern times had become much tighter. It is deemed appropriate at this point to make a brief sketch of the state of the sea which led to the greatest controversy of scholarship between the champions of mare liberum on one side and of mare clausum on the other since the turn of the 16th century into the next.

a. The British Seas

No other country could have made use of the sea so thoroughly and for so long a time as Britain. She is also unique in her early realisation of the importance and the inseparability from her prospects of the sea for her survival, prosperity and conquest. It is said that British claims over the sea date to as far back as the 10th century. The inevitability of her adventures into the sea is attributed to her geographical and ethnical features. "We are borne in an Island", says Boroughs rather romantically,

1. The peoples in other parts of the world seem to have been less sea-fearing but more sea-faring than those of Europe. The practical use of the sea and the conflicts arising therefrom were of peculiarly Western origin. Up to very recent times, the sea did not impinge forcefully upon their interests or attention except through or because of Europeans.

2. Colombo, op. cit., p. 48; also W. E. Hall, op. cit., p. 139.


"and cannot goe out of it without asking leave of the sea and Winde; and not
to know what Right we have to that Water which divides us from all the World,
is something ill becoming such as can read".  

1. The metaphor by Nedham is also noteworthy: "without a Soveraigne there, the Island itself had been a great prison, and ... the Natives but so many Captives and Vassals to their Neighbours round about".  

2. The ethnical part is explained by Fulton in the observation that "a great part, if not the larger part, of our blood has come from the old Scandinavians peoples, - the sea-wolves".  

By category, Britain would no doubt belong to the side of mare clausum, and this can be seen from what was historically meant by the "British Seas".  

This was by no means a simple geographical identification of some areas of the sea but signified the part of the sea over which she not only claimed but also enforced exclusive rights of jurisdiction. Naturally there was no definition of its actual size, except by reference to the arbitrary stretch of her naval pow...  

4. Various also are the names by which the British Seas were referred to, such as the Two Seas, the Three Seas, the Four Seas and the Narrow Seas, aside from other casual ones employed by different sovereigns on different occasions.  

5. The thoroughness with which she controlled, or tried to control in the earlier days of her maritime adventures, can also be seen from the grandeur of language in the documents, legal and otherwise, as well as from the extent to which the salute to the

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2. M. Nedham, in the Epistle Dedicatoire in his translation (London, 1652) of Selden's Mare Clausum
4. Infra, chap. 5, 5, b.
5. Fulton, op. cit., pp. 17-18; the 'Narrow Seas' seems to have, at times, meant something beyond its literary sense.
6. An example would be the letters patent of 1496 by Henry VIII to John Cabot, as quoted by Colombos, op. cit., p. 49.
British flag was exacted from foreign vessels on her seas. In this connection, it should be made clear that the claims to sovereignty over the seas were not based entirely and necessarily on selfish motives to promote national interests only, but partly on the virtue of reciprocity between the claimant of such sovereignty on the one hand and the recipients on the other of the assistance and protection by the former from pirates. 1

With regard to the long-standing British tradition of *mare clausum* as implied by the "British Seas", however, it is of much interest to note an example of expedient departure from it, which took place in the face of the need to defend national interests. It is embodied in the oft-quoted famous response of Queen Elizabeth I to the Spanish Ambassador Mendoza upon his protest in 1580 that the voyage of Drake to the Pacific constituted an intrusion into the Spanish main and that the plunder taken by Drake should be restored. In no ambiguous terms did the Queen make clear the British stand of *mare liberum*, when she refused to admit that Spain had any right to debar British subjects from trade or from freely sailing that vast ocean, seeing that "the use of the sea and air is common to all; neither can any title to the ocean belong to any people and private men forasmuch as nature nor regard of public use permitteth any possession thereof". 2 This typically Roman principle of *mare liberum* was reaffirmed by Britain in 1602 in her negotiations with Denmark regarding the collection of tolls at the Sound and the licensing of fisheries in the northern seas by the latter. 3

1. Cf. supra, chap. 3, 1, para. 2 and 3
3. Fulton, *op. cit.* p. 110; Colombos, *op. cit.* p. 51. For the passages of the Queen's instructions (which Fulton calls an admirable exposition of the principles of the freedom of the sea) to her ambassadors for the 1602 Bremen negotiations, see S. A. Riesenfeld, *Protection of Coastal Fisheries under International Law* (Washington, 1942), p. 130.
These announcements of policy led some writers to decide quite rightly that it was Queen Elizabeth of England, not Hugo Grotius of the Netherlands, to whom the credit of having first asserted the freedom of the sea in the modern sense of the term should be given.

On the ground of this shift from the traditional stand of *mare clausum* to that of *mare liberum*, it is said of the Queen that she was "indifferent to inconsistency" and that "her declarations were not always consistent". In the light of what Selden later undertook to defend so ardently, it can be said that the adoption of this principle by the Queen could never have safely escaped his attention in the course of his learned charge against Grotius through his *Mare Clausum*. As can be expected, he remarks that it was "clearly contrarie to our English right, as also to the interventient Law of Nations, which hath continued in force for so many Ages about the Dominion of the Sea". These charges were defended by Fulton in his assertion that "no claim was put forward by her to the sovereignty of the British Seas; on the contrary, they were declared to be free for the navigation and fishery of all nations".

With regard to these charges, two points may be raised: one is whether it was the Queen or the British tradition that was inconsistent; the other is whether it would have been of any legal significance had Britain maintained this consistency, even by choice, in the absence of any legal

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obligations and in the presence, on the other hand, of inevitable damage to her national interests. Regarding the first point, the charge against the Queen would be hard to defend unless it could be established beyond any point of doubt that there was an unmitigated consistency between the declarations of Britain and her contemporaneous practice relating to the principle of *mare liberum* throughout the whole area of the British Seas. Here, however, there does not appear to be an agreement of opinion. As an example of the inconsistency of British practice, the policies of Queen Elizabeth, King James I and King Charles I may be noted. The Queen's principle of *mare liberum* was replaced or reversed by James I to the traditional stand of Britain — *mare clausum* — to the point where a proclamation was published in 1609 by which unlicensed fishing in the British Seas was to be prohibited. It was not enforced, however, in the face of unswerving opposition by the Dutch who were the greatest rivals to Britain in the North Sea herring fisheries and in consideration of the new relationship with the Netherlands foreseen to arise out of the assassination of King Henry IV of France. Another proclamation to a similar effect was published by Charles I in 1635.

1. Fulton records a resemblance between the dispute between Queen Elizabeth and the King of Denmark and that of James I with the Netherlands, with the British position reversed in the latter case to *mare clausum* (*op. cit.*, p. 112).
3. The Tudor tradition of the freedom of the sea, which culminated during the reign of Queen Elizabeth, was thus met with the advent of new factors by which the policy had to be eventually reversed to *mare clausum* under the Stuarts. There were two major ones: one was the serious decline of the British fishing industry and trade under the increasing effects of the Reformation, which brought about a growing laxity of ecclesiastical rules on the consumption of fish and on the abstinence from flesh among the clergy — and the laity as well; the other, which was no less detrimental to the British fisheries and fish trade, was the rapid growth of the Dutch deep-sea herring fisheries, which was referred to as "the chief industry of the country...Continued
b. The European Seas

For the purposes of this discussion, the European seas at the beginning of the 17th century may be divided into three major regions, in each of which were leading maritime states, each claiming the rights of exclusive jurisdiction over wide and important areas in its own sphere of influence, namely, the Italian republics in the south, the Scandinavian countries in the north, and Portugal and Spain in the west.

Firstly, the maritime states of Italy of this period were represented by Genoa, Pisa and Venice, as has been earlier mentioned. Of these three masters of the sea, it was Venice that eventually conquered the other two which were rivals of each other at the other side of the peninsula. The scope and length of the maritime dominion of Venice in the Adriatic deserves further mention in more detail. It is said that Venice herself had been exposed to the depredations of the Dalmatian pirates until the end of the 10th century, when she successfully cleared the Adriatic of the sea-robbers, thereby opening an era of prosperity for the next five centuries. She also shared one of the common features - geographical - which underlie the prosperity of every maritime power. She actually excelled over all others, whether earlier or later, in exploiting her geography to the fullest extent. Her main heritage was not the land but the sea: even at the height of her power, she had owned only a sixth of the total length of the Adriatic coast. The smallness of her land seems to have

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and principal gold-mine of its inhabitants under the name of the Groote Vischorye - the Grand Fishery. The whole fishing industry of Britain was diminishing as a consequence of these factors, despite the numerous measures to check them by the sovereigns, one of which was the 1609 proclamation of James I. For further details, see Fulton, op. cit., chap. III.

1. Above, chap. 3, 1, para. 2.
been compensated by the rare invulnerability which she enjoyed from her geographical situation. No lesser role than this physical feature did history play to enable her to achieve commercial prosperity. With the Adriatic in her own hand, she not only monopolised the carrier service for the Crusaders during the whole period of the three-century campaign, but also levied duty from commercial navigators in the area on a rigorous ad valorem scale.

After all, her dominion prevailed for such a long time that, even after the decline of her power, she could nevertheless enjoy almost the same privilege on the ground of prescription, acquiesced in by other powers. Of course, behind this recognition lay an extra-legal, utilitarian motive of the western states whose interests could have been seriously affected but for the policing role of Venice against the possible invasion by Turks and Saracens as well as against the pirates. In reality, however, the benefit which these states had obtained by virtue of their recognition of the Venetian claims was massively outweighed by the enormous gains accruing to Venice. These advantages were effectively maintained, in the face of periodic opposition to her claims, by her steadfast reliance on the prescriptive basis of her rights to justify their continued assertion. In this connection, an outstanding example is recorded, regarding the dispute between Venice and Austria over the charge of dues for passage in the Adriatic. The joint commission of lawyers which considered the case in 1563 seems to have found it difficult to decide otherwise than in favour of Venice, the long-standing tradition of the Venetian prescription sufficing to override the various grounds on which Austria based her protest.¹

¹ The pleadings in this case are found at the end of Nedham's translation of Selden's Mare Clausum.
Secondly, due to the geographical proximity of maritime states in
and near the Scandinavian seas, the claims to the sovereignty of the sea in
this region have always been so controversial as to give rise to numerous
important incidents and events - disputes, treaties and wars - in the
history of the international law of the sea and fisheries since the latter
part of the Middle Ages. The history of the countries of this area,
Denmark, Norway, Sweden and Finland, and of those in the vicinity, Greenland
and Iceland, is also marked by the rapidity in the succession of changes in
the mastery of the oceans, and this makes it quite understandable that, as
far as the law of the sea and fisheries is concerned, the whole region has
been one of the most eventful areas throughout the world. There have been
ceaseless efforts among these countries to share and to compete for every
corner of the Bothian Gulf, the Baltic, the Little and Great Belts, the
Sound, and the North Sea, each not only claiming the dominion of the waters
in its proximity, but also trying to exercise its sovereignty over as
distant and as wide an area of the sea as its naval power permitted.
Foremost among them was of course Denmark, noted for her toll collection
and for her constant claims - mainly against Britain, and against the
Netherlands to a lesser extent - over rights of trade and fisheries. It
was therefore not by accident that this region provided the world with the
first legal dispute over the freedom of the sea relating to trade and
fisheries on the high seas. Of the two major uses of the sea - trade
and fishery - fishery appears to have had a more immediate bearing upon

1. For further details on the Dutch-Danish fisheries disputes, see A. Beaujon,
chap. V, the History of Dutch Sea Fisheries, Fisheries Exhibition
Literature (London, 1884), vol. IX (1883 International Fisheries
Exhibition).
2. Riesenfeld, loc. cit.
the frequent conflicts of interests among the three rivals for maritime supremacy in this region, Britain, Denmark and the Netherlands. This can be seen from the important position of fisheries in the national interests of each of them as well as from the seriousness and tenacity with which they consequently dealt the disputes and treaties on the rights of fisheries in the coastal waters.

The original closure of the sea by Denmark, which dates back to the latter part of the 13th century, appears to have been met with no serious protest until the end of the 16th century when the maritime countries of Europe and Russia began to attach importance to their trade by way of the North Cape. Apparently the *mare clausum* here, therefore, started for the purpose of checking free navigation, though the approach of foreign fishermen to the allegedly Danish waters seems to have sufficiently aroused her attention to result in the application of the same measures to fisheries. Thus, at the beginning of the 17th century, the Scandinavian seas were more tightly closed to freedom of the sea than in any other areas.

a. The Claims of Portugal and Spain

The character and extent of the claims by Portugal and Spain over vast areas of the world's oceans were substantially different from those of the other above-mentioned countries. The claims by Britain in the British Seas, by the Italian republics in the Adriatic and the Ligurian, and by Denmark in the Sound and other areas of the Scandinavian waters, were all confined to comparatively small regions in their proximity and limited to the purposes of attaining and protecting their more immediate interests.

Naturally their claims were sufficiently definitive and open to the possibility of introducing into them negotiations - legal or diplomatic - for the solution of controversies before resorting to less peaceful or even ultimate means, as was often the case.

The two great maritime rivals of the western Europe of the time, Portugal and Spain, certainly deserve the credit for having opened new horizons to mankind, primarily in the field of navigation and consequently in other areas of human endeavour, the former through her conjunction of the East and the West, and the latter through her extension of civilisation into the New World across the Atlantic. The absence of any significant rivals before them, however, had eventually given rise to the circumstances under which there was hardened in the hearts of these giants of the sea the thought that much of the sea and the land of the world was virtually open (as it certainly was) to their arbitrary acquisition by the wake of their ships and the trace of their feet, however casual these means might have been at times. This state of the greater part of the world being left subject to the dominion of the first comer seems to have continued to the rare advantage of these sea-faring countries for no less than a hundred years by the end of the 15th century, by which time the only rival before each of them was the other.

It was, therefore, as a means of preventing and settling the conflicts between them, arising from their competition to obtain the lion's share, that there ensued the formulation of the famous and oft-quoted Papal Bulls of 1493, proclaimed by Pope Alexander VI by virtue of his authority as the spiritual master of the Western world, out-ranking all temporal authorities. By the first Bull, which was issued soon after the return of Columbus from his first trans-Atlantic voyage, Spain was granted the ownership of the newly-discovered part of the world; and by the second was
drawn the famous Pole-to-Pole line for a vague division of the open areas of the globe between Portugal and Spain. Their adjustment of the line of demarcation by treaty the next year attests the binding character of the papal authority at least on the grantees of the Bulls. Thus at the beginning of the 17th century every corner of the oceans, except perhaps areas unknown or inaccessible to mankind, appears to have been open to no other countries than to those that allegedly owned it, subject to their capacity to exercise the requisite control.

The claims by Portugal and Spain were such that they monopolised the major portion of the global surface to the gross disadvantage of other maritime powers who were left with marginal corners only. The state of this imbalance was possible only by virtue of the corresponding imbalance in naval strength between the two maritime giants and other weaker powers. This disparity in power, however, was not to survive the change of times. It was towards the end of the 16th century that the Portuguese and Spanish dominion of the seas began to be seriously challenged, in practice and in law also, by Britain and the Netherlands, as navigation in these countries had also reached a stage comparable with that of the other two maritime powers, and as the urge for maritime trade with far-off countries hitherto

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1. Hilton, op. cit., p. 106. Of the six Bulls issued from 1493 to 1501, the second, of May 1493, called "the Bull of Demarcation" is regarded as the most important. The New Cambridge Modern History (vol. I) gives an interesting account of it: "... perhaps purely medieval in conception; it was certainly already an anachronism whose stupidity the Maritime Powers of the future, England, France and the Low Countries, were later to show" (p. 79); and "... both sides must in any case have realised that so vague a boundary could not be fixed with accuracy, and each thought that the other was deceived" (p. 431).
closed to them had begun to be as deeply felt. It should be noted at this point, however, that in point of legal doctrine the challenge by Britain should be described as having been temporary because of the necessary shift of policy to the principle of mare clausum by the successors of Queen Elizabeth, which in view of the British tradition, ambition and potential, seemed inevitable.  

The challenge of the Netherlands to the Portuguese and Spanish pretensions to the sovereignty of the seas is noteworthy. It can be safely asserted that she was the only maritime state whose practice was consistent, either by choice or involuntarily. The turn of the 16th century into the next did witness the maturity of the period when a complete absence of any protest against Portugal or Spain would have been unnatural. The general trend of thought regarding the sea and its use had begun not only to come into keeping with the community of the sea, but also to be enhanced by the need and development of navigation. It was at this stage that the Dutch contested by means of practice the Portuguese monopoly of trade in the East Indies. The world was thus in need and looking for a lead, both loud and firm; and by good fortune the age produced the man in the person of Grotius.

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1. For the more immediate and practical need to shift the policy, see above, Chap. 4, a.
CHAPTER 5

The Grotius-Selden Controversy

1. The Forerunners of Grotius

The legal status of the sea had thus undergone a series of oscillations between *mare clausum* and *mare liberum* up to the end of the 16th century. On a broad basis, however, it can be said that the only law of the sea that was effectively operative was the law of the strongest, which from the practical point of view could be simply identified with another version of the state of lawlessness. On the other hand, it was true that, as has been related earlier, the dominion of the sea by the strong was not necessarily disadvantageous to the weak, because the latter benefited from the safety of navigation provided by the former against piracy, in return for the recognition — by means of tribute, if necessary — of such dominion. It should be made clear at this point, however, that the relationship between these two parties of involuntary contract did not imply the slightest legal ground for or against the sovereignty of the sea, but was a simple practice based on sheer expediency.

The beginning of the 17th century had already seen an increase in the number of maritime rivals, stronger demands for liberty at least on the level of individual states, and the expansion of commerce among nations. These factors naturally posed a direct challenge to the traditional maritime doctrine of the previous centuries that the sea was capable of arbitrary appropriation by the coastal states (and in reality this practice had been

1. Regarding the doctrine of *mare liberum* only; regarding other fields of international law, see Oppenheim, *op. cit.*, pp. 89-91.
pursued by states in proportion to the extent of their power). The nature of the matter suggests that such challenge was unlikely to manifest itself in a single sudden outburst of activity. For some time voices had been heard tending in the direction of what later turned out to be the greatest controversy of legal scholarship of the Modern Ages regarding *mare liberum* and *mare clausum* under the championship of Grotius on one side and Selden on the other.

There appear to have been a few protagonists of the doctrine of *mare liberum*, who supported the freedom of the sea to varying extents. Queen Elizabeth was one of those who opposed the closure of the sea most actively, even though her stand was based on the expediency of policy, not on a systematic legal ground. In the context of Grotius's exposition of his legal theory through his monumental work, *Mare Clausum*, two Spaniards are usually cited, among others, as his outstanding forerunners, namely, Francis Alphonso de Castro and Ferdinand Vasquez, both of the mid-16th century. The ultimate source from which they derived their versions of *mare liberum* was of Roman origin. They both protested against the claims of Genoa in the Ligurian, of Venice in the Adriatic, and of Portugal and Spain regarding the exclusive rights of navigation to the East and West Indies respectively. Furthermore, it is noteworthy that, in regard to the rights of fishery, Vasquez set up a convincing distinction between marine fishery and inland fishery on the basis of the community and inexhaustibility in the use of the sea.

With respect to the circumstances under which de Castro and Vasquez raised their opposition against the maritime dominion of Portugal and Spain as well as of the Italian republics, two points can be relevantly considered. One is that both of them protested against the long-standing practice of
their own countries. This should be taken to attest the firmness of their conviction out of which their legal theory was elicited. The other point is their silence on the authority or the validity of Papal Bulls to which Portugal and Spain resorted in defending their dominion of the seas. Their voice on the one point and silence on the other may be susceptible to different interpretations. This silence, however, would not have to be attributed necessarily to the absoluteness of the Papal authority, reasonably probable and possible as the case might be. If the ground of their protest relating to the first point had been sufficiently established, at least in the form of a new theory of law, it would have not been necessary to raise the second point for discussion.

2. Mare Liberum

The two monumental works of Grotius, Mare Liberum (1609) and De Jure Belli ac Pacis (1625), literally marked the beginning of a new era in the history of international law. As a matter of fact, they are so important and indispensable as well that it is virtually meaningless, if not impossible, to attempt any simple discussion on the origin of international law in its modern sense without turning to them. Grotius's merits have therefore been exaggerated by many jurists, especially by the ardent eulogists of the 19th century, to the extent of calling him the "founder" or even the "father" of international law. As can be expected, opinions of eminent scholars and historians widely vary on this point, not always because of the literal implication of these terms, but because of the different views and stands regarding the merits of his forerunners and

successors whose contribution towards the development of international law is thought to be often unduly overshadowed by his. What would matter in this connection, if it is to matter, however, is not to accentuate the terms of glorification which have been used to describe him — be it the "founder" or the "finder" or the "father" or the "step-father" — but is to achieve on the basis of what is justly due to him a fair and disinterested evaluation, rather than an impassioned and unwarranted praise or detraction, of his contribution towards the development of international law. Apart from this point, there appears to be a general agreement of opinion that he was a prodigy of learning and probably of energy as well.

Few other legal works have ever attracted so much exhaustive scholarship as those of Grotius. Unless the accident of a new discovery such as that of 1864 were to repeat itself, any serious attempt in search of some hitherto unknown facet of his works would be, in all likelihood, lost in the maze of prolific literature accumulated in the course of the past four centuries, before ever arriving at any point beyond what has long since been explored. As, in the nature of the present discussion, it would be superfluous to repeat here the points raised, and answered — some boldly and others crudely — by Grotius himself in the above two works, the discussion here is confined to giving a selected summary of them and to presenting a few points of view relating mainly to the legal status of the sea and the right of marine fisheries as professed by him.


2. "The Miracle of Holland" symbolising Grotius's prodigy is said to be the remark made by Henry IV of France (Nussbaum, op. cit., p. 102).
It is said that *Mare Liberum* had been regarded as an independent work for over 250 years following its publication. It was not until 1864 when many items of Grotius's writings were discovered in the form of manuscript, however, that it turned out to be only a chapter - with marginal adaptation for separate publication - of a larger work under the title of *De Jure Praedae Commentarius*. Prefaced by a reasoned appeal embodying the cause of his doctrine, as is implied by its title, "To the rulers and to the free and independent nations of Christendom", and with an appendix consisting of two letters by the Spanish King Philip III to his Viceroy, the thirteen chapters of the book present a logical refutation of the exclusive claims of Portugal to trade and navigation in the East Indies. The language is articulate, the reasoning subtle, and the coverage systematic. Furthermore, the author enlists the authority of numerous earlier historians, jurists, orators, philosophers and poets whose messages and passages conveniently fall in line with what he so passionately seeks to defend. It is not a cause of particular surprise, therefore, that, in the course of his exhaustive search for documentary support, even the Golden Rule is employed to play a part.  

The major part of the work deals with the rights of sovereignty, navigation and trade, each filling three to four chapters out of the thirteen. The above-mentioned initial statement in the book is followed by a fundamental premise that navigation is free to all by the law of nations (Chapter I). It can not be denied that there is seen here evident traces of the Roman law regarding the community of the sea. The validity of

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1. *Mare Liberum*, VII.
the Portuguese right of sovereignty over the disputed areas of the ocean is refuted in the next three chapters (II, III and IV) on the grounds of the three alleged titles being void, namely, the titles by discovery, by the Papal donations and by war. At this point, it is interesting to note that, unlike his two Spanish forerunners cited above who were — or rather had to be — silent on the authority or validity of the Papal Bulls in this regard, Grotius being a Protestant, enjoyed the advantage of freedom from that particular religious orthodoxy. Another three chapters (V, VI and VII) are devoted to denouncing the Portuguese rights of navigation in the same areas of the ocean, specifying the invalidity of the grounds of the alleged titles, by occupation, by the Papal donation and by prescription or custom. The denunciation is not confined to the rights of sovereignty and navigation, but is further stretched, more specifically, to the right of trade as well. The ultimate purpose of navigation at the time having been dominantly for trade, it appears that Grotius meant to defend the Dutch right of trade with more enthusiasm. In addition to the refutation on the three grounds of title alleged by Portugal, such as those for navigation, in Chapters IX, X and XI, there is given one more chapter (XII) in which the Portuguese attempt to prohibit trade is disputed as having no foundation even in equity. The work concludes with a chapter (XIII) the point of which is clearly indicated by the way in which its title is worded, namely, "The Dutch must maintain their right of trade with the East Indies by peace, by treaty, or by war." The impression which this title elicits certainly implies a measure of departure from the general context of the whole work as a legal treatise to the direction of a patriotic announcement.
3. Grotius on Fisheries

a. In *Mare Liberum*

Even though *Mare Liberum* was the first of the three works\(^1\) in which Grotius treated the question of the legal status of marine fisheries, the primary part of the argument here concerned itself with freedom of navigation, and the problems of fisheries were given only incidental mention mainly in Chapter V in the course of his refutation of the claims of Portugal. When he says that "the same principle which applies to navigation applies also to fisheries, namely, that it remains free and open to all",\(^2\) he appears to have placed marine fisheries and navigation on the same footing, as Fulton observes.\(^3\) In the nature of the general direction of his discussion in this work, however, it would be more appropriate to say that the mention of fishery was made in order to strengthen his line of argument in favour of the point on navigation. This can be seen further from the way in which the author refers to fisheries in connection with their exhaustibility or inexhaustibility. At one point, he says that "if it were possible to prohibit any of those things, say for example, fishing, for in a way it can be maintained that fish are exhaustible, still it would not be possible to prohibit navigation, for the sea is not exhausted by that use."\(^4\) At another point, however, this exhaustibility of fisheries assumes a different shade of meaning when he says that "everyone admits that if a great many persons hunt on the land or fish in a river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the

\(^1\) Riesenfeld, *op. cit.*, pp. 12 et seq.
\(^2\) *Mare Liberum*, V.
\(^3\) Fulton, *op. cit.*, p. 346.
\(^4\) *Mare Liberum*, V.
ease of the sea." These two points would appear directly to contradict each other, unless each were interpreted in the context of what is meant by the contrast in it. In the former, the exhaustibility of land or river resources is compared with that of the sea, thereby drawing a conclusion that "Therefore there is not equal reason on both sides". However, it would be reasonable to say at this point that at the time of this argument there could hardly have been a serious discussion - on regional, still less on global terms - about the possible exhaustion of marine resources due to excessive fishing. Nevertheless the possibility, not any immediate probability, of such a contingency could have well been regarded as conceivable and conveniently invoked for the sake of defence or refutation in legal arguments against foreign countries.

With further regard to fisheries, Grotius makes an awkward attempt to analyse the legal nature of taxation on fisheries. Relying on the authority of the regalia, according to which the sovereign is regarded as entitled to impose on his own subjects taxes for fisheries, he tries to establish that the tax is levied not for fishing itself, but on the person exercising the right of fishery. What matters here is then whether the sovereign can levy taxes on and exact them from foreign fishermen. Despite his efforts to dispute the point he had in mind, namely the refutation of the British attempt to tax or license foreign - Dutch - fishermen, the subtlety with which he so successfully contested other claims at issue appears to have left him at this point. Furthermore, the confusion that he raised but failed to clarify did not escape the attention of his opponents.

1. Mare Liberum, VII.
2. Mare Liberum, Ibid.
but was readily taken advantage of by them in their refutation of *Mare Liberum*. On the ground that rights of fishery were not directly relevant to the controversy at issue, Fulton even upbraids him for his thematic impertinence in this connection.

b. In *Defensio Capitis quinti Maria Liberii*

The second occasion on which Grotius treated the legal problems of marine fisheries was the preparation of his reply to William Welwood, the Scottish lawyer, under the title of the "Defence of Chapter V of the *Mare Liberum*". The motive which prompted this book is self-evident from its title.

The primary target which Grotius had in mind in refuting the notion of maritime dominion through his *Mare Liberum* was apparently Portugal, the fatal opponent to the Dutch trade and navigation to the East Indies. In reality, however, the attack was directed not only against the immediate antagonists of the Dutch, but also against all advocates of *mare clausum*. This was the time in Britain when the Stuarts resumed the traditional policy of *mare clausum* which had been temporarily reversed under the Tudors. Moreover, the publication of *Mare Liberum* coincided with the 1609 Proclamation of James I prohibiting unlicensed fishing by foreign fishermen off the British coast. This shift of policy by Britain is attributed to

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2. The English text translated by R. F. Wright is in vol. 7, Bibliotheca Vissariana, 1928, its full title in English being: The Defence of Chapter V of the *Mare Liberum* which had been attacked by William Welwood, Professor of Civil Law, in Chapter XXVII of that book written in English to which he gave the title "An Abridgement of all Sea Laws". This work is also said to have been discovered in 1864 together with other manuscripts. The reason why it was not published in Grotius's time is given, but not very convincingly, by R. Fruin in vol. 5, Bibliotheca Vissariana, 1925.
two major reasons, among others, one internal and the other external. One
is that the idea of restricting foreign fishermen in the British coastal
areas by means of licence is said to have been brought down to England by
King James from Scotland - he himself being a Scot - where the
traditional practice regarding marine fisheries had always been conservative
and opposed to opening her seas to foreign fishermen, her own fishermen
paying tribute to the crown in the form of assize-herring. The other is
that the Dutch had by this time presented themselves as the most formidable
rival in marine fisheries and maritime commerce. By foreign fishermen,
therefore, were meant no other people than the Dutch.

Under these circumstances, it was quite natural that few other
people were so seriously aroused by the appearance of *Mare Liberum* as the
British, who rightly took it as a direct and imminent challenge to their own
policy and interests. As a consequence, the strongest - as well as the
first - opposition to *Mare Liberum* arose not in Portugal but in Britain.
The silence of the Continental states is attributable, according to Fenn,
to the following three reasons, namely, the suppression of Grotius's book in
Portugal and Spain, the almost coincidental settlement of the Treaty of
Antwerp and the Continental dislike of the Portuguese-Spanish claims over

1. Fulton, op. cit., p. 124
2. Fenn, op. cit., pp. 165-166.
3. Opinions about the influence of *Mare Liberum* on the settlement of this treaty
vary, because of the short period of time between the publication of the book
in March and the signing of the treaty in April 1609. Fulton (op. cit.,
p. 350) says: "The immediate object for which *Mare Liberum* was published -
the recognition of the right of the Dutch to sail to the East Indies and to
trade there - was achieved by the Treaty of Antwerp in the month following
its appearance, and no reply from the Portuguese or the Spaniards to the
argument of Grotius was published till sixteen years later." Frans De
Pauw's view is different, as expressed at p. 21, *Grotius and the Law of the
Sea*, Brussels, 1965 (English version): "Nevertheless, it is hardly likely
It was William Welwood (1578-1622) of Scotland who, as an individual, raised the first controversy against Mare Liberum in 1613 through his book, An Abridgement of all Sea-Lawes. In his determined effort to defend the vital interests of his country, as well as those of England, whose fishing industries had long since begun to be seriously threatened by the Dutch fishermen constantly encroaching on the waters off the British coasts, he produced a strong protest against Grotius, drawing heavily in the fashion of his time on a variety of Graeco-Roman literature and even on the Laws of Oleron, and also relying on the authority of the Bible. It is, however, Chapter 27 of his book that is important in any discussion in this connection, its title being "Of the Community and Property of the Seas". It began as follows: "Having of late seene and that the publication affected the negotiations. In spite of Grotius's insistence on rapid printing, it is most probable that it appeared too late; his letters inform us that the book was still not printed on 7 March 1609. Consequently there is little probability that the book had any effect on the negotiations, which were concluded on 9 April. In fact we know that Jeannin, the French delegate, reported to the States General on 18 March on the current position, from which it appears that the difference concerning trade with the Indies during the Truce had already been settled." 2. The full title of this book is "An Abridgement of all Sea-Lawes, Gathered forth of all Writings and Monuments, which are to be found among any people or Nation, upon the coasts of the great Oceans and Mediterranean Sea, and specially ordered and disposed for the use and benefit of all benevolent Sea-farers, within his Majesties Dominions of Great Britain, Ireland, and the adjacent Isles thereof", London, 1613. This book is a new and enlarged version of his "The Sea Law of Scotland, Shortly gathered and plainly dressit for the reddy use of all Sea-fairingmen", Edinburgh, 1590, which was written in Scottish and, according to Fulton (op. cit., p. 352), is believed to be the earliest regular work on maritime jurisprudence printed in Britain. An English-Scottish bi-lingual text is in the 3rd Series, Vol. 4, Miscellany Volume, The Scottish Text Society, 1932, printed in 1933 with an Introduction by T. C. Wade.
perused a very learned, but a subtle treatise (incerto authore) intituled Mare Liberum, containing in effect a plaine proclamation of a liberty common for all of all Nations, to fish indifferently on all kinds of Seas...." Thus began the tirade of charges and counter-charges between the upholders of mare liberum and mare clausum, an academic exchange that was later called "Une Bataille de Livres" by Nys.  

As it was in Chapter V of his Mare Liberum that Grotius dealt with the freedom of fisheries in the sea, it was at the demolition of this very chapter that Welwood's axe was aimed. In the light of the circumstances in and the purpose for which it was written, therefore, it is understandable that his refutation was a manifestation of his patriotic efforts, as was Grotius's, to defend the vital interests of his country. The tone of language he adopted at some points implied his readiness to reduce Mare Liberum down to the level of sheer nonsense, as may be seen from his outright challenge at one point, for example, "I cannot passe the Author his ridiculous pretence..." Under these circumstances, Grotius found himself in a position where his silence at the appearance of Welwood's challenge would have seemed to him a gross disservice to the cause of mare liberum which he had been so resolutely determined to defend. It was at that stage that he wrote his Defence of Chapter V of the Mare Liberum, the first and only reply to the various refutations of his Mare Liberum written by numerous jurists.

In this treatise, the argument was naturally focussed mainly on the

1. Ernest Nys, *Etudes de Droit et de Droit Politique* (2e serie, Bruxelles, 1901). In fact this is the title of a chapter in the work, in which a subtle criticism of the battle of books is given (pp. 260-272).
freedom of fisheries. Every point raised by Welwood in the way of refuting Mare Liberum was disputed systematically and at considerable length. The tone of language in this counter-charge by Grotius matched that of the charge by Welwood, when the former related, "... I do not see how I could more appropriately term than by the use of his word, ridiculous." As he was defending the points that had been raised and refuted by Welwood with regard to fisheries, Grotius had here the advantage of being able to be more specific on the subject than in his Mare Liberum in which, "to clinch the argument", he "cited authorities who asserted that not even fishing on the sea could be prohibited by anyone".  

Aside from being an amplified defence of the points dealt with in Mare Liberum, the Defence was also a pointed counter-charge against Welwood's views, and so there can not be seen in the latter such marginal flexibility of argument as can be gleaned from the former. For example, the existence of maritime sovereignty in some part of the sea as implied by the distinction between the inner sea and the outer sea is not to be seen here.  

c. In De Jure Belli ac Pacis  

The third occasion on which Grotius treated the problems of marine fisheries can be seen in his De Jure Belli ac Pacis. Even though his Mare Liberum of 1609 was also such a great work of scholarship that in the opinion of some jurists it alone would have won him lasting fame in the history of international law, it is nevertheless the work of 1625 from which, despite

2. Mare Liberum, V.  
the limitations that have been indicated by subsequent jurists, has been
derived the origin of international law in its modern sense as well as the
reference to him as the "father" or "founder" of this branch of law.

Unlike his other works cited above, namely, *Mare Liberum* and *De Jure Praedae*
and *Defensio*, which were solely on the law of the sea and fisheries, this
treatise was a general work on the law of nations written in the fashion of
his time and circumstances, as may be seen from its title. In this work,
too, he drew heavily on the earlier classical authors in various fields of
learning. The problems pertinent to the sovereignty of the sea and
fisheries were therefore given a rather brief treatment in the work that
was so great in its size and scholarship. So far as the law of the sea
and fisheries is concerned, therefore, the value of this monumental treatise
is not to be judged in terms of the space devoted to this subject, but
rather by reference to the conciseness and maturity with which his doctrine
of *mare liberum* as professed in his earlier works was systematised into what
Riessenfeld called "a refinement rather than a change of position".¹

In this work, too, as in his two earlier works discussed above,
the fundamental principle of his doctrine remained unchanged; that is, the
sea is not subject to private ownership. This principle was defended on
the basis of moral grounds and natural reasons, his own reasoning being as
follows:

*Moral grounds:*

Having laid down these fundamental principles, we say that the sea,
viewed either as a whole or in its principal divisions, can not
become subject to private ownership. Since, however, such
ownership is conceded by some in the case of individuals but not in

¹ Riessenfeld, *op cit*, p. 18.
the ease of nations, we bring forward proof, first on moral grounds.

The cause which led to the abandonment of common ownership here ceases to be operative. The extent of the ocean is in fact so great that it suffices for any possible use on the part of all peoples, for drawing water, for fishing, for sailing. The same thing would need to be said, too, about the air, if it were capable of any use for which the use of the land also is not required, as it is for the catching of birds. Fowling, therefore, and similar pursuits, are subject to the law laid down by him who has control over the land.

Natural reasons:

There is furthermore, a natural reason which forbids that the sea, considered from the point of view mentioned, should become a private possession. The reason is that occupation takes place only in the case of a thing which had definite limits. .... Liquids, on the contrary, have no limits in themselves. .... Liquids therefore cannot be taken possession of unless they are contained in something else; as being thus contained, lakes and ponds have been taken possession of, and likewise rivers, because they are restrained by banks. But the sea is not contained by the land, since it is equal to the land, or larger;...

Those things, therefore, which were common to all men, and were not divided in the first division, no longer pass into private ownership through division, but through occupation. And they are not divided until after they have become subject to private ownership.

Much effort was made, at numerous points throughout Chapters II and III of Book II, to define the legal status of the sea and fisheries, the freedom of navigation and trade, and the nature and origin of the rights of possession of things. It is of interest to note the definition of the two possible types of possession, sovereignty and ownership, each being considered distinct from the other. Fish were classified, together with places hitherto uncultivated, islands in the sea, wild animals and birds, as things

1. De Jure Belli ac Pacis, II-II-III-I.
2. II-II-III-2, 3.
3. II-III-IV.
which could be made subject to private ownership but which had not yet become private property.\(^1\) The legal status of fish being so, they were said to have become the private property of whoever caught them, so long as the municipal law did not intervene.\(^2\) The condition under which certain parts of the sea could be acquired was given on the basis of an analogy with rivers being capable of acquisition by occupation. This can be said to have been the beginning of Grotius's definitive distinction between the free part of the sea and the coastal waters, the latter being regarded as capable of occupation. An example of his rather cautious statements, preceded by one on the conditions for the acquisition of rivers, was given as follows:

In the light of the example just given, it would appear that the sea also can be acquired by him who holds the lands on both sides, even though it may extend above as a bay, or above and below as a strait, provided that the part of the sea in question is not so large that, where compared with the lands on both sides, it does not seem a part of them.\(^3\)

With regard to the extent of the adjacent sea whose definition was attempted as above, Grotius bequeathed an important proposition which was to be developed by subsequent jurists into a universally recognised theory of territorial waters. Even though he did not specify except by implication the means by which this idea could be carried into practice, what he actually meant by the following two passages should be said to be self-evident:

It has, however, been a fairly easy matter to extend sovereignty only over a part of the sea without involving the right of ownership; and I do not think that any hindrance is put in the way of this by the universal customary law of which I have spoken.

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1. II-II-IV.
2. II-II-V.
3. II-III-VIII et seq.
It seems clear, moreover, that sovereignty over a part of the sea is acquired in the same way as sovereignty elsewhere, that is, as we have said above, through the instrumentality of persons and of territory. It is gained through the instrumentality of persons if, for example, a fleet which is an army afloat, is stationed at some point of the sea; by means of 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.\(^1\)

It was not until the beginning of the next century, however, that there was eventually given by Bynkershoek a relatively precise and acceptable definition of this doctrine on the extent of sovereignty which a coastal state was thought to be entitled to exercise over its adjacent seas without meeting protests from other states.\(^2\) The significance of the above passages should therefore be appraised in the light of the fact that it was voiced by a source no less unlikely than the author of *Mare Liberum*.

d. Grotius's Modification of Doctrine

With regard to the consistency or inconsistency of Grotius's doctrines on the legal status of the sea and fisheries as well as on the rights of navigation and trade, as professed throughout the above three works, there can be seen widely varying opinions among legal writers. His inconsistency has been strongly insisted upon by those who undertook an item-by-item analysis and comparison down to the minute details of the corresponding individual statements in each treatise. In contrast to these are the points of view of those who placed emphasis, in their appraisal of his doctrines, on the general virtue of his epoch-making principles of *mare liberum* developed on a broad basis with subsequent

1. II-III-XIII.
2. Cf. infra, pp. 117-120.
modification on some points. The need for him to qualify some points can be ascribed to the apparent influence, on his doctrines, of the impassioned motives by which he was called upon to write the patriotic treatises.

The major part of the controversy in this connection is focussed on the nature and extent of the adjacent sea. In Grotius's work, the whole argument is initiated, with a cautious approach, by the introduction of an analogy on the legal status of rivers, and is gradually developed to the stage of dealing with the marginal areas of the high seas referred to as mare proximum. The whole process, therefore, starts at Mare Liberum and ends at least formally with De Jure Belli ac Pacis. In other words, the argument begins with whether or not there can be assigned to certain areas of the high seas adjacent to the coasts a legal character distinct from that given to the rest of the high seas, and ends with how far its extent then may be allowed to reach from the shore. In the course of this extension in space, there takes place a doctrinal evolution, which aroused the attention of subsequent jurists. Many of them adopted a stronger tone of language with which to define such evolution as anything from inconsistency to volte-face, while others called it, in a milder tone, simply a refinement or modification.  

Whichever may have been the case, an appraisal in any degree of fairness of these three works of Grotius would have to be preceded by an

1. Riesenfeld, op. cit., p. 18: "...he built up a great, well considered and detailed system of the rights pertaining to sovereigns in regard to the sea. And it will appear that the above mentioned writers who blamed Grotius for inconsistency or opportunistic change of position have misconstrued his doctrine;" and "...he added certain refinements to his exposition but always adhered basically to the same theories." One of the latest treatises that analyses these points in detail from an opposite point of view may be De Pauw's (op. cit.).
analysis of the purpose for which, and the circumstances under which, each of them was written. With regard to the purpose, as has been mentioned earlier, the first two were aimed at their definite targets respectively, each having been written in the form of defending one side of the argument, whereas the third was in the form of a general discourse. If the former represented a closed and impassioned controversy not without the consequent weaknesses inherent in such writings, the latter was an open and unimpassioned account, less influenced by patriotism. As for the circumstances, from the life of Grotius it can be seen that there elapsed a span of two decades from the time he began to write *Mare Liberum* to the time his *De Jure Bello ac Pacis* was published. It is, however, not the length or shortness of time but the vicissitudes of his fate that should be taken into particular consideration in this respect. His glory was lined with misery. His *Mare Liberum* and *Defensio* were written before the swing of his fortune to the other extremity. He is said to have remarked himself about these earlier works of his as "childish", being written when young. 1

Regarding the circumstances under which *Mare Liberum* was written, Fulton remarks as follows:

It may be noted that those who took part in it on one side or the other, including some of the most learned men of their age, were in large measure inspired by patriotic motives. National interests as much as lofty ethics or legal principles were at its root. Even Grotius, notwithstanding his impassioned appeal to the conscience of the world for the liberty of the sea and the freedom of commerce, was not exempt from this weakness. It was his happy fortune that the cause he publicly advocated was equally in conformity with the growing spirit of liberty and the immediate interests of the United Provinces. 2

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The circumstances under which his *De Jure Belli ac Pacis* was written were certainly different from those under which the other two were written, not only in that he was in exile from his own country whose cause of *mare liberum* he had so passionately defended, but also in that he had by this time reached an advanced stage of maturity in scholarship and in experience as well. With these factors properly taken into consideration, it is quite understandable that the doctrine which he had championed and defended in the form of a legal theory had to undergo in the course of its consolidation a certain degree of marginal adaptation under the inevitable influence of the public function he was called upon to fulfil and of the drastic change of circumstances in which he found himself. The irony surrounding his doctrine and his personal career is that the author of *Mare Liberum* had to engage himself in the highly unbecoming task of arguing against the very doctrine of *mare liberum*, when the Anglo-Dutch competition for commercial monopoly in the East Indies gave rise to disputes over the freedom of trade and navigation only four years after the publication of his book.  

This quite rightly leads to the impression that his theory regarding the legal status of the sea was of a dual and even utilitarian character to some extent. On one side, he defended the doctrine of *mare liberum* with such subtlety that it defied any equal. On the other, he defended with equal versatility what he was earlier so firmly determined to demolish - *mare clausum* - thereby demonstrating a most unlikely departure from one extremity towards the direction of the other. In this regard, however, it should be made clear that the former standpoint was

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predominantly theoretical and the latter as much political and that this
doctrinal oscillation did not, therefore, substantially affect his unique
fame as a great advocate of the doctrine with which he has been so
immortally identified.

4. The Forerunners of Selden

Although it was John Selden, the author of the famous work
\textit{Mare Clausum}, who presented himself in the course of the battle of books as
a counterpart comparable - if not superior in a certain sense - to
Grotius in fame and scholarship, there were forerunners of Selden, as in the
case of Grotius, who endeavoured to expound the doctrine of \textit{mare clausum}
prior to the appearance of the masterpiece. Their major effort was to
develop legal or theoretical grounds for the traditional claims of Britain
to the parts of the sea adjacent to her. Their means of approach to this
common and patriotic end may be roughly summarized as below.

Thomas Digges (?-1595) is said to have been the first to attempt
to set up the concept of a \textit{prima facie} theory on the status of the adjacent
sea. As he was not a jurist by profession, but versatile in astronomy,
engineering, mathematics and land surveying, his treatise on this subject,
written during the early part of Queen Elizabeth's reign under the title of
"Proofs of the Queen's Interest in Lands left by the Sea and the Salt Shores
thereof",\footnote{Details of Digges's argument and his text are found at pp. 180-211 of
S. A. Moore's \textit{A History of the Foreshore} (London, 1888); and a concise
summary by Penn, \textit{loc. cit.}, pp. 170-172.} maintains a practical approach to the defence of the proprietary
status of the foreshore areas rather than an abstract legal discussion on
the problems of the adjacent sea as a whole. His argument is based on the
crude assumption that the prince retains by the common law the royal prerogative over the land as well as on the foreshore areas and that as a consequence the ownership of such areas by his subjects is possible only by a royal consent in the form of grant. This can be seen from the initiating title and a subsequent passage from his work:

Arguments proving the Queenes Maties propertye in the Sea Landes, and salt shore thereof, and that no subject can lawfully hould any parte thereof but by the Kings especiall graunte.

Hereby yt plainly appeareth that no borderer or lord of the soyle adicyninge, may claim any interest in the salt shore, as they may in the fressh, consyderinge that although in the use they are publyck and therein agree, yet as towching the propertye they are repugnant, And therefore maye necessarily bee inferred that the Prince only hath propriety in them. For yt is a sure Maxime in the Common Lawes that whatsoever lande there is within the kings dominion whereunto no man can justly make propertye yt is the kings by his prerogative. But the same may thus bee manifestly approoued.

Apart from his resort to the common law, Digges does not give an explanation for the basis of the royal prerogative. Only its authority is further specified by the denial of title by prescription as a means by which royal subjects might obtain ownership over some parts of the foreshore areas:

......, but whosoever hould yt otherwyse then by the princes graunte, they intrude, and in this case ......, no contynuance of time or prescription can serue their toorne, ......

Digges’s argument on the rights of marine fisheries can be seen from the following:

Nay it further appeareth that although the Kings of England have beeene content to suffer fishermen Jure gentium to enjoy to their owne use such fishe as by their charges travill and adventure they can in the Englishe Seas take, Yet haue the Kings

of England for remembrance of this theire favoure that the
memorie of theire propertie in the Seas shoulde not be
extinguished, alwaies reserved to them selves the chief fishe as
Sturgeon Whale, etc.¹

These points are concisely summarised by Moore, that the prima
facie theory was based on the general ownership of the King over the land
of the whole kingdom and that "from its inception until today the claim of
the prima facie title rests upon one basis - viz., that it is parcel of
the waste of the Kingdom and has never been de facto granted out, and that
evidence of user and longa possessio avails not to give a title to it
unless the grant be shewn."² According to Moore, Digges's theory seems to
have understandably caused serious and long controversies between the crown
and the subjects where claims to property were involved.

Digges's argument was an assumption under which a bold attempt
was made to concern itself with such a serious matter as the rights of
property over the areas of the land and the sea which were already in, or
capable of coming into, possession of individual subjects. Little trace
can be seen of his attempt to establish a sufficient ground of legal theory
to support his own assertion, though it would have been a matter of
extraordinary difficulty because of the nature of property rights. Two
points of his theory should be noted with interest, however, that the
foreshore derives its character from that of the land, not from that of the
sea, and that the foreshore areas are capable of possession by the coastal
state.

Another author who advocated the doctrine of dominium maris was

¹ Moore, op cit., p. 203.
² Moore, op cit., p. 182.
Thomas Craig of Scotland (1538-1608). His doctrine is represented by *Jus Feudale* (1603) which, according to available references, does not appear to have been so controversial as to attract much in the way of scholarly attention from subsequent jurists. It is said that he presented no objection against the community of the sea for navigation, his major argument having been on the property and jurisdiction of the adjacent sea. Without giving any definite limit to its extent, except in the case of an island arising in the sea in which case Bartolus's 100 mile limit was supported, he insisted on the pertinence of the coastal state's claims over the areas of the sea adjacent to it.

There are two points in Craig's doctrine which should not be overlooked in discussing the early development of the doctrine of *dominium maris*. Firstly, in defending the legal status of the adjacent sea, he resorts to the theory of prescription, citing the example of Venice that claimed the whole areas of the Adriatic. In the sense that Venice owned only a minor portion of the Adriatic coast, however, this example does not fit exactly into the argument over the rights of property and jurisdiction of the coastal states over the adjacent sea; her claims to the waters adjacent to the coasts other than her own could not have been based on the pretext of adjacency. Secondly, with regard to coastal fisheries, he simply defined them as belonging to the sovereign of the coastal state. This should be said to be only a natural conclusion from his resort to the theory of prescription, aside from any preconception relating to the traditional practice of Scotland.

Fenn considers Craig to be "the first British lawyer to make a general statement that a sovereign is the proprietor of the fisheries found
in his waters", whereas Fulton asserts that Welwood "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 coasta..." This disagreement here which does not bear much significance, appears to have less to do with the chronology than with the difference in the viewpoint with which the corresponding assertions on fisheries by Craig and Welwood were appraised by Fenn and Fulton.

Bold and crude as their assertions and assumptions were, it can not be denied that both Digges and Craig made remarkable contributions each in his own right, towards enunciating the British doctrine of dominium maris. However, it was not until the time of Welwood that the real controversy between mare liberum and mare clausum took place. This renders important the position of Welwood as one of the forerunners of Selden. As a brief mention has had to be made above (3. b) of Welwood and two of his books because of the direct interrelation between his Abridgement and Grotius's Defensor, it is deemed sufficient to deal at this point with what has not been discussed earlier.

It should be noted that Welwood did not object so much to the freedom of navigation as to the community of fisheries in coastal waters. From the general direction of his argument as well as from the tone of his language, however, his attitude towards the freedom of navigation - which was in any event not within the direct range of his refutation - does not appear to imply so positive an assertion as interpreted by some writers, 3

1. Fenn, op. cit., p. 173.
3. Fenn, op. cit., p. 176; Fulton, op. cit., p. 353.
but rather gives the impression of indifference. He regards the "liberty
only to saile on Seas" as "a thing farre off from all controversie, at
least upon the Ocean..."; and expresses his lack of concern over the far-
off areas of the sea by saying:

And therefore I would meet him with his deserved courtesie; even
to proclame Mare liberum also: I meanes that part of the maine
Sea or great Ocean, which is farre removed from the just and due
bounds above mentioned, properly pertaining to the neerest Lands
of every Nations.2

It was Welwood's primary concern to provide theoretical grounds
under which the claims of Scotland to the exclusive rights of fisheries in
her coastal areas might be legally justified. In his determined effort to
this end, he presents some practical reasons:

If the use of the Seas may bee in any respect forbidden and
stayed, it should be chiefly for the fishing, as by which the
fishes may bee said to bee exhausted and wasted; which, daily
experience these twenty yeares past and more, hath declared to
be over true; for whereas aforesime the white fishes daily
abounded even into all the shores on the Eastern coast of
Scotland; now forsooth by the neere and daily approaching of
the busse Fishers the sholes of fishes are broken, and so farre
scattered away from, our shores and coasts, that no fish now
can be found worthy of any paines and travels; to the
impoverishing of all the fort of our home fishers, and to the
great damage of all the Nations.3

His assertions on the legal nature of fisheries in the adjacent
sea, which are reminiscent of what Craig had earlier mentioned, can be seen
in Chapter XXVII of the Abridgement entitled "Of Fishers, fishing and
traffiques therewith":

Yea, now a-dales, in rivers, and in parts of the Seas nearest to
the possessions of men having grant and infeftment from the King,
may fishing be forbidden, but no private man, without the grant
of the Prince, upon any pretence, or allegation of long

2. Welwood, op. cit., p. 236.
consuetude and prescription, may acquire the propriety of any such part of the sea, as to prohibit others to fish there also; for such prescriptions onely pertain to Princes.¹

These endeavours having probably failed to satisfy him in his legal and theoretical defence of the interests of his country regarding coastal fisheries, Welwood demonstrated his culminating effort by returning to the same subject two years later, namely, in 1615, when he amplified his chapter into a separate publication.² This work is said to be "much superior and more logically arranged", and enjoyed such a recognition on the Continent that it was re-published at The Hague in 1653.³ All the classical authors on whose authority Grotius relied are simply branded by Welwood as 'ignorant of the true law of nature' and accused of having 'inflicted the minds of later generations with a preposterous notion concerning some universal community of thing'.⁴ At this point, all legal doctrines which happen to lie opposite his are collectively dealt an abrupt blow. Then he expresses the necessity of jurisdiction over the adjacent sea and goes on to say that the exercise of it should be done by the state that has jurisdiction over the neighbouring land. In contrast to the community of the waters outside mare proximum, he defines two fundamental rights of the coastal state over the adjacent sea, namely, the right of navigation and that of fishing including possible taxation of it. Here the reasoning is quite logical. In his exhaustive search for grounds of justification, however, his enthusiasm undergoes, at one point at least, a deviation not altogether becoming in a legal discussion, when he resorts to

¹. Welwood, op. cit., pp. 188-189.
⁴. Cf. Fulton, ibid. et seq.
mythology by saying that:

God had appointed the fishes (herrings) to swarm along the coasts of Britain and the surrounding isles at seasons and places which He had pre-arranged, and for the benefit of the inhabitants: why, then, should the people be hindered from possessing as their own this benefit which God had granted them?

It can be seen from various references that, besides these three forerunners of Selden, there were several other writers in Britain - not all of them jurists - who, prior to the publication of *Mare Clausum* in 1635, endeavoured to establish legal or theoretical justifications for the traditional British stand regarding claims over the adjacent sea. This relative proliferation of post-Grotian literature with varying influence and importance can be, to a large extent, ascribed to the need to defend what had been challenged by Grotius. The following four authors, among others, may be cited here, namely, Serjeant Callis, Lord Coke, Gerard Malynes and John Boroughs, each of them enunciating his ideas based on different grounds and assumptions. Callis and Coke resorted to the common law and the authority of the sovereign power, as did Digges; Malynes to maritime law, as did Welwood; and Boroughs to historical facts. None of them appears to have presented any serious objection to the community of the ocean, their major arguments having focused on the legal status of the adjacent sea; nor does any of them seem to have seriously attempted to mark its clear-cut extent except by quoting, where appropriate, Bartolus's 100 mile principle. Furthermore, resort to the common law and the sovereign power in the case of Digges, Callis and Coke should be regarded as an oversimplified assumption.

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which should have been preceded by the justification of the authority of this law beyond the municipal domain.

Among the writings of these authors, Boroughs is said to have been the first to give a successful recording of the historical facts regarding the claims of Britain over the adjacent sea. The author's official position as the Keeper of the Records in London Tower was undoubtedly a great advantage to him in writing the treatise (which was not very voluminous)\(^1\) in order to meet the desire of King Charles to reconfirm the British rights of maritime dominion on the strength of historical practice. In the sense that Selden's *Mare Clausum* had been completed in 1619, Boroughs whose book appeared in 1633 can hardly be said to have been Selden's forerunner. Selden himself, however, admits the thorough revision and amplification of his book before its publication 16 years later;\(^2\) it is said that in doing so he relied heavily on the historical facts collected by Boroughs.\(^3\)

Because of the documentary nature of his treatise which places dominant emphasis on historical aspects, Borough's book appears to have

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1. Borough's book opens with "To the Readers" in which he gives some explanation of the small size of his book: "Be not startled to see so great a subject handled in so small a Volume. When you have read but a little of this little you'll think the Author was tender of your trouble but not of his own. For (how cheap soever you come by this Book) it cost the Author the perusal and search of the best and most Records of our Nations. And yet hee was one that knew well enough how to value his time; for none made better use of it; and (in these kinds of Scrutinies) you may believe he went the best way, because hee knew them all, and trod them every day; it being his Office not to be ignorant of any Records that concern'd the Honour or Antiquity of his Island." (p. 41).

2. *Mare Clausum*, p. 3, (Epistle Dedicatories by Nedham): "It was a work begun (it seem's) in the Reign of King James, and then laid aside again for over sixteen years; but afterwards revised, alter'd and enlarged by the Learned Author (as hee saith in his Epistle) at the command of the late Tyrant".

disregarded the inevitable weakness that, valuable as it may be as a source of the history of British practice, it does not give sufficient reasoning and profundity with which to justify the legal stand of Britain in connection with maritime dominion. He asserts rather than reasons that the sovereignty of the sea and the rights of fisheries rest with no other authority than with the king; his own statement is so definitive as to leave little room for argument:

That Princes may have an exclusive property in the Sovereignty of the several parts of the Sea, and in the passage fishing and shores thereof, is so evidently true by way of fact, as no man that is not desperately impudent can deny it.¹

His argument on fisheries is given at a relatively greater length, taking into consideration various factors by which the fishing off the British coasts was affected and quoting the regulations of coastal fisheries of other countries such as Russia, Denmark, Spain, Italy and Holland, among others. His conclusion is as declarative as his opening:

For conclusion seeing by that which hath formerly bin declared it evidently appeareth that the Kings of England, by immemorable prescription, continuall usage and possession, the acknowledgement of all our neighbour States, and the municipall lawes of the Kingdome, have ever held the Sovereigne Lordship of the Seas of England, and that unto his Majestie, by reason of his Sovereignty, the supreme command and Jurisdiction over the passage and fishing in the same rightfully appertaineth.²

It is deemed appropriate to add some brief observations on Gentilis at this point, even though, as far as maritime law is concerned, his position would have to be considered in a context somewhat different from that of the others cited above. Firstly, he is rightly regarded as one of the forerunners of Grotius, not in connection with the forming of maritime law,

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1. Boroughs, op. cit., p. 43.
2. Ibid., p. 114.
but with that of international law as a whole. Secondly, his opinions on maritime law as given in his *Hispaniae Advocationis* (1613), especially in respect to the adjacent sea and the limits of neutral waters, can not be said to have been altogether consistent, having been based substantially on the differing practices of different countries. This second point can be, not unjustly, attributed to the course of his life which was fairly migratory, as in the case of Grotius, as well as to the public position which he was consequently called upon to hold. Otherwise, it would have not been conceivable for subsequent jurists to regard him, on the basis of his inconsistent expositions, as a forerunner of two jurists who were so squarely opposed to each other as Grotius and Selden, insignificant as his influence may have been as a forerunner on one or the other.

Gentilis also supported the doctrine of the community of the sea. What was considered controversial, however, was his ambiguous distinction between the dominion and the jurisdiction over the sea. By dominion he meant the exclusive claims of the coastal state over its adjacent sea to the extent of 100 miles, a limit that dates back to Bartolus; and by jurisdiction he meant so vague an extension of claims far beyond the reach of dominion that the joint jurisdiction of Britain and Spain could be stretched so far as to America under his implication. In consequence, therefore, his view was believed to have identified itself more with the interests of Britain.

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5. Mare Clausum

The publication in 1635 of Selden's *Mare Clausum* had thus been preceded by the exhaustion of scholarship and practical arguments of various individual writers in the field of theory and practice. As has been mentioned, some of them resorted to the common law, others to the maritime law, and still others to the history of British maritime practice. However, none of them appears to have been reasonably successful in defending the British side of the battle of books as well as in satisfying the growing ambition of King Charles I to secure the maritime sovereignty of Britain by means of the pen and the sword.

Under these circumstances, it was Selden, a versatile scholar of law and history, who acted as champion in order to meet the need that had been so sorely felt by his country, the need to justify the cause of *mare clausum* and thereby to silence the growing opposition to it. All the voices of his forerunners were elaborately gathered and integrated into his masterly exposition of the British cause. As far as the materials and grounds of argument were concerned, therefore, he was undoubtedly very fortunate to have at his disposal all that had been said and argued by the protagonists and antagonists of the doctrine he was to seek to defend. After all, it was his great advantage to defend what had earlier been attacked by Grotius. Apart from his ingenuity as a legal scholar, his determination to defend the doctrine of *mare clausum* should be said to have been greatly enhanced by this advantage.

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1. From historical evidence, it appears that the King's effort to establish legal grounds for the British stand was made only in support of what was later to be achieved by means of power.
There were two major propositions which he sought to prove by focussing his arguments throughout the work, namely, the denial of the community of the sea and the ownership by Britain of its adjacent sea:

As to what concern's the aforesaid circumstances of Sea Dominion, whereas there are two propositions here (so far as the term may be born in things of a civil nature) made evident; the one, that the Sea, by the Law of Nature or Nations, is not common to all men, but capable of private Dominion or proprieties as well as the Land; The other, that the King of Great Britain is Lord of the Sea flowing about, as an inseparable and perpetual Appendant of the British Empire; ... ¹

Each of the two books of his work, having 26 and 32 chapters respectively, begins with an introductory chapter in which is given the general method of dealing with the subject in its subsequent chapters.

From his own statement, it can be seen that, in his endeavour to prove the above propositions, he meant to maintain a thematic division of his work into matters of law in the first book and matters of fact in the second. In point of fact as well as in the nature of the matter, however, it appears to have been difficult or even meaningless to draw a distinction between the themes throughout the work, many elements in each being closely interrelated with those in the other. That he was sufficiently conscious of this point can be seen from his own remark that "as the point of Law hath many things mingled with it, which manifestly arise from matter of Fact; so this of Fact comprehend's not as a few which relate unto that of Law." ³ Broadly speaking, therefore, the actual distinction between them is only the difference of emphasis placed on each, the first book dealing mostly with the historical aspect of the claims and practice of earlier

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1. *Mare Clausum*, The Author's Preface.
2. *Mare Clausum*, I-1.
states and the second with those of Britain. For the purposes of the present paper, the discussion of the contents of the work is confined to giving a summary of his major propositions.

a. The First Book

In the first book, it can be readily seen how systematically and cautiously he approaches the subject in disapproving the community of the sea; in fact this can be gathered from a simple view of the arrangement and the titles of the chapters. The major part of his argument is preceded by his brief definition of some basic terms such as 'sea', 'law' and 'dominion' and further by his scrupulous attempt to classify law into the obligatory law and the permissive law.¹ His objections to the community of the sea were focussed on the three points at which the dominion of the sea was opposed by his opponents, that is, the freedom of commerce and navigation, the physical nature of the sea, and the opinions of jurists supporting the doctrine of mare liberum.²

The community of the sea is refuted on the grounds that so many states exercised maritime dominion at one time or another since the ancient times to which historical records may be traced. As a likely instance, he also resorts to the verses of the Book of Genesis, as did Welwood.³ As has been discussed earlier, time is divided into two different ages, the fabulous and the historical, and an attempt is made to defend the virtue of a fable in support of his argument. Singularly exhaustive is the unswerving effort with which the endless stock of examples were searched representing

¹. *Mare Clausum, I-1*
². *Mare Clausum, I-2*
³. *Genesis, I-28, 9-2*
⁴. *Supra, chap. 1, I*
maritime dominion over the span of time ranging from the fabulous age up to his own time. At this point, it should be noted with interest that he also disapproves the claims of Portugal and Spain over vast areas of the ocean, but on a ground different from Grotius's, his being based on the lack of legitimacy in the method of their alleged acquisition. In this connection, he refers to the disputes between Queen Elizabeth and King Sebastian of Portugal by saying:

But the question in that dispute was not, whether or no Sebastian could bee Lord of that Navigation or Sea, but whether hee had made any lawfull acquisition of such a Dominion. 2

Regarding the freedom of commerce and navigation, his discussion on what may be in modern terms called innocent passage on the sea is noteworthy because of its peculiarity, not of its virtue. By no means does he deny it, but insists that such recognition is not based on any legal right of the foreign users of the sea, but on the humanitarian discretion of the owner of the sea. He does not maintain any difference between inoffensive passage on land and that on sea. This identification should be regarded as crude and vulnerable to refutation. This inevitably led him to the conclusion that the granting of such freedom of passage does not in any way derogate from the right of dominion of the sea. Consequently, as may be seen from his own assertion, his argument in this respect had to rely on a principle of morality or equity, not on legality:

The Offices of humanitie require, that entertainment bee given to Strangers, and that inoffensive passage bee not denied them. 3

1. Mare Clausum, I-9 to 19.
2. Mare Clausum, I-17; (cf. Fulton, on cit., p. 371).
3. Mare Clausum, I-20.
Fishing is another point of interest in his argument relating to the use of the sea for commerce and navigation. His opposition to the freedom of fisheries is based on the resources of the sea being not inexhaustible:

But truly we often see, that the Sea it self, by reason of other men's Fishing, Navigation, and Commerce, become's the worse for him that own's it, and others that enjoieth it in his right; So that less profit ariseth, then might otherwise bee received thereby.¹

His persistence in maintaining his own line of argument on behalf of mare clausum can be seen from his somewhat elastic analogy, on this point again, under which the use of the sea for fisheries is assimilated to that of mining, quarrying and even gardening on land.² His point is further amplified by his mention of the gainfulness of fishing for pearls and corals, which he considers on the same footing as ordinary fishing, by saying that "there is truly the same reason also, touching every kinde of Fishing."³ Apart from the scope of pearl and coral collecting as a staple at his time, this point can be one of the numerous examples of his exhaustive effort and amplification in seeking to defend his cause.

His defence against the sea being common to all because of its physical nature cannot be so subtle as that against the inexhaustibility of the sea. By introducing the nature of rivers, he resorts to the same analogy as that applied above in his defence against free navigation and fishing. He overemphasises the nature of rivers by saying that they are in "perpetual flux", whereas the seas "stand immovable", that "the rivers themselves are onely lesser Seas", and that "the fluid nature of water

¹. *Mare Clausum*, I-22.
². *Mare Clausum*, ibid.
³. *Mare Clausum*, ibid.
(therefore) can no more hinder a Dominion in the one, than in the other. ¹

Thus, seas, rivers and other bodies of waters are to him the same in name and substance. This analogy is stretched further into the status of the air in the superjacent space of a house.

Regarding the defects of boundaries and limits in the sea, his defence is not much different from that given above. He argues about the definition of boundaries and limits by saying:

And why Shores should not bee called and reputed lawful Bounds, whereon to ground a distinction of Dominion in the Sea, as well as Ditches, Hedges, Meers, rows of Trees, Mounds, and other things used by Surveyors in the bounding of Lands, I cannot fully understand.²

It appears that here his analogy is stretched beyond reasonable limits, because in practice boundaries in the sea can not and should not be conceived in the same way as those solid land boundaries above. Furthermore, he relies on the examples of abstract and impractical boundaries by means of which the seas were marked, an outstanding example being the division of the oceans by Pope Alexander VI.

'The writings and testimonies of learned men' against the dominion of the sea are for obvious reasons the major target of refutation in Selden's first book. His determined effort to disapprove them can be seen from what is elaborately discussed in the last four chapters, which cover the writings of lawyers from ancient times up to his own day and even of ancient authors who were not lawyers. His argument naturally culminates in refuting the doctrines of Vasquez and Grotius. The opinions and authorities of all the earlier writers on which these two lawyers based their doctrines are

1. Mare Clausum, I-21.
2. Mare Clausum, I-22.
persistently disputed for the purposes of 'felling the tree by cutting the root'.

Vasquez's opinions supporting the community of the sea and casting prescription out of the law of nations are emphatically disapproved of as 'manifestly false and impertinent' on the ground that they are contrary to the laws and customs of ages and nations. His refutation is thus based on the historical practice of nations since ancient times:

Almost all the principal points of the Intervenient Law of Nations, being established by long consent of persons using them, do depend upon prescription or ancient Custom.

The first book closes with his refutation of a number of points, among others, the two works of Grotius, namely, Mare Liberum and De Jure Belli ac Pacis. It is interesting to note his remark on the numerous references and quotations which Grotius employed in his latter work, that "disputing for the Profits and Interests of his Country, he draws them into his own partie" and that "he hath so warily couched this subject with other things, that whether in this hee did hit or miss, the rest howsoever might serve to assert the point which hee was to handle."

Grotius's distinction between the inner sea and the outer sea as given in Mare Liberum is met with a rather mild but definite opposition to the effect that "the difference of a lesser and a greater part, cannot take place (I suppose) in the determining of private Dominion." Admitting the physical difficulty of owning the ocean, he says:

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1. Mare Clausum, I-26.
2. Mare Clausum, ibid.
3. Mare Clausum, ibid.
4. Mare Liberum, V.
There is no man but must conceive it a very difficult thing to possess the whole Ocean: Though if it could bee held by occupation, like a narrow Sea, or a Creek, or as the whole world was said to bee possessed at first by ancient Princes, it might even as well pass into Dominion or Ownership of him that should enter upon it by occupation.¹

Thus it can be seen that there was expended an enormous amount of scholarship in his determined effort to refute, on the ground of historical practice, the inadmissibility of the community of the sea. What he aimed at in his first book is summed up in his conclusion given at the end of it:

No man (I suppose) will question but that there remain's not either in the nature of the Sea itself or in the Law either Divine, Natural, or of Nations anything which may so oppose the private Dominion thereof, that it cannot be admitted by every kind of Law, even the most approved; and so that kind of Sea whatsoever may by any sort of Law whatsoever be capable of private Dominion; which was the thing I intended to prove.²

b. The Second Book

In the sense that it is the second book of *Mare Clausum* that constitutes the principal part of what Selden intended to prove by refuting the doctrine of *Mare Liberum*, the first part of the work can be said to be preparatory and complementary to the second in purpose and importance. As the latter deals solely with the historical aspect of the claims of Britain to the dominion of the sea, namely, the British Sea, the ultimate purpose on which the author concentrated such an extraordinary effort can be better seen in this larger half of the work. In the nature of its purpose, however, it can be said that as a legal theory its contents are mainly documentary in substance and therefore attract less interest than the first. Consequently

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2. *Mare Clausum*, Ibid.
it is not saturated with the usual display of theoretical complexities often characteristic of legal writings, the discussions tending to be declarative rather than argumentative throughout the book. In other words, the effort to protect the national interests and claims to the vested rights of Britain is predominantly conspicuous in the second book. If the publication of Mare Clausum enjoyed a favourable reception at home but aroused a great sensation abroad, especially in the maritime countries of the Continent, this should be attributed to these particular reasons.

The arguments in the second book are no doubt based on the definite assumption that the capability of maritime dominion by any kind of law is an established theory, which the author believed had been sufficiently proved through his earnest assertions in the first book. He maintains that what remains to be done at this point is, therefore, merely to provide - without provoking or discussing any more superfluous controversies - the historical testimonies that furnish evidence of the British dominion of the British Sea.

In all of these ardent controversies on the legal status of the British Sea (which is referred to by a variety of names*), however, there is not - here or anywhere else - an indication of what precisely is meant by it in terms of its physical size. All that can be seen in this book is a general description of the four parts into which it is divided for the convenience of discussion.

The ambitious aim of the second book is laid out in simple terms at the beginning of its first chapter, which opens with the following introductory remarks:

1. Supra, chap. 4, 1, a; under Selden's vague definition, the British Sea extended as far as to the coasts of America (Mare Clausum, II-1 and 30).
2. Mare Clausum, II-1.
Having made it evident, in the former Book, that the sea is capable of private Dominion as well as the Land, and that by all kindes of Law...; it remains next that wee discours touching the Dominion of great Britain in the Sea encompassing it about, and of those large Testimonies whereby it is asserted and maintained. Then it shall be shown, from all Antiquities, down to our times without interruption, that those, who by reason of so frequent alterations of the state of Affairs, have reigned here, whether Britains, Romans, Saxons, Danes, and Normans, and so the following Kings... have enjoyed the Dominion of that Sea by perpetual occupation, that is to say, by using and enjoying it as their own after a peculiar manner, as an undisputed portion either of the whole bodie of the estate of the British Empire, or of som part thereof.... Lastly, the Kings of Great Britain have had a peculiar Dominion or propriety over the Sea flowing about it, as a Bound not bounding their Empire, but... as bounded by it; in the same manner as over the Island itself, and the other neighboring Isles which they possess about it.  

On a broad basis of chronology, the second book can be divided into two major periods, one covering the period from the beginning of British history up to the time of the Norman conquest (Chapters 2-13) and the other from then up to his own time (Chapters 14-26). The remaining six chapters deal with matters incidental to what had been discussed in the preceding ones, such as the testimonies on foreign recognition of the British dominion. It is, however, in the latter of these two periods that the more substantial part of his effort to establish the proof can be seen. He classifies the testimonies into the following eight items:

1. The Custodies, Government, or Admirltie of the English Sea, as a Territorie or Province belonging to the King.

2. The Dominion of those Islands that lie before the French Shore.

3. The leave of passage through this Sea granted to Foreigners upon request.

1. Mare Clausum, II-1.
IV. The Libertie of Fishing therein allowed upon courtesie of Foreiners and Neighbors, and the Protection given to Fishermen.

V. Prescribing of Lawes and Limits to Foreiners, who being in Hostilities own with another, but both in amitiie with the English, made Prize of each other in this Sea.¹

VI. The Records whereby this Dominion is expressly asserted by the By, as a most undoubted right; and that not onely by the King, but by the Parlaments of England, when they debated of other matters.

VII. The Commentaries of the Law of the Land, and common customs of the Nation, which do either assert or at least allow such a Dominion.

VIII. Som antient Testimonies of inferior note.

Of these eight points, however, it is I (Chap. 14-18), III (Chap. 20), IV (Chap. 21), and V (Chap. 22) which Selden amplifies in great length and detail, having regarded them as the major proofs of the power that the British Kings exercised over their seas since the Norman conquest.²

Having at his disposal sufficient examples of what in his own view were regarded as acts of occupation, Selden appears to have found it to his advantage to employ occupation as a valid ground on which to establish the ownership of the sea. He readily agrees with Grotius that a mere act of occupation does not by itself justify ownership, unless it is reasonably strengthened by means of "an outward act from which the taking of possession may be understood".³ However, it should be pointed out here that, despite the wealth of documentary sources from which he quoted so abundantly, not all of his assertions can be considered to be directly related to the theory of

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1. Cf. infra, b, para. 10 (pp. 97-98).
2. A recent analysis in detail of these four points is given by Viktor Bühmert, pp. 23-33, Internationales Recht und Diplomatie, 1963, under the title of "Meeresherrschaft und Meeresgelebtum nach englischem Recht."
3. De Jure Belli ac Pacis, II-III-11; Mare Cleusum, II-2.
occupation he seeks to defend, unless they are interpreted so flexibly as to admit considerable remoteness in point of relevance. He returns to this point elsewhere in the book to add that "all Dominion is chiefly founded upon just possession or occupation, and its continuance, and that possession is not supposed to be had, by the act either of the minde or bodie singly and apart but is most firmly gotten and retained by the joint concurrence of minde and bodie." His effort to adopt occupation for the defence of his argument culminates in the following passage in which occupation is further specified:

Therefore Arguments are not to bee derived altogether from a bare Occupation or Dominion of Countries whose Shores are washed by the Sea: But from such a private or peculiar use or enjoyment of the Sea, as consist's in a setting forth Ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it; in reviewing such Profits and Commodities as are peculiar to every kindes of Sea-Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure.

With regard to the fishing rights off the British coasts (Chap. 21), Selden quotes a number of proclamations of the kings "upon all persons whatsoever that used Fishing in the Sea", by which it was forbidden for anyone to carry on fishing therein without licence "by petition." These proclamations cited as historical evidence of the British dominion include stipulations that define the fishing season and areas, the size of vessels as well as the amount of what was originally called the "Danegeld", which was levied from the licensed fishermen as a form of tax and in return for the protection given them on the sea.

Selden's reference to these proclamations as well as to other
citations on fishing rights is not in any sense a legal argument, but is merely a description of the British policy which he intended to adopt as proof of maritime dominion. It cannot be denied, therefore, that throughout his great work - with its exhaustive employment of testimonies - the legal problems of maritime fisheries were treated only with scanty attention. This relative silence on fisheries can be rightly attributed to two underlying reasons. Firstly, the primary purpose of his work was not to establish the legal grounds for British jurisdiction over fisheries off the British coasts, but to provide unquestionable proofs for his two aforementioned fundamental propositions, which were more important to his doctrine than were the problems of fisheries. Even on a general basis, problems of fisheries cannot be so fundamental as those of the community or the dominion of the sea, predominant and immediate as the role of fishery was in developing the modern principles of the international law of the sea. Secondly, Selden did not encounter any such direct challenge as Grotius did from Welwood on the problems of fisheries.

Furthermore, it appears that the effort of some jurists to trace the sources from which Selden alleged to have quoted his citations relating to the issuance of fishing licences, has not been wholly successful. In fact, it is said that this is one of the points at which he suffered from the weakness of untraceability in some of his testimonies. The statement by Camden around 1586 - and another one by Hitchcock around 1580 - is cited by him by way of example of this, that "It is worth the while to note what an extraordinary plentiful and gainful Herring-Fishing the Hollanders

and Zeelander use to have in the neighboring Sea, having first obtained leave from this (Scarborough) Castle according to the ancient custom. For, the English have ever given them leave to fish; reserving always the honor and privilege to themselves, but through a kind of negligence resigning the profit to strangers. ¹ Fulton indicates the lack of authority quoted by either of these two writers and gives a historical explanation of the unlikelihood of Scarborough Castle playing any such role. ²

There is another indication, in many of Selden's citations of testimonies, which tends to weaken their significance. It is the mythological story of King Camitus (or Chute) of England who, as lord of the sea and land, is said to have sat on the seaside and "made trial of the obedience of the Sea", by commanding:

Thou, O Sea, art under my dominion, as the Land also upon which I sit is mine. And there never was any that disobeid my Command without punishment. Therefore I command thee not to ascend up upon my Land, nor do thou presume to wet the feet or garments of thy Soverign. ³

The admission of disobedience by the sea to the King's command makes this story less mythological and its chronology makes it less significant as a testimony, since the maritime dominion during the Anglo-Saxon period was believed to have been unsatisfactory. From a practical point of view, therefore, it would be reasonable to say that only by a considerable stretch of logic could a testimony of this nature be properly regarded as evidence of the dominion of the sea.

In the nature of what he sought to expound, it is understandable

1. Mare Clausum, II-21.
2. Fulton, op. cit., p. 64.
3. Mare Clausum, II-12.
that Selden did not confine his arguments only to refuting Grotius's doctrine of *mare liberum*. As may be expected from the general character of his controversy, he disclaims the maritime policy even of the previous English Kings so far as it was in conflict with the doctrine of *mare clausum*, namely, that of Queen Elizabeth on the freedom of the sea and that of King James I on the definition of the so-called King's Chambers. With regard to the former, he refers to the Bremen treaty of 1602 with Denmark about the freedom of fishing and navigation in the Norwegian sea and remarks that "as it was ill done of those Commissioners in that Treaty to make use of an Argument drawn from a necessarie commoditie of the Sea, so there is no truth in that which they let fall concerning the Irish Sea". Regarding the latter, as has been mentioned earlier, King James did not support the doctrine of *mare liberum*. His proclamation of 1604, by which were designated 27 maritime areas along the English coasts and called the King's Chambers, appears to have meant to establish what may be called in modern terms maritime neutral zones for foreign powers in a hostile relationship, and thereby to guarantee equal treatment - innocent passage and protection - for the Dutch and the Spaniards then at war with each other. Selden insists that the extension of such protection was not necessarily confined within the limits of the Chambers and that the idea of the proclamation was therefore only a form of *ad hoc* measure, not a general statement by which the ownership of the areas beyond the limits of the Chambers was disclaimed. Even though he says that

2. Cf. supra, Chap. 4, 1, a, parae. 4 and 5.
3. Cf. supra, V (p. 94).
"the King had not intent in that Proclamation, that his Jurisdiction should bee circumscribed simply by those Limits, but only in relations to acts of hostilities at that time betwixt the Spaniards and Hollanderst, he seems to have been unsuccessful in presenting definite evidence that would have better supported his interpretation of the proclamation. 2

Just as the first book concludes with a definitive statement to the effect that the sea is capable of private dominion, its community being admissible under no circumstances, so the second closes with a simple recapitulation of what he was so firmly determined to perpetuate, that is to say, the open and vast ocean around Britain justly belongs to Britain as a matter of fact.

And without question it is true, according to the Collection of Testimonies before alleged, that the very Shores or Ports of the Neighbor-Princes beyond Sea, are Bounds of the Sea-Territory of the British Empire to the Southward and Eastward; but that in the open and vast Ocean of the North and West, they are to be placed at the utmost extent of those most spacious Seas, which are possessed by the English, Scots, and Irish.3

The author of the famous book, Mare Clausum, has thus reached the point at which he aimed when he said earlier in his own way and in his own rhetoric: 4

So the Sea flowing about is shut or closed within the compass of the Royal Patrimony of the British Empire. Other passages there are everywhere of the same kind. But I enlarge myself too much in a thing so manifest. Therefore I forbear to light a Candle to the Sun. 5

6. Grotius and Selden

The great controversy over the two incompatible doctrines of mare liberum and mare clausum was thus championed by a square match between

1. Mare Clausum, II-30.
2. Further analysis of this point by Bühmert, op. cit., pp. 30 et seq.
3. Mare Clausum, II-32.
4. Mare Clausum, The Author's Preface.
5. Mare Clausum, ibid.
two eminent jurists, Grotius and Selden. From the variety of literature on their lives and works, it can be seen that both of them were endowed with a brilliance of scholarship which was comparable only with that of the other. This rare quality was further combined with their patriotism that was so lavishly demonstrated in their defence of the respective causes upon which the interests of their own countries so vitally rested.

Inconceivable as it would have been under the circumstances of the controversy to expect Grotius and Selden to be less mindful of their national interests than they actually were, their patriotism in expounding their doctrines should be rightly regarded as an inevitable weakness in this legal argument. On the other hand, however, it would be unfair to tolerate any exaggeration of this point to the possible derogation from the substantial value of their works. Aside from the political motives underlying the exposition of these doctrines, therefore, it should be appropriate to interpret them from different angles, namely, the practical and the legal points of view.

Firstly, from the practical point of view, the general trend of thought relating to the legal status of the sea up to the time of this culminating controversy was to regard the sea as being capable of private dominion, where the naval power of the coastal state permitted it. Under this context, therefore, it could have hardly been conceivable that such dominion was against the law of nations, which was itself still at such an early stage of making that only long-standing practices or customs of states tended to identify themselves with what might be considered as legitimate acts of state under a positive system of international law. This was the fundamental point upon which Selden based his argument to justify the British dominion of the sea on the strength of history. Secondly, from the legal point of view, however,
it was not regarded as permissible for a state to claim the ownership of vast areas of the ocean merely upon the pretext of custom or practice that survived the test of time simply by virtue of the power to enforce it. This was the point from which Grotius defended his side of the controversy. In simple terms, it may be said that Selden spoke on the past and Grotius on the future, with the trend of the times beginning to show the signs of change in favour of the latter.

The nature of the controversy makes it meaningless and irrelevant as well to attempt to reach any clear-cut view as to which side was in the right or in the wrong. If the main theme of each were reduced to its core, it becomes clear that neither Grotius nor Selden was definitely successful in formulating an independent theory, but successfully presented one each of the two aspects from which the modern law of the sea evolved, namely, the regime of the high seas and territorial waters. The former placed emphasis mainly on the community of the high seas, whereas the latter on the ownership of the territorial waters, each in doing so running to an extreme which defied compromise with that of the other. Consequently, each of them treated the areas of the sea outside his own major concern rather fragmentarily and ambiguously.

This inevitably led to the consequence that some points of argument crossed each other in the course of their refutation, especially where a distinction between the two different areas of the sea was involved. This was inevitable for the simple reason that the claims of Portugal and Spain which Grotius disputed in his Mare Liberum were not identical with those of Britain which Selden advocated in his Mare Clausum. The latter sought to defend from the British standpoint what the former directed exclusively at Portugal and, by implication, at Spain as well. Strictly speaking therefore,
Britain was not a direct party to the heated controversy of the Netherlands against these two countries. In this sense, Selden can be said to have acted on a preventive and presumptive motive to forestall what had appeared, by an unmistakably clear implication, to be a challenge to the immediate interests of his own country.

This observation should not be taken to imply any derogation from the great contribution towards founding the modern regime of the high seas by Grotius and of the territorial waters by Selden. Nor should it mean that it is possible to lavish uncritical praise or blame upon one of them without the risk of what may be said to be doctrinal discrimination against the other, as has not infrequently been done. As far as the law of the sea is concerned, therefore, it would be reasonable to say that both of these highly patriotic jurists deserve equal credit for their devotion towards its development. At the risk of oversimplification and a slight deviation of discussion, however, it may be added at this point that, after all, Grotius had the good fortune to be called upon to defend the interests of his own country, which happened to be in line with what was to follow during the subsequent period of transition in the field of international law of the sea.

In concluding the discussion on the controversy of *mare liberum* v. *mare clausum*, it is deemed appropriate to note a remark of the very author by whom it was named "une bataille de livres."

Le *Mare clausum* est diffus; le style est fort rude; toutefois on ne peut s'empêcher d'admirer la grande érudition de l'auteur, qui, ici encore, se montre, suivant le mot de Wood, "the great dictator of learning in the English nation." La thèse était fausse, mais elle était mieux défendue que la thèse vraie et juste n'avait été défendue par Vasques et Grotius. Il est à remarquer, du reste, que la doctrine de Grotius allait à l'entrecrois des nécessités mêmes de l'époque. Son mérite n'en est pas moindre, sans doute, mais ce fait explique son échec.

La politique commerciale en était à la formule: *Ouius regio ejus*
commercium, comme la politique ecclésiastique en était au principe: *Cujus regio ejus religio.*

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1. Nys, op. cit., p. 269. This passage quoted from his work of 1901 is a slightly revised but virtually identical one from his earlier work of 1894, i.e. *Les Origines du Droit International* (Bruxelles), pp. 385-386.
1. The Beginning of Differentiation

As far as the origin and growth of the modern law of the sea are concerned, one of the immediate contributions of Grotius and Selden can be evaluated in terms of the extraordinary nature of the effort and subtlety with which they brought to light through their monumental works of *Mare Liberum* and *Mare Clausum* virtually every aspect of the great controversy conceivable under the circumstances of their time. Indeed there appears to have been left out very little that could have been added further in the way of defending either side of the argument. The battle of books, which signified the juridical phase of this Anglo-Dutch dispute over the legal status of the sea and fisheries, had thus reached its culminating point when Selden's book was made public and its pretensions incorporated into the maritime policy of Britain by King Charles I.

This culmination of juridical controversy and its subsequent gradual decline coincided with the advent of a new and more practical — indeed political — approach towards its settlement by both parties involved. By its own weight, the dispute began to move from the pens of scholars to the guns of sailors. As will be seen below, however, it was not this new development but the continued juridical or theoretical endeavours that gave rise to the eventual solution of the controversy. This new means simply invited inevitable hostilities as evidenced by no less than three successive
wars between Britain and the Netherlands, with consecutive victories to the former, within the span of less than three decades during the latter half of the 17th century. The *casus belli* in each case was, needless to say, prompted by the strong and persistent aspirations of Britain to preserve the traditional honour of the flag and to protect off her coasts the controversial herring fisheries from the unthinking Dutch fishermen. In other words, the areas of the North Sea between Britain and the Netherlands still remained subject to constant competition for ownership by one and its denial by the other. Nor were the other parts of the seas in Europe at the time any more free from the dominion, to varying degrees, of the neighbouring states. While the striking of the flag was still exacted as in the past by Britain in other areas of her undefined seas, the Venetian claims in the Adriatic continued to survive the decline of her former power, the Baltic was under the sway of Denmark and Sweden, and vast areas of the North Sea, as far as Iceland and Greenland, were claimed exclusively by Denmark. Thus, in reality, the status of the sea did not yet show any appreciable change from the side of *mare clausum*, though Portugal and Spain had abandoned their unrealistic claims.

It is, therefore, the juridical side of the controversy that requires further discussion at this point. The reaction to the publication of *Mare Clausum* among the Dutch jurists seems to have been anticlimatic, because of the growing imminence of the threat that the dispute would have to be dealt with by means other than legal or theoretical. The neutral or

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1. Fulton records a lengthy account of these wars (*op. cit.*, chaps. I, II, XIII and XIV).
non-partisan attitude of other European jurists is also understandable from the fact that none of their countries was so directly involved in the rivalry for maritime supremacy. Furthermore, the extravagant claims of Portugal and Spain had also been doomed to abandonment for reasons of impracticability and anachronism rather than for legal or theoretical reasons. Therefore it was mainly the jurists of Britain and the Netherlands who employed their scholastic pens, but with decreasing enthusiasm, for the defence of the policy of their own countries. In this connection, it is of much interest to note the unbecoming silence with which Grotius responded to the appearance of *Mare Clausum*. Even though he had in the meantime undergone a measure of doctrinal modification regarding his extreme opinions on *mare liberum*, his silence is also quite rightly attributed to the change in his personal circumstances. He had found himself in a position in which he could have hardly refuted Selden's presentations, without at the same time running into conflict with the policy of the country in whose service he then was, namely, Sweden, whose maritime practice did not coincide with the principles he had earlier represented.

The Grotius-Selden controversy can not be said to have by itself achieved any direct end for which the battle of books was launched. When it culminated, the tireless attempt to own or to open the sea by means of juridical charges and counter-charges had now to reach a point of stalemate at the same time. From a more practical point of view, therefore, it can be said that the controversy simply had the effect of providing jurists of succeeding decades with sufficient means with which to establish the basis of lasting principles in the law of the sea. This can be seen from what grew out of some essential points in it. Broadly speaking, the opposing theories of *mare liberum* and *mare clausum* appear to have been so far removed from each
other that they would have doubtless defied any effort to seek compatibility between them. In strict terms, however, each side was not simply either of the two opposing views of an identical issue; there were elements in each that were sufficiently different from those of the other in purpose and emphasis. At least by implication and consequence, it can be said that the one concerned itself predominantly with the freedom of the ocean at large, the other with the claims to ownership of the adjacent sea. In this context, the controversy may be said to have been dual in character to the extent of eventually reaching compatibility at some critical points. This was what actually did develop through the effort of subsequent jurists up to the early part of the 18th century. What was sought by them was now not to attempt a settlement as such, as had so long been sought in vain, but to develop out of it what would be rational and practical under the name of the law of nations. Consequently the issue was now, not the adoption or the dismissal of either, but the adoption of the compatible elements from each.

Among the first jurists of the two opponent states in the controversy, who sought to establish a theoretical distinction between the free high seas and the ownable adjacent sea, may be named Johan Isaac Pontanus of the Netherlands and Sir Philip Meadows of Britain, who developed in somewhat crude terms a compromise between the two controversial theories. Their attempt was to institute a basis on which to build the scope of claims to maritime ownership. The effort of the jurists of this period rightly symbolizes the beginning of the attempt by legal minds to solve one of the hardest problems in the whole history of the international law of the sea and fisheries, namely, the problem of defining in practical terms the extent of territorial waters. Despite the repeated endeavours of nations, this problem still retains every likelihood of remaining a permanent obstacle to the
progress of the law of the sea.

Pontanus was one of the two Dutch jurists — the other one being Graswinckel — who wrote their books in the form of a reply to Selden's *Mare Clausum*. Though, at the time of his writing, he was also in the service of a foreign country, Denmark — as was Grotius, in that of Sweden — whose maritime practice always adhered to the doctrine of *mare clausum*, he appears to have been extremely rigorous in his criticism against almost every point on which Selden relied in his effort to establish the legal ground of the British maritime dominion. His argument against Selden's theory was, however, confined to refuting the concept of the unlimited ownership of the high seas; with regard to the capability of ownership of the adjacent sea, he held the same view as Selden. It is, therefore, this latter point that is significant here, because from the standpoint of the Dutch jurists this not only meant a compromise as well as a concession from the traditional doctrines to which they had till then so persistently adhered, but also implied an express recognition of the distinction in legal character between the two areas of the sea, apart from the definition of their extent. Pontanus's treatise was published in 1637 amid the height of the Dutch opposition arising from the appearance of Selden's *Mare Clausum* in 1635. He had thus demonstrated the discretion to interpret the heated controversy of *mare liberum* and *mare clausum* with more reason and less passion, thereby marking the beginning of a turning point.

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in the growth of the law of the sea. The significance of his theory should be viewed in the light of this point.

Meadows's book,¹ which was published over 50 years after Pontanus's, is an excellent presentation of his observations regarding the traditional maritime practice of Britain. With reason and conviction, he argues the impracticability of claims to dominion over unlimited areas of the sea and thus regards the British pretensions as a dilemma and even as an eventual danger in the way of maintaining peace with the neighbouring states of Europe. Considering the example of Venice as inapplicable to the case of his own country, he specifies the grounds of difference between the claims of Venice and those of Britain on the basis of geographical fact - and of its implications - that the Adriatic is a closed seaway at best, apart from the extent of its traffic, whereas the Channel is a passage open on both sides and of paramount importance for communications among many states of northern and southern Europe. He regards Selden's *Mare Clausum* as a comprehensive work which defended the sovereignty of the sea so admirably that the effort of any subsequent writer with the same purpose would simply have meant an attempt to fulfil the task of "writing an Iliad after Homer".² On the other hand, however, it is Selden's theory of *mare clausum* that he treats with rigorous opposition. His own remark in this connection is noteworthy:

But if all the claims and pretensions of England, supported by the authorities and allegations produced in that book, shall be vouched as the proper measure and standard of right and wrong betwixt us and other nations; .......; if what is well written must be fought for too, not being to be gained but by a longer tool than a pen, the King of England will unavoidably be cast upon this hard dilemma, either of being involved in endless and dangerous quarrels with all his neighbours abroad, or having his honour and reputation prostituted at home, as tamely suffering the best jewels of his crown to be ravished from it. .......

He thus came to the conclusion that the extravagant claims to sovereignty over unlimited areas of the sea could not prevail but that the exclusive rights of coastal states over their adjacent seas should be recognised. This undoubtedly implied the differentiation between the high seas and the adjacent sea, though the difficulty of defining the extent of the latter still remained to be solved.

At this point it should be noted that this new trend in the progress of the law of the sea, towards the end of the 17th century, owed its advent to the ever-growing need to preserve fishing rights in coastal waters. Problems of fisheries always had such an immediate bearing upon the national interests of maritime states, especially of Britain, Denmark and the Netherlands, that it could hardly have been meaningful or practical to consider claims to exclusive rights - still less to establish boundaries - over coastal waters without direct reference to fishing rights. In this connection, Meadows argued that "the dominion of the sea, without an appropriate fishing, is as if a vineyard should be a property, but the grapes common. Or like an estate or possession of land, vested in one, to the use of another," and goes on to say with articulateness that:

1. Meadows, ibid.
If there be no certain standard in nature, whereby to ascertain the precise boundaries of that peculiar marine territory, I am now speaking to, which belongs to every Prince in right of his land; yet, by treaty and agreement, they may easily be reduced to certainty. For, as to the judgment and opinions of private persons, we cannot derive from thence any true measure; for though they all agree unanimously, that there is something due of right, yet they vary in the quantum, or how much. Baldus reckons one hundred miles at sea, as the district of the adjacent land. Bodin affirms it for a received law amongst nations, that the Prince, whose country abuts upon the sea, should have sixty miles jurisdiction from the shore, and that it was so adjudged in the case of the Duke of Savoy. Another Doctor will tell us, that so much of the sea appertains to the land, as far as a man can see from shore on a fair day. But this will not serve our turn; for if a man may see from Dover to Calais, I suppose the like may be done from Calais to Dover, and whose shall the sea be betwixt? Therefore the surest way is, to prescribe the limits of fishing betwixt neighbouring nations by contract, and not by the less certain measure of territory. If no bounds be fixed, how many inconveniences, and what a licentious extravagance, may such a liberty run into!  

From available references, therefore, it can be seen that the distinction between high seas and adjacent seas, as well as the measures to define their boundaries in more practical terms, began to develop during the latter part of the 17th century, which throughout most of its length had witnessed a series of juridical controversies with varying but declining degree of seriousness. Some early examples of the extent of territorial waters can be seen in the practices of a few maritime powers of Europe, which by means of treaties or proclamations specified in numerical or similar terms their maritime boundaries and those of their possessions in the New World. Fulton quotes as some of the early examples the Anglo-French treaty of 1686, the Franco-Algerian convention of 1689, and the limits fixed by Denmark in the northern seas in 1691.

2. Fulton, op. cit., pp. 526 et seq.
The publication of Meadows's treatise was preceded by the conclusion in 1686 of the above Anglo-French treaty by a few years. None the less this chronological precedent should be considered as not derogating from the great contribution he made as one of the doctrinal pioneers towards the practical theory of dividing the sea into two separate areas each of a different legal character. The circumstances of his time and the nature of the traditional British practice suggest that the author himself was sufficiently conscious of the theoretical departure of his opinions from those of the earlier jurists of his country and therefore deemed it appropriate to initiate his book with a deliberate vindication of his position, stating that his "discourse may possibly upon a slight and superficial view, seem to have the tendency towards the diminution of the rights of England, and consequently the enlargement of those of other governments." From what has been developed of his theory, however, it can be said that the laudatory remarks about his theory by subsequent scholars, such as Fulton and Gidel, are well warranted. Summarising Meadows's principle as following, Gidel called it "un axiome du droit maritime international du temps de paix":

Il insistait en même temps sur la légitimité au profit des États riverains de droits exclusifs sur la mer le long de leurs côtes et sur l'utilité pratique de déterminer la zone d'existence de ces droit spécialement en matière de pêche.

Among the European jurists of the later 17th century who, independent of the ensuing Anglo-Dutch controversies, concerned themselves with the legal status of the sea and fisheries, may be mentioned Samuel Pufendorf (1632-1694) of Germany and Fra Paolo Sarpi (?-?) of Italy. The opinions of the former

1 Meadows, op. cit., p. 346.
2 Gidel, op. cit., p. 197, t. 1.
regarding the appropriation of the sea were expressed in his famous work, 
*De Jure Naturae et Gentium* published in 1672,\(^1\) a book which is so great in 
scholarship — and formidable so in size — that the writer’s authority 
was, in Fulton’s words, second only to that of Grotius, even though his 
treatment of the sea and fisheries was made brief by his intention to avoid 
repeating what had seemed to him to have been sufficiently exhausted by 
other authors. His method of argument is somewhat in the fashion of 
Grotius, though he does not agree with the extreme views of either Grotius 
or Selden. On one hand, he discarded on moral grounds private dominion by 
a state over unlimited areas of the ocean. On the other, however, he 
advocated the appropriation of adjacent sea for purposes of fisheries and 
national defence. For neither purpose did he suggest any definite limit on 
such appropriation, except by implication to the effect that a considerable 
area could be placed under dominion on the grounds of property rights or 
treaties, and especially for the purpose of defence. It is interesting to 
ote note that he attached so much importance to national defence or security in 
considering this problem, as may be seen in his simple and clear statement 
that “any maritime people which has any use of navigation is master of the 
sea which washes its shores, in so far as it is held to serve as a defence, 
and especially of ports or places where an easy landing can be made.”\(^2\) In 
his own words regarding fisheries can be seen more clearly an adumbration of 
what is still a subject of serious debate in the modern international law of 
fisheries under the name of the so-called preferential rights of coastal 
states in marine fisheries.

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1. The English translation by Oldfathers, No. 17, *The Classics of 
International Law*, 1934.
...... it is clear that fishing can be partially exhausted and become less profitable to maritime people, if any and every nation should want to fish along some particular shores; especially since it often happens that fish or things of value, such as pearls, coral, and amber, are found in only one part ... in the sea. In such cases nothing prevents the people dwelling along that shore or neighbouring sea from being able to lay a stronger claim to its felicity than those who dwell at a distance, nor can the rest of mankind rightfully hate or envy them for this... 

With all these assertions, it cannot be denied that Pufendorf's general line of argument regarding mare liberum is substantially more in accord with the views of Grotius than with those of Selden.

Sarpi's opinion on fishing rights in adjacent sea is noteworthy for its reason and justice. Defending the Venetian claims to ownership over the Adriatic, he expressed the view in his book that "each state is master of such part of the sea as it has need to make use of without injury to others." His theory is further indicated by Fulton, who says that:

The extent of territorial sea should not be fixed everywhere in an absolute manner, but should be made proportionate to the requirements of the adjoining state, without violating the just rights of other peoples. Thus a country or city which possessed large and fertile territories that provided adequate subsistence for the inhabitants, would have little need of the fisheries in the neighbouring sea, while one with small territories that drew a large part of its subsistence from the sea ought to have a much greater extent of sea for its exclusive use. This doctrine, though obviously difficult of application internationally, has much to recommend it on grounds of reason and justice.

As the behaviour of a state is not so much governed by reason and justice as

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2. Domini del Mar Adriatico e sue Raggiones per il Jus Belli della Serenissima Republica di Venetia, Venezia, 1686 - (Fulton, op. cit., p. 547; the English text has been quoted from Riesenfeld, op. cit., p. 47).
by its interests, it should be said that this principle expresses no more than an ideal; and its inapplicability to the conflicting practices of different states is manifest, especially in the absence of a supranational authority in the community of states to define the 'need' of a state and to decide the existence or non-existence and the extent of the 'injury' to another. Undoubtedly this is a theory that was entirely befitting the Venetian situation of the time which Sarpi sought to defend, just as those of Grotius and Selden suited their respective countries. It should be further added that his theory was alluded to by another Italian author of the mid-19th century, who remarked that "the necessities of a nation whose satisfaction is not injurious to the approved rights of another nation are of more value than the private opinions of the writers on international law which often prevail in questions where the winner is in the wrong."

In spite of these developments in the way of establishing the distinction between the high seas and the territorial sea during its latter part, however, the whole period of the 17th century can not be said to have witnessed significant progress in the theoretical aspect of the law of the sea and fisheries. What marked this period instead was the Grotius-Selden controversy of *mare liberum* and *mare clausum*, which was followed by a series of wars between the two maritime rivals, each representing an extreme end of the theory and practice opposed by the other. In the light of subsequent developments, however, the period of controversy was not entirely fruitless and futile, because it was apparently in consequence of it that the tendency to differentiate between the areas of the sea made its appearance earlier.

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than it might have done otherwise, the tendency which for its substantiation had to wait for the turn of that century into the next.

2. The Cannon-Shot Rule

The hard struggle for and against the common rights of states to the use of the sea had called forth a futile service of the pen and a violent play of the sword during the 17th century, before it led to the conclusion that neither of the two exclusive claims was to survive as a viable principle of the international law of the sea. As a consequence, there was to be no longer any serious refutation of the compromise solution that a state could claim the ownership of a limited area of the sea along its coasts. Now the argument was not whether the sea was free or capable of dominion, but where the dominion was to end and the freedom to begin. Thus the 18th century dawned with this inherited endeavour to define the extent of the territorial sea in terms which were reasonable as a matter of legal theory and capable of adoption as a common practice among states.

There had earlier been some attempts by jurists of different states to define the extent of the territorial waters of a state, but none of them was practical enough to reach any significant degree of common adoption among maritime states. The theory of a 100-mile limit by Baldus and that of a 60-mile limit by Bartolus and Bodin, both based on the range of navigation attainable in a single day were merely works of imaginative scholarship at a time when little had been heard with regard to assigning territorial limits over the sea. The principle of mid-channel or 'thalweg' should be said to be as far removed from actual practice as that of the range of navigation, though the former appears to have had a wider currency because of its relative definiteness. Another method of delimitation, which
was mainly found in Scottish practice, primarily for the protection of her coastal fisheries, was one based on the range of vision, the extent of one 'land-kenning' being regarded as 14 miles. In spite of the specification regarding the method of measurement, especially in the 'land-kenning', these principles were exposed to some serious physical limitations in the way of agreement or application to practice by different states.

Thus, in the absence of any definite method of delimitation and yet in the face of a growing necessity therefor, it was Cornelius van Bynkershoek (1673-1743) who made history - or is credited with making it - by virtue of his famous principle of the so-called cannon-shot range. This rule, which was expounded in his two great treatises, De Dominio Maris Dissertatio (1703) and Quaestiones Juris Publici (1737), was symbolised by his aphoristic statement which is seen in every writing on the history of the law of the sea: Potestatem terrae finiri, ubi finitur armorum vis. 3

The public post, supreme in the legal profession, in which he was called upon to serve his country was by itself a sufficient proof of his extraordinary scholarship in legal science; and this was further demonstrated by his prolific authorship of numerous books covering a variety of legal subjects. It is, however, by the above two major works that he is better known to posterity as the jurist who opened a new era in the chronicle of the law of the sea, by terminating the century-old legal controversy of mare liberum

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1. Mention was made to similar effect also by Grotius (Mare Liberum, V).
2. The respective English translations: by Magoffin, No. II (1923), and by Frank, No. 14 (1930) The Classics of International Law.
and mare clausum. His theory on the sovereignty of the sea was presented in the first of the above works and was briefly reiterated in the second with a confirmation: "I have not yet altered my opinion." He also established, as did Grotius, a distinction between mare proximum and mare exterum, the one being the areas of the adjacent sea which could be controlled from land and the other the areas beyond what the state could thus control. His opinions can be, therefore, summarised in the following two major points. Firstly, regarding the delimitation of a state's maritime belt, he argued that "the control of the land (over the sea) extends as far as cannon will carry". Secondly, regarding the general point on the capability of appropriation of the ocean, he reasoned "that this also can be occupied, and has been occupied at times, can not, I think, be denied". This statement is only a defensive and negative assertion that can not be regarded as a genuine admission of the capability of occupation of the outer sea as a prerequisite to ownership, since the author himself qualified this view by saying that "ownership is not retained in any other way than by perpetual possession" and that "at present no outer sea is under the dominion of any sovereign since none of it is in possession of any". In other words, he established a compromise between the doctrinal possibility as well as the physical impossibility of owning the high seas, on the one hand, and the capability of owning the marginal sea only to the extent of a cannon-shot range, on the other.

Prolific as Bynkareshoek may have been as a legal writer, it should

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1. Quaestiones, Lib. II, C. XXI.
2. De Dominio Maris, C. II.
3. De Dominio Maris, C. III.
5. Quaestiones, Lib. II, C. XXI.
be pointed out that he was undoubtedly silent on the legal problems of fisheries, even in his *Quaestiones* which represents his comprehensive opinions on miscellaneous subjects of the law of nations. This silence, which can fairly be said to be somewhat unexpected in a Dutch jurist of the time, may be partly attributed to his preoccupation with the general problem of establishing the extent of the maritime belt; and it alone has undeniably won him lasting fame.

With little opposition this principle was eventually accepted in international law as a rule in defining, in practical terms, the limit of the territorial waters of a state. It can not be denied, however, that it owes its undisputed reception not only to the extraordinary felicity and novelty of its expression but also to the ineffectiveness and consequential failure of earlier endeavours to determine such limits. It follows from this observation that, aside from its inherent merits, therefore, this maxim must have by its timely advent silenced prospective polemics on both sides of the Channel who would have otherwise gone to any lengths to produce a variety of fictions on this question by means of further charges and counter-charges.

The felicity with which the cannot-shot rule was expressed was further strengthened by his effort to generalise it by saying: "I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of man's weapons ends; for it is this, as we have said, that guarantees possession". 

1. *De Dominio*, C. II.
hypothetical character of the principle, since it carries the implication that it is an open statement which in effect fails to close the question of delimitation, thereby calling for the necessity of defining the issue in numerical terms, as is discussed below.

Even though, by virtue of his extraordinary contribution towards transferring it into theory, Bykershoek is identified with the cannon-shot rule as the first jurist to give it extremely felicitous expression which was heeded to by subsequent jurists, available references provide sufficient grounds to establish the existence of precedents for it both in theory and practice, though in limited and less definite form. The first precedent in diplomatic practice dates back to 1610, about a century before the publication of Bykershoek's De Dominio Maris Dissertatio, when the Dutch envoys in London registered a protest against the 1609 proclamation of King James I forbidding unlicensed fishing of foreign fishermen in the waters off British coasts. The envoys are quoted as having said that "no prince can challenge further into the sea than he can command with a cannon". 1 Little evidence can be seen, however, as to whether it was Grotius who instigated the idea, though the probability can be fairly reasonably deduced from the circumstances. The theoretical precedent is found in Grotius's De Jure Belli ac Pacis, 2 though here the means of compulsion was not specified except by implication.

3. The Three-Mile Limit

a. The Opinions of the 18th Century Jurists

In spite of Bykershoek's effort to generalise his statement which

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1. Fulton, op. cit., p. 156; further references are given by Riesenfeld (op. cit., p. 21) and by De Pauw (op. cit., p. 70).
2. II - III - XII.
symbolised the cannon-shot rule, its lack of definiteness in terms of its extent implied its inadequacy as a legal principle and its vulnerability to disputable applications, and this in turn gave rise to the need to define it in more practical form. However, it does not appear that this need led to any immediate transfer of the rule into the three-mile limit; the former failed to receive a ready agreement of jurists - still less of states - but had to stand a period of trial before a selection of jurists with widely varying views till the end of the century.

Among the other important jurists of the 18th century who concerned themselves with the legal status of territorial waters, and of fisheries in some cases, and sought to assign a fixed distance to the range of cannon, may be named, among others, Christian Freiherr von Wolff (1679-1756) of Germany, Emmerich de Vattel (1714-1767) of Switzerland, Ferdinando Galiani (1728-1787) of Italy, Georg Friedrich von Martens (1756-1821) of Germany and Domenico Alberto Asuni (1749-1827) of Italy. Wolff's opinions, which were itemised in his Jus Gentium (1749) with unusual clarity, are not very specific on the extent of the maritime belt of a state. The occupation of the adjacent sea was based on the supposition that it is not inexhaustible in its resources and that navigation in it is not always innocent, whereas the sea furnishes the state with a natural means of protection.  


Vattel’s monumental work, Le Droit des Gens (1758),¹ is regarded as the most authoritative and comprehensive book on international law during the latter part of the 18th century. Apart from its other merits, the authority of his book can be judged simply in terms of the number of its editions and translations into different languages. Furthermore, its arrival in America appears, it may be said, to have been such a happy coincidence with the particular need in the new Republic that it was regarded as the standard authority towards the end of the century. His argument is very closely in line with those of Pufendorf and Wolff — particularly the latter with whom he was so intimately associated as a follower.

Vattel’s opinions may be divided into two main points, one pertaining to the legal nature of the high seas and the other to territorial waters. Firstly, his objection to the appropriation of the high seas was based on the inexhaustibility of the use of the high seas for navigation and fishing:

> It is clear that the 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 who fishes therein injures no one...²

He further reasons that the acquisition of exclusive rights in the high seas is possible, not by prescription or long usage, but by treaties. It is interesting to note, in this connection, that he extended this point to what he calls "un pacte tacite", regarding as an implicit recognition of such rights sufficient signs of acquiescence of a state in the exclusive claims of

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another in the high seas. Secondly, his argument in favour of the appropriation of adjacent sea was based on the exhaustibility of its use, in contrast with that of the high seas:

The resources of coast seas are not inexhaustible, so that the Nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands. Who can doubt that the pearl fisheries of Bahrain and Ceylon may be lawful objects of ownership? If a Nation has specifically profitable fisheries along its coasts, of which it can take possession, are we not to allow it to appropriate that gift of nature as being connected with the territory it occupies, and to keep itself the great commercial advantages which it may enjoy?

In the light of the comprehensive nature of his book, it is somewhat disappointing that his treatment of the extent of territorial waters is not specific at all:

Precise determination could only be based upon a general consent of Nations, which it would be difficult to prove. But between Nation and Nation the most reasonable rule that can be laid down is that in general the sovereignty of a State over its marginal waters extends as far as is necessary for its safety and as far as it can be maintained.

Further in this connection, he regards it as meaningless for a state to claim a right which cannot be enforced. In an argument which should have been legal in character, however, this point constituted no more than a slight digression into the problems of political realities.

Galiéni is generally believed to be the first to assign a definite distance of three miles to the range of cannon. But his new opinions as expressed in this book do not appear to have been either readily adopted or

2. Ibid.
3. Dei Dovere del principi neutrali verso i principi guerreggiamenti, e di questi verso i neutrali (Naples, 1782); Gidel, op. cit., t. 3, p. 41; Fulton, op. cit., p. 563; and Riesenfeld, op. cit., p. 25.
opposed by other jurists of his time. This lack of immediate response in favour of this new principle can not be attributed so much to the distance of three miles itself being or not being considered as a reasonable equivalent to the range of cannon, as to the lack of relative flexibility in this numerical definition. The departure from one to the other would have been thought rather too sudden and restrictive, in spite of the recognised need. Furthermore, the opinions of this author seem to have varied considerably elsewhere.

Martens is also regarded as an important writer of the late 18th century, though his opinions on the extent of territorial waters were not very definite. His identification of the range of cannon with the distance of three leagues is believed to have sprung from his failure to differentiate in use between the terms "league" and "mile". The lack of precision in his theory can be seen by comparing the following two assertions:

A custom, generally acknowledged, extends the authority of the possessor of the coast to a cannon shot from the shore; that is to say, three leagues from the shore, and this distance is the least, that a nation ought now to claim, as the extent of its dominion on the seas.

A nation may occupy, and extend its dominion, beyond the distance mentioned in the last section, either on rivers, lakes, bays, straits, or the ocean; and such dominion may, if the national security requires it, be maintained by a fleet of armed vessels.

Therefore, it can be said, without doing injustice to his undoubted authority

2. Ibid. (Sect. 4).
3. Ibid. (Sect. 5).
in international law in general and to his effort to determine the legal character of territorial waters, that Martens was nevertheless an advocate of the cannon-shot principle rather than one of the three-mile rule. 1

After all, it was Azuni by whom the cannon-shot rule was given expression with sufficient precision to mark on it a doctrinal change at the close of the 18th century. His great contribution towards the progress of maritime law can be seen from the elaborate and comprehensive way in which his book was written. The second volume of his work deals solely with the war-time law. It is the first volume that contains an historical survey of maritime law as well as an account of the various practices of different states up to his own time. He reaches the following conclusion:

It would be reasonable then without inquiring whether the nation in possession of the territory has a castle or battery erected in the open sea, to determine definitely that the jurisdiction of the territorial sea shall extend no farther than three miles from the land which is without dispute the greatest distance to which the force of gun powder can carry a ball or bomb. 2

Thus, largely due to the great efforts of Galiani and Azuni, the closure of the 18th century witnessed the appearance of a new attempt to impose a change in the method of determining the width of territorial waters, from the loose extent of cannon range to the fixed distance of three miles. It should be pointed out, however, that neither the advocates of the cannon-shot principle nor the supporters of the three-mile rule opposed the view that, under the

1. Rieseweld (op. cit., p. 28) regards it as "interesting to note ... that he referred neither to Galiani nor to Amuni". The publication of Martens' main work in French (op. cit.) had, however, preceded that of Amuni's by six years.
pretext of security or other unusual circumstances - and still more by virtue of agreement - a state might extend its control beyond either limit.

b. The Opinions of Jurists since the 19th Century

Since the early 19th century a great many scholars have been making untiring efforts to achieve a harmony of views on the extent of territorial waters. No agreement has been arrived at, nor is there much likelihood of one. Riesenfeld quotes the representative opinions of no less than 227 authors whose writings were published between 1800 and 1937.\(^1\) It is interesting to note the gradual shift in support from one view to the other:

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\begin{array}{l|cc|cc}
 & 1800-1899 & 1900-1937 \\
(a) \text{Cannon-shot Rule} & 52 & 14 \\
(b) \text{Three-mile Rule} & 27 & 41 \\
(c) \text{Either (a) or (b)} & 15 & 6 \\
(d) \text{According to State Interests or Circumstances} & 18 & 52 \\
(e) \text{Different Fixed Measure} & 1 & 1 \\
\text{Total} & 113 & 114 \\
\end{array}
\]

It can be pointed out from the table that the number of authors supporting the three-mile limit increased remarkably, but not in proportion to the decrease in that of those supporting the cannon-shot rule. Instead, the increase from 18 to 52 of those whose theories were based on state interests or circumstances marked a change even greater than that in either of the other two categories. This can be quite safely interpreted to have

\[1\] Riesenfeld, op. cit., pp. 29-89.
been a prelude to what has begun to take place since the 1950's in the law of the sea, namely, the wide differentiation in the reasons for which different states claim differing extents of territorial waters.

No generalisation of any precision can be expected from such statistics, as the author himself admits the limitations that arose from the difficulty of classifying such individual writers as had been changeable or unspecific or even unoriginal in their views. In the light of the growing variety in practices today when states, now tripled in number, face the dilemma of having to save their individual interests on the one hand and to prevent the law of the sea from falling victim to doctrinal and practical anarchy on the other, the general trend as implied by the distribution of theories in the above table can be said to have been by no means wide of the mark.

4. The Three-Mile Limit and the Practice of States

a. Up to the 19th Century

It was long before the close of the 18th century that concepts regarding the status of the sea had begun to be framed in the context of the accepted need to differentiate the areas of the ocean into two different types and assign to each a distinct legal character. When it came to the problem of establishing a fixed boundary between them, however, the opinions of jurists differed as widely as the interests of the states to which they belonged, suggesting a variety of different limits and methods of delimitation. Finally, the advent of the cannon-shot principle virtually terminated the state of doctrinal anarchy as far as the theory and means of delimiting territorial waters were concerned. Not only was this novel principle acceptable as a legal theory, but its applicability to practice was
sufficiently inherent in its physical implication. It was rightly thought, however, that rules based on the cannon-shot principle as such would not stand the test of time and practice because of their lack of precision; and this in consequence led to the eventual translation of the principle into numerical terms of three miles. To a large extent, this transfer was still confined to the theoretical aspect only, as there did not take place an immediate dismissal of one in favour of the other.

In connection with the origin of this principle and of the rule which succeeded it, the three-mile limit, it should also be mentioned that, unlike in the case of the early stage of the differentiation between high seas and adjacent seas when fishery was the major concern, these two principles now owed their development to the problems of defining the extent of neutral waters, especially in time of war. This meant that different limits were thought acceptable for different purposes; and indeed the point was emphasised by different jurists.

Another point of interest, which may be mentioned in connection with the conversion of the range of cannon to the distance of three miles, is the argument whether, in the light of early 18th century weaponry, the latter was a reasonable equivalent of the former, and whether the cannon-shot principle was "the direct progenitor of the three-mile rule". It appears to have been the general belief that "in the days of Bynkershoek, a cannon carried approximately three miles; hence the statement that a nation may occupy and exercise ownership over waters three miles within low water mark. This was the solution accepted by the nations; this is the solution still obtaining, unless

modified by express consent. These opinions are in line with what was mentioned by Galiani and Asuni. Recently, however, some doubt has been thrown on the generally affirmative opinions regarding the above two questions. That the three-mile rule was already in practice, though on a tentative basis, before the publication of Asuni's book cited above, can strengthen the doubt in the case of the second question, as is discussed later.

At this point, it is of much interest to note the developments in the maritime practice of nations up to the early part of the 19th century. In the case of Venice, due to the decline of her power, she was compelled to limit her maritime claims to the range of cannon shot in 1779, thereby abandoning her five-centuries-old lordship over the Adriatic since 1261; and she was finally conquered by Napoleon in 1795, when her antiquated ceremony of "espousing" the sea was terminated. In the case of Britain, her rule of the waves, which she attained as a result of consecutive victories in the three Anglo-Dutch wars, was decisively strengthened after her victory in Trafalgar in 1805, when a new era opened in the history of man's rule of the sea. In the absence of any maritime rival, the most ardent advocate of mare clausum now found its traditional stand to be in conflict with its national interests. Nor was the ceremony of the flag deemed any more meaningful shortly thereafter. Hereupon Britain not only assumes the

championship of the freedom of the sea, but also begins to play the role of a maritime traffic policeman.\(^1\) While the Scandinavian claims had been rather extravagant and persistent, especially for purposes of fishery, a decree of 1745 defined the extent of Danish and Norwegian territorial waters for neutrality purposes as one league of four miles, which was finally made their territorial limit for all purposes in 1812. As for Portugal and Spain, their claims had already been reduced to a distance of six miles as early as 1760. It follows from the above developments that, by the beginning of the 19th century, claims to sovereignty over wider areas of the sea were greatly restricted everywhere and were reasonably in keeping with the progress of legal theory.

The cannon-shot rule appears to have been fairly widely adopted among maritime states by the late 18th century.\(^2\) However, the first instance of the adoption of the three-mile limit into state practice dates back to 1793, when, in the face of the Anglo-French war, the United States of America found it necessary to fix, provisionally and for neutrality purposes only, the extent of her territorial jurisdiction at a distance of "one sea league, or three geographical miles".\(^3\) As, during the early period, there were variations in the United States practice regarding the extent of her territorial waters, this example of 1793 should be noted in the context of the qualification "provisionally and for neutrality purposes". The second

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1. For a summary on the great contribution of Britain towards promoting freedom of the sea, see Colombos, *op. cit.*, pp. 56 et seq.
2. Fulton, *op. cit.*, pp. 566 et seq.
example is found in the series of British judicial decisions of 1800 and 1801 in the two Twee Gebroeders cases, and of 1805 in The Anna case, in which Lord Stowell (Sir William Scott) established precedents by introducing the cannon-shot rule and the three-mile limit into British Jurisprudence.¹

These examples show that the transition from one rule to the other was only a slow progress, accompanied by a lengthy period during which they co-existed. Though the general trend was thus in favour of these two rules, it nevertheless can not be denied that, broadly speaking, they were still far from firm acceptance universally, as may be seen from the prevalence of varying practices of different states for different purposes such as fishery, customs or quarantine. One of the outstanding and oft-quoted examples in this respect would be the Russian ukase of 1821, by which she claimed an exclusive jurisdiction to the distance of 100 miles into the sea. Though, in the face of persistent objections from Britain and the United States, this claim had to be eventually reduced to three miles limit in 1853, it was one of the different practices which betokened the prematurity of conclusions that the three-mile limit was a generally acceptable rule at the time.

Thus, apart from the above examples of Britain, Russia and the United States, it was not until the second quarter of the 19th century that the three-mile limit began to attain wider currency among many states, mainly of Europe, as a rule to be resorted to for limited purposes and in limited areas. Some examples of the first instances of its adoption into practice on a wider scale would be: Belgium in 1832, Austria-Hungary in 1846, Chile

in 1855, Ecuador in 1857, El Salvador in 1860, France in 1862, Germany in 1868, Argentine and Greece in 1869, Japan in 1870, Britain in 1878 and the Netherlands in 1889. In connection with the above examples, it should be noted that the adoption did not simply take the form of an ordinary promulgation of law, but was usually occasioned by some particular events that gave rise to the necessity. Fishery disputes were the major cause of such events, because, after the close of the Napoleonic wars, the problems of international sea fisheries in Europe assumed a new and greater importance than those of neutrality, and therefore the question on the extent of the territorial waters began to be centred mainly on the rights of fishing in foreign waters. It may be pointed out that, in the case of Britain, however, the enactment of the Territorial Waters Jurisdiction Act of 1878, by which the three-mile limit was incorporated in the municipal law of Britain, was not in any way motivated by the problems of fisheries. It was the difficulty experienced by the British judiciary in the *Franconia* case that led to the provision of criminal jurisdiction for crimes committed within the territorial waters of Britain.

The growing trend of introducing the three-mile limit in the

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2. Fulton (*op. cit.*, p. 591) does not agree with the view that this Act settled the extent of the British territorial waters at three miles.
practice of individual states during the 19th century naturally began to be reflected in the treaty practice of most of the maritime states of Europe at the same time. The first example is seen again in the Anglo-American Convention of 1818, by which the American fishing was renounced within three miles off certain coasts of the British territory in North America (Art. 1). The second instance - but the first in Europe - took place in 1839, when the Anglo-French fisheries treaty was concluded. These were followed by a few more agreements defining fishery limits between Britain and the continental states. The treaty between Britain and Belgium of 1852 did not specify a definite limit, but simply stipulated that the relevant terms of the 1839 Anglo-French treaty should be employed. The growing controversy over fishing rights between British and French fishermen necessitated further modifications of the 1839 treaty to the point of an attempt to renew it in 1867, which proved abortive because of the failure of France to ratify it.

Germany appears to have been conservative in committing herself to delimiting the extent of her territorial waters by means of municipal legislation, the 1868 treaty with Britain being the first traceable indication of her policy.

The conclusion of these bilateral treaties failed to eliminate the deep-rooted cause of disputes over fishing rights mainly for three reasons, among others. Firstly, they were bilateral, and consequently could not bind third states, especially those to which the limit of three miles was not acceptable from the beginning; secondly, the application of this limit was confined to areas where the configuration of the coast line was in no way peculiar; and thirdly, because of the importance of the fishing industry as a

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peace-time staple, the fishermen of the coastal states tended to regard this limit as inadequate and too artificial, and therefore constantly attempted to exclude foreigners from areas even beyond it, in disregard of the treaty provisions. In these circumstances, the only step likely to overcome these difficulties was a multilateral treaty, and this step was taken in 1932, when the famous North Sea Fisheries Convention was signed by Belgium, Britain, Denmark, France, Germany and the Netherlands. Norway and Sweden participated in the conference but refused to sign the Convention for reasons explained below. The formal title of the Convention, so befitting the purpose for which its need arose, symbolised the desirability at the time of an international device to preserve the peace among the fishermen in the North Sea areas: International Convention for the Purpose of Regulating the Police of the Fisheries in the North Sea outside Territorial Waters.  

For many substantial reasons, this Convention is extremely important in the study of the history of the international law of fisheries. It has played the role of a prototype in forming the pattern of subsequent fisheries treaties of today. A simple proof of its intrinsic merits and uncommon utility would be its long duration in spite of its being the first multilateral treaty of its kind and its short mandatory life of five years (Art. xxxix). 2 One of its articles that is important for the present discussion reads:

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2. Britain, one of its sponsors, was the first to denounce it in 1964. The subsequent developments leading to the conclusion of the European Fisheries Convention of 1964 are given by D. H. R. Johnson, op. cit., pp. 43 et seq.
Article II: The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks. As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles. The present Article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing-boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs.

It is of much interest to note that, from the beginning, the four maritime states at both extremes of the outer coasts of Europe, namely, Portugal and Spain at one extreme, and Norway and Sweden at the other, deviated from the practice of other states. As has been discussed earlier, the Iberian tradition of a six-mile limit had developed by 1760, long before the adoption of the three-mile limit by other maritime states. The two lords of the sea of former centuries seem to have regarded as moderate their retreat to a six-mile limit from their earlier limitless position. To the north, the Danish claim to four miles in 1312 can be said to have been adjusted to the practice of other European states when she signed the North Sea Fisheries Convention in 1882. What matters at this point is the Norwegian and Swedish claim to four miles, which by virtue of long-standing practice has hardened into a regional custom recognised in international law. This was made clear beyond doubt in the earlier stages of the Anglo-Norwegian Fisheries Case of 1951. Aside from the predominant importance of fisheries to these states, and especially to Norway, the Scandinavian practice can be said to owe its origin and recognition largely to the peculiar sinuosities of the coasts, which

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made it necessary to adopt a different unit and method of measurement.  

b. The Practice of Today

At the risk of over-simplification, progress in the modern practice of states regarding the extent of the territorial sea can be traced back with particular reference to two important events, namely, the Hague Codification Conference of 1930 sponsored by the League of Nations and the two Geneva Conferences on the Law of the Sea of 1958 and 1960 sponsored by the United Nations, and then to the developments since 1960.

The problem of territorial waters was not the sole topic discussed at The Hague Conference, but was only one of the three, the other two being Nationality and State Responsibility. As far as the law of the sea is concerned, however, it was the first occasion on which this problem was so intensively considered at a level properly international in the sense that the Conference enlisted what may be called a universal representation of forty-seven states including Danzig and Monaco as well as Russia as an observer.  

The immediate relevance of this Conference to the present discussion lies in the implication of its failure to reach agreement on the extent of

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1. One marine league in the Scandinavian ordinances is said to have meant the distance of fifteen to a degree of latitude, equal to 7,420 metres (about four nautical miles), whereas the ordinary marine league twenty to a degree of latitude, equal to 5,565 metres (about three nautical miles). As regards the method of measurement, the judgment of the 1951 Fisheries case finally formed the basis of Art. 4 of the United Nations Convention on the Territorial Sea and the Contiguous Zone relating to the method of determining base lines.

2. A recent summary of this Conference was made by Takabayashi, op. cit., pp. 196-208.

3. Thirty-five states were represented at the final meeting of the committee on territorial waters.
territorial waters, as may be seen from the statement in the report of the
Second Committee (Territorial Sea):

The Committee refrained from taking a decision on the question
whether existing international law recognises any fixed
breadth of the belt of territorial sea. Faced with
differences of opinion on this subject, the Committee preferred,
in conformity with the instructions it received from the
Conference, not to express an opinion on what ought to be
regarded as the existing law, but to concentrate its efforts on
reaching an agreement which would fix the breadth of the
territorial sea for the future. It regrets to confess that
its efforts in this direction met with no success.1

In the face of the uncompromising difficulty inherent in the
problem, the Committee was so helpless that it could not, or rather did not,
make any further efforts on this point beyond simply confirming the
prevalence of widely varying opinions and practices among the thirty-five
participating states, as given in the table later. It was made clear that
the adoption of any fixed extent of the territorial waters, still less that
of the three-mile limit, was a sheer impossibility.2 However, the achievement
of this Conference should not be underestimated solely on the basis of this
point, since many other points that were discussed during the course of its
preparation since 1924 and agreed upon at its regular sessions have been
incorporated into the Geneva Convention on the Territorial Sea and the
Contiguous Zone of 1958.

The significance of what took place between The Hague Conference of
1930 and the first Geneva Conference of 1958 merits a brief mention at this

1. Report of the Second Committee (Territorial Sea), Publications of the
League of Nations, G 230, M 117, 1930, V, p. 5

2. In brief, the future of the three-mile rule was openly predicted at this
Conference. Gidel's remark on this point is of interest: "La prétendue
règle des trois milles a été la grande vaincue de la Conférence." (ibid., t. 3, p. 151).
point, by way of ascertaining the background of the detailed scholarship and the political factors which influenced the course of discussion among the delegates of eighty-seven states at the two Conferences in Geneva. It was the two Truman Proclamations of 1945, one on the continental shelf and the other on high seas fishery resources, that unwittingly opened a decade-long epidemic race of numerous coastal states extending their jurisdiction over the high seas.

The total number of independent states and other political entities that followed suit in the post-War campaign reached almost forty by the time of the first Geneva Conference of 1952. With the exception of Ceylon and Venezuela, their announcements of jurisdiction had been made in or before 1955, claiming under sundry names and purposes exclusive rights over the continental shelf or fishery resources or both. This was a fatal challenge - and by means of practice at that - against the traditional regime of the high seas, whereas the same challenge at The Hague Conference of 1930 was one by means of opinion only.

Aside from the circumstances under which the Truman Proclamations had to be made, it is of much interest to note that the measures taken by the United States were made use of by many states, whose interpretations of them ranged from the loose and incautious to the wholly unwarranted, and in consequence gave rise to an unforeseen 'boomerang' effect to the detriment of the economic - and even military - interests of their originator. For example, most of the Latin American states almost immediately began to place certain areas of their adjacent seas under their jurisdiction and have since

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1. Details are given at p. 260.
enforced it notwithstanding the refusal of the United States to recognise it. It was the fishermen of the latter that were greatly disturbed by the former as a result. Eventually there was enacted in the United States a peculiar law under the self-evident name, "An Act to Protect the Rights of Vessels of the United States on the High Seas and in Territorial Waters of Foreign Countries" (68 Stat. 883, 1954), popularly called the "Fishermen's Protective Act", by which the government is to reimburse the amount of fines levied on her fishermen by foreign authorities for the alleged violation of their jurisdiction (Sect. 3).¹

In connection with the merits or demerits of the Truman Proclamations, a recent remark on them is noteworthy:

The reaction we got from the blunder of issuing the Truman Proclamation on Fisheries in September, 1945, is that other countries will claim more than any new claim the United States makes, deliberately interpret the new claim the United States makes in their favor, and use our new claim, their new claim, and their misinterpretation of our new claim, as substantiation for any action they wish to take over and above what the United States wants to do. The parochial view ...... pushed us into this invidious position in 1945, and we should guard carefully against repeating this mistake.²

These claims, made mostly by less developed countries during the post-War period, symbolised a new trend in the law of the sea of extending unilateral control of the coastal states over their adjacent seas by dividing

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them into different sections and assigning to each such legal character as would justify their control. Their motive can be said to have been prompted by such factors as economic need, scientific advances and the implications of the new order in international politics, the last of these having been usually impressively linked with the overtures based on the first and the second.

It was this political factor that inspired the Latin American republics to take the lead and set the fashion in the move for a wider extent of jurisdiction over the sea. Although, unlike the new states of Asia and Africa, they achieved their independence during the 19th century, they had been always under the pressure of greater powers. In view of their current practice, it is noteworthy that, up to the 1930's, the common practice among the eight major coastal states of the region regarding the breadth of the territorial waters was the three-mile limit. As their individual adoption of this limit took place between 1855 (Chile) and 1939 (Venezuela), however, it would not be appropriate to regard this common practice as having been the conscious extrapolation of a common conviction. Nor does it appear that the outcome of The Hague Conference affected the attitude of these states to any significant extent, as may be seen from the irregularity with which changes took place in their practice between 1930 and 1939. Two of them extended

1. Laws and Regulations on the Regime of the High Seas, ST/LEG/SER. B/1, United Nations, 1951, vol. I:

Chile ................. in 1855 (p. 61) Mexico ............ in 1902 (p. 86)
Ecuador ............... in 1857 (p. 67) Honduras ........ in 1906 (p. 80)
El Salvador ............ in 1860 (p. 71) Venezuela ........ in 1939 (p. 130)
Argentina ............. in 1869 (p. 51)

Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER. B/6, United Nations, 1956:

Brazil ................. in 1938 (p. 443)
their territorial waters beyond the three-mile limit (Mexico to 9 miles in 1935 and Honduras to 12 kilo-metres in 1936), while another two newly adopted this limit (Brazil in 1933 and Venezuela in 1939). It was therefore the advent of the new international political climate created by the close of the Second World War that prompted these states to make use of the occasion to liberate the law of the sea, in their own fashion, from the alleged monopoly of the powers by whom it was thought to have been made for their own convenience.

The above unilateral measures of the post-War years were all based on the undeniable and inevitable necessity of the conservation of marine resources. The pretext of conservation was, just as it still is, a ground so easy to defend and justify on the part of the coastal states and as hard to argue against on the part of those whose interests were affected by it, since the admitted danger of possible exhaustion of resources no longer gave any fishing states the audacity to question its necessity. What mattered at this point was therefore not its necessity but its method, and the method which was readily employable was first to extend the jurisdiction into the adjacent seas before resorting to the desired means of agreement with interested parties. At the height of such extensions, the individual unilateral measures among the Latin American states gathered sufficient momentum to give rise to a few examples of collective measures, such as the Santiago Declaration of 1952 and the Principles of Mexico of 1956.  

Simultaneously with these unilateral and multilateral measures in Latin America, but of course from different motives, multilateral conservation arrangements were taking place in other regions of the world, sponsored by

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1. For the series of such examples, see Bayitch, op. cit., pp. 48-63.
interested individual states or through the efforts of international organisations. Thus, the period between the late 1940’s and the first Geneva Conference of 1958 witnessed an unexampled proliferation of regional and universal conservation arrangements.

In the face of the pressing need for conservation, the Latin American and other newly-emerged states began to ignore the authority of the traditional law of the sea, regarding it merely as an untenable legacy of the old order. In addition to this historical background of the need to revise the conventional regime to fit the emergence of new situations, there was another reason, which was no less demanding. Numerous and ambitious as the existing arrangements might have been, they were nevertheless so 'parochial' in point of participation and so 'selective' in the coverage of stocks and areas, that these shortcomings fostered the difficulty of enforcement. It was the pressure of these circumstances that gave rise to what may be called a general recodification with universal participation, namely, the first United Nations Conference on the Law of the Sea at Geneva in 1958.

The two Geneva Conferences of 1958 and 1960 literally marked the beginning of a new era in the annals of the international law of the sea. The achievements of these global efforts may be evaluated in terms of their intrinsic merits as well as of their great influence on subsequent developments in the law of the sea, which has since become much more definite.

1. For the background of various regional arrangements, see Whiteman, Digest of International Law (Washington, 1965), vol. 4, pp. 977 et seq.; for that of the FAO-sponsored General Fisheries Council for the Mediterranean (1949) and the Indo-Pacific Fisheries Council (1949), see op. cit., pp. 1074-1075 and 1077-1082 respectively; and for that of the UN-sponsored International Technical Conference for the Conservation of the Living Resources of the Sea, Rome, 1955, see op. cit., pp. 1099-1101.
in every aspect than before. In the light of the participation being virtually universal and of the variety of interests represented by each state or group of states, it should be noted with admiration that the four Conventions adopted in 1958 commanded such an impressive majority of votes in favour: 61 in favour, 0 against and 2 abstaining for the Convention on the Territorial Sea and the Contiguous Zone; 65:0:1 for the Convention on the High Seas; 45:1:18 for the Convention on Fishing and Conservation of the Living Resources of the High Seas; and 57:3:8 for the Convention on the Continental Shelf. ¹

This impressive account of success is unfortunately paired with that of failure, which cannot be safely overlooked because of its constant threat to outweigh the whole achievement. As far as the problem of determining the breadth of the territorial sea is concerned, it cannot be denied that the failure experienced at The Hague Conference 28 years before repeated itself in spite of the painstaking efforts of the nations to avoid it. This is a failure that is fatal to this field of law, for the simple reason that the whole system of the law of the sea has to rely on this axis for effective functioning. The gravity of the failure was explained by the fact that the first Conference had to close with the adoption of a resolution requesting the General Assembly of the United Nations "to study..... the advisability of convening a second international conference of plenipotentiaries for further consideration of the questions left unsettled", which were "the breadth of the

¹ First Conference Records, A/CONF. 13/32, vol. II, pp. 73, 61, 59, and 57, respectively. It cannot be denied, on the other hand, that the size of the majority in each was, to a large extent, due to the generality of the wording of important provisions throughout each Convention.
territorial sea and fishery limits".  

The cause of this failure can be attributed to the absence of any genuine community interest discernible in the attitudes of individual states or groups of states. The division of votes on each proposal for any particular fixed breadth took place almost mechanically, according to its implication on the multi-dimensional interests – political, economic, military or regional – of each group. On a broad basis of the actual grouping of votes at the two conferences, the 87 participants of the first conference and the 88 of the second may be divided into the following four regional interest groups: the 27 states of West Europe including those of North America and Oceania, plus Israel and South Africa; the 10 states of East Europe including Yugoslavia; the 20 states of Central and South America; and the remaining 33 states of Asia and Africa. Of these four, the Afro-Asian group was the problem child at both conferences, as it is at many international meetings of similar scale today, noted recent examples being the biennial conferences of the UNCTAD. The attitude of the states in this group has considerable significance for the development of international law today, not only because of their drive by the force of majority where the number of heads mattered as in Geneva, but also because of the fact that it was the first formal occasion on which they emerged to challenge the traditional international law evolved before their attainment.

2. The merger of Egypt and Syria during the first conference reduced the number to 86 from March 11, 1958. Afghanistan and Nepal attended the first conference only, and Cameroon, Ethiopia, Guinea and Sudan the second only.
of post-war independence. Throughout the numerous sessions of both conferences, however, the most vital and constant division was that between the traditional "three-miler" states and the other "wider-limit" states, the one trying to stay within the "six-mile" limit and the other struggling to stretch it beyond twelve miles. Thus, under these bi-polarised circumstances, the two-third majority was not to be had.

Among the series of proposals that were voted down, those by Britain and the United States deserve some special mention at this point, because these two long-standing champions of the three-mile limit demonstrated their unusual determination to risk a departure from their traditional stand for the sake of agreement on the breadth of the territorial sea. The implications of such a departure for their national interests, mainly in navigation and security, as explained by their delegates, are also noteworthy. However, the


b) Arthur H. Dean, Chairman of the United States Delegation is quoted as follows:

"To see the shore-line at a distance of twelve miles a navigator's eye would have to be 110 feet above the water, a height rarely attainable on commercial or fishing vessels; to be seen, even under ideal conditions from a standard height of, say, 15 feet, from the same distance, any shore navigational aid would have to be at least 44 feet high. Many convenient charted landmarks visible from three miles would no longer be visible from twelve miles, and the 'international lights' ..... would probably be too far apart to be of use for accurate fixing; secondary systems of lights and buoys would not be visible at such range. It had been estimated, moreover, that only one in five of the world's lighthouses had a range of twelve miles or more. It was therefore conceivable that a nation's entire system of navigational aids might have to be rebuilt - perhaps even entirely replaced by an electronic system - to meet the new conditions

Continued
opposition to the proposed six-mile limit was such that, in the course of heated debates, the "proposed departure" or the "offer" was met with the sarcastic philippics of some delegates. In spite of the carefully-guarded reservations voiced by the proposers, it was a moment of most acid trial on the three-mile limit, which could have virtually ceased to exist had the proposal been passed then.

The voluminous records of both conferences reveal that the atmosphere in most of the sessions was predominantly political and impressively oratorical as well. No tongue remained idle and any time was the best time to speak, and in consequence little appears to have been left unsaid. The technicality of decision-making even on minor points of procedure was also a novelty, voting on whether to vote starting the series of votings on how to

imposed by an extension of the territorial seas to twelve miles. Finally, it would be virtually impossible for most merchant ships to anchor in waters twelve miles off-shore, where depths of 700 fathoms were often met" (Second Conf. Rec., A/CONF. 19/8, p. 15). And again: "A twelve-mile limit would result in 116 of the major international straits coming under the sovereignty of coastal states, whereas with a six-mile limit only 52 would be so affected. With a six-mile limit probably only 11 states would claim the right to terminate or interfere with the transit of United States warships or military aircraft" (ibid., p. 106).


2. The examples may be, among others, the funeral oration by Dr. Jorge Bocobo of the Philippines (Max Sorensen, Law of the Sea, No. 520, International Conciliation, 1958, p. 250; II-Young Chung, Seaentce - Korean monthly, June, 1960, p. 255); and the remark on Dean's speech by Mr. Ahmed Shakeiri, Chairman of the Saudi Arabian Delegation (Chung, ibid.), which were not printed but would have both appeared at p. 170, vol. III, First Conf. Rec., A/CONF. 13/32.
vote and when to vote, to be followed by a lottery on who should vote first, before the final operative voting took place by roll-call. In the absence of an alternative, however, the competence of such political conferences of plenipotentiaries to discuss legal issues of this magnitude can hardly be questioned, the reality of international relations being what it is. In this connection, Hurst expressed the view in 1946, discussing the failure of The Hague Conference of 1930, that "the work...... cannot be done by governments or by delegates working under government instructions. It cannot be done upon a purely individual basis. To be successful the work must be undertaken on both a national and an international basis." In consideration of the elaborate work of the International Law Commission of the United Nations on the basis of whose draft the considerations at Geneva proceeded, the Geneva conferences can be said to have been fairly in keeping with the third point of Hurst. In point of reality, however, it remains to be answered what an international basis is.

The immediate and most conspicuous reaction of fishing states to the failure in Geneva to reach agreement on the breadth of the territorial sea was reflected in their unilateral extension of fishery jurisdiction to 12 miles. The first state to take the lead in the post-Geneva proliferation of this practice was Iceland, whose delegate stated at the closing session of the first conference on April 27, 1958, that "his delegation had abstained in the vote on the Cuban proposal because it did not wish to commit the Government of Iceland to the policy of not taking any action for the time being so far as Iceland's own fisheries jurisdiction was concerned. His government had

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waited patiently till the end of the present conference, but no agreement had been reached, and there was no assurance that agreement would materialise at another conference.\(^1\) It was on June 2, 1958, that the Icelandic government made its announcement on the 12-mile fishery zone, which was promptly met by a strong protest from Britain. The failure of the second conference of 1960 found an immediate reaction from Scandinavia, when within three weeks of the close of the second conference on April 26, 1960, Norway began to move towards taking similar measures along her highly irregular coasts. These extensions and subsequent developments in European fishery placed Briton at a great disadvantage, and eventually gave rise to the conclusion of the European Fisheries Convention of 1964, which had been preceded by a series of bilateral arrangements between Britain and other European states.\(^2\)

In connection with the above developments, it should be made clear that the measures taken by the individual states were focussed exclusively on their fishery interest. Two examples may be quoted. Firstly, the attitude of Norway was dual in purpose in that she intended to secure her fishery interest by claiming jurisdiction to 12 miles on the one hand, and yet observing her traditional stand of 4-mile territorial waters for the protection

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1. First Conf. Rec., A/CONF. 13/75, vol II, p. 78. The Cuban proposal was on the convening of a second international conference, which was adopted by a vote of 45:2:26 (ibid.).

of her shipping interest on the other. Secondly, for obvious reasons, neither Iceland nor Norway became a party to the European Fisheries Convention of 1964, since it would have superseded the 1961 Anglo-Icelandic and the 1960 Anglo-Norwegian agreements, thereby allowing the British and other foreign fishermen to operate within the otherwise forbidden waters off their coasts. It may also be added in this connection that one of the major motives of Denmark's adherence was because of the waters around Greenland and the Faroe Islands being outside the Convention areas and therefore being free from its restrictions on her claims to a 12-mile fishery zone.

This trend of establishing 12-mile fishery zones inevitably spread to other regions of the world, so that other champions of the three-mile limit had also to involve themselves in it reluctantly or otherwise. It was in 1965 that Japan, not without reluctance and fear of establishing a precedent, entered into a fisheries treaty with Korea, thereby creating a notable departure from her long-standing tradition in maritime practice, as will be discussed intensively in Part II. The United States also established a contiguous fishery zone in 1966, which was categorically different from that of Japan in that it was unilateral. In view of the coherence of their maritime practices and their persistence in the three-mile limit in particular, the above post-Geneva measures of Britain, Japan and the United States should be said to be particularly significant in the process of ramification of the fishery zone from the traditional concept of the territorial sea.

The basic idea of the 12-mile fishery limit as implied by the Canadian and United States proposal at the second conference in Geneva was prompted by the eagerness of the proposers to arrive at agreement on the breadth of the territorial sea by pairing it, as a compromise, with the proposed 6-mile limit of the territorial waters, and hence the artificial principle of "the inner six plus the outer six." The proposal failed to secure the support of the required two-third majority and in consequence "the offer" of the 6-mile limit was automatically withdrawn. However, the 12-mile fishery zone became detached from its original duality and made its advance single-handed with such a rapidity and popularity that even states with particular attachment with "the inner six" of the proposal had also to join the race. The merit of the proposal may be therefore more appropriately viewed in the context of its subsequent developments. In point of reality, its failure was not a complete failure as such, in the sense that the hair-breadth narrowness of the votes for and against it was tantamount to a prelude to the forthcoming prevalence of 12-mile fishery zone. It could not have been more effectively recognised and publicised, so that only "the outer half" of it should have been adopted to the needs of each fishing state.

Further to the motive of the above proposal, in passing, the

1. The vote was 54:28:5, failing the proposal by the margin of but one negative vote (Second Conf. Rec., A/CONF. 19/8, p. 30). Dean, head of the United States delegation, attributes this failure to the last-minute changes of opinion by delegates who had agreed to abstain but voted against in the end (Dean, "Second Geneva Conference on the Law of the Sea: the Fight for Freedom of the Seas", AJIL, 1960, vol. 54, pp. 751, 779-781).
particular position of the United States as a co-proposer of the compromise may be noted with interest. In the struggle at Geneva over the breadth of the territorial sea between the advanced maritime states and the less developed coastal states, she found it difficult to side with either without inviting eventual sacrifice of her national interests. In the interest of her security and fisheries off the Latin American coasts, "the inner six" was more important to her, whereas for her North Pacific fisheries "the outer six" could not be disregarded. In every sense, therefore, the compromise was born out of the marginal situation in which the conference found itself at the end of an exhaustive search for unity in an atmosphere so desperate and nerve-racking.

The progressive shift of state practice regarding the breadth of the territorial sea and fishery zone during the period from 1930 to 1960 and from 1960 to the present may be reduced into a table on the basis of recent available information. However, the difficulty should be admitted of obtaining up-to-date information at any given point of time, due to the unpredictable and undemonstrative way in which the announcements of change are made as well as to the variety in the terms and concepts used by

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1. Figures represent the number of states that have given their breadth specifically in numerical terms only.


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Because of the great increase in the number of independent states and other political entities since the close of the Second World War and the growing diversification of interests for which individual states fix the breadth of their maritime jurisdiction, it is not possible to establish a direct and meaningful correlation between different times in the above table, especially between 1930 and 1960. However, it should be noted with interest
that the number of "12-milers" and 200-milers has made a marked increase, and that of "3-milers" a modest increase.
For the purposes of the present paper, it is not deemed necessary to trace the rather sporadic relations between Korea and Japan before 1876, when, in the name of friendship, a treaty was concluded between them. In fact, however, the treaty was forced on Korea in pursuit of her answerability for a shooting incident deliberately provoked by Japan at a Korean fort on the west coast the year before. Since previous formal approaches by Japan to establish relations with Korea had failed, as did those of some Western powers by means of missionaries or ceremonial visits of warships, Japan employed this means in the fashion of the time and successfully tried on her naive neighbour what she had unwittingly experienced, in connexion with territorial integrity and economic justice, in the early days of her relations with several Western states.

The conclusion of this treaty, therefore, marked the beginning of a new phase in the fateful history of Korea ever since. It was not only the first treaty ever to be signed between Korea and a foreign state, but also the very first step of Japan's ill-fated expansion into the Continent. Subsequently there were concluded between the two states over 50 unequal treaties under various names and for sundry purposes, the insatiable ambition of Japan finally culminating in the treaty of annexation in 1910.

Furthermore, this termination of Korea's state of hermit-like
self-exclusion from international society gave rise to an inevitable influx of foreign interest in the thitherto little-known kingdom, as was proved by the rapid proliferation of treaties of friendship and commerce between Korea and no less than six Western powers within five years, with a few more following at the turn of the century.¹ Thus, it was even before the close of the century that Korea became a scene of vigilant rivalry among China, Japan and Russia, the other participants either abstaining or retreating to the status of interested third parties. As a matter of fact, it was China that was instrumental in the conclusion of the first few of the above treaties between Korea and the Western states, especially those with the United States in 1882 and with Britain in 1883. On the part of China, the introduction of interested Western powers to Korea was a means of checking the growth of Japan's influence in Korea, since, as the first article of the Korea-Japan treaty of 1876 confirmed the independence of Korea, China regarded this as an intolerable infringement of her traditionally vested right of suzerainty over Korea, and therefore intended to "set a thief to catch a thief".

These developments were exactly what the uninformed rulers of Korea had been afraid of and based their policy of seclusion on, apart from their blind reliance on China as the centre of the world, if not of the universe. It is of much interest to note, in passing, how earnestly Korea wished to be left alone, only to be forced to open her door helplessly. Undeniably, China was the only constant authority to which Korea used to

¹ With the United States in 1882, with Britain and Germany in 1883, with Italy and Russia in 1884, with France in 1886, with Austro-Hungary in 1892, with Belgium in 1901, and with Denmark in 1902.
The rapid collapse of China's unique authority in the face of the eastward movement of the Western powers during the latter part of the 19th century, therefore, left Korea with a growing sense of insecurity. Aroused by the obstinate belief that any contact with Western heresies was merely an invitation to such national disaster as had taken place even to her master, China, Korea chose to keep her door to the outside world more tightly closed. Apparently it occurred to her that the only way of maintaining her national security under the circumstances was to remain isolated as even. This way of thinking was further enhanced by her repeated 'victories' in isolated skirmishes against visiting foreign warships and merchant vessels (7 French warships and an American merchant ship in 1866 and 3 American warships in 1871). These incidents led the Korean leaders to underestimate the real strength of the Western powers and in consequence to conclude that the maintenance of her international seclusion was possible. As a result, there were erected numerous inscriptions at major points of public notice throughout the country with a strict warning that any attempt to establish any relationship with the West would be identified as an attempt at treason and dealt with accordingly.

The most determined champion in the struggle for hegemony over Korea was Japan, both of whose rivals were compelled to withdraw from Korea in consequence of their unexpected defeat in the Sino-Japanese and Russo-Japanese wars of 1894-5 and 1904-5 respectively. In these competitions, Korea was the cause and the much-coveted innocent trophy as well. Japan was now in a position, for the foreseeable future, to monopolise Korea and utilise her as the ideal bridge to the continental mainland in the fulfilment of her growing desire for expansion into
China. 1

Russia's defeat in 1905 thus left Korea entirely at the mercy of Japan. Even before the cessation of hostilities, plans had begun to be made in Japan for the conclusion of a protectorate treaty with Korea, which was signed immediately after the war. Henceon, the sovereignty of Korea virtually ceased to exist, the Japanese resident-general being in actual control of governmental functions including external affairs. Now the eventual annexation, which took place in 1910, was merely a matter of time and convenience.

The insatiable efforts of Japan to dominate Korea presented two different aspects. The one took the form of direct negotiations with Korea, as symbolised by the series of treaties and agreements, each of which was very carefully designed to move Korea a step nearer to the fatal trap of eventual annexation. The other made its appearance in the form of Japan's struggle to silence, by means of word or sword, the third party 'wolves' to whom her monopoly of Korea was a matter of grave concern or of great interest.

Firstly, to China and Russia, it was literally a grave concern and finally led to grave consequences. The treaty of peace with China after the Sino-Japanese war, concluded in Shimomoseki, Japan, in April 1895, specified in its first article that "China recognises definitely the full and complete independence and autonomy of Korea...." 2 It was an irony of

1. In this connection, it should not be overlooked that another side of Japan's vital concern over Korea was partly due to her fear that Korea in any foreign hand would mean "a gun pointed at Japan's heart".
2. The English texts of four treaties and agreements out of the five cited herein are in Pamphlet No. 43, Korea: Treaties and Agreements, Division of International Law, Carnegie Endowment for International Peace, 1921; for that of the fifth (The Taft-Katsura Agreement) cf. footnote below.
history that a peace treaty specified the independence of a third state. The tragedy did not end there. A second act followed within a decade. The treaty of peace after the Russo-Japanese war, concluded in Portsmouth, U.S.A., in September 1905, stated in its second article that Russia, acknowledging that Japan possesses in Korea paramount political, military and economical interests, engages neither to obstruct nor to interfere with the measures of guidance, protection and control which the Imperial Government of Japan may find it necessary to take in Korea.

In connexion with the Russo-Japanese competition to bring Korea into their respective spheres of influence, mention should also be made of the so-called Lobanoff-Yamagata Protocol of June 1896, signed in Moscow. This was the occasion when Japan offered Russia to divide Korea between them along the 38th northern parallel, which the latter rejected, having the whole or the better half, not simply any half, in mind. When the circumstances changed in favour of Japan shortly thereafter, namely, by 1903, Russia was now to offer Japan a similar bargain - but along the 39th parallel this time - which the

1. It is the two-article secret agreement appended to the four principal articles that is important in this regard. The English text referred to in the preceding footnote does not contain the secret articles: the Japanese text is at p. 176, Vol. II, Nihon Gaiko Nempo Narabini Shuyo Bunsho (Chronicle of Japanese Diplomacy and Major Documents), Tokyo, 1965.

2. The line coincides with the present one of 1945; geographically it divides the peninsula into almost equal parts, with the north slightly bigger. Recent studies on the origin of this extremely sinister line have been made by: (a) William L. Langer, The Diplomacy of Imperialism (2nd ed., New York, 1951), p. 406: "So Yamagata was sent to the coronation at Moscow with the handsomest offer the Japanese ever made. He proposed to the Russians that they divide Korea at the thirty-eighth parallel of latitude, the northern part to be a Russian sphere, the southern part (with the capital Seoul) a Japanese sphere."; and (b) Georg Schwarzenberger, Power Politics (A Study of International Society), (2nd ed., London, 1951), p. 419: "It was also during the Potsdam Conference that the 38th Parallel made its first appearance since 1896. Then, it had been suggested by the Japanese to Russia in their abortive negotiation for a division of Korea."
latter in turn rejected for the same reason. ¹

Secondly, to Britain and the United States, it was a matter of great interest for both of them to acquiesce in the Japanese domination of Korea, in return for her acquiescence in their relations with China and the Philippines respectively. The terms of such land-sharing were specified in the Anglo-Japanese Agreement of January 1902, which was replaced by that of August 1905 — both signed in London — with more definite terms on the Korean question (Art. III), and the so-called Taft-Katsura Agreement of July 1905 — signed in Tokyo — (Para. 3), in the form of a long and confidential conversation between the Japanese Prime Minister and the visiting United States Secretary of Defence. ²

As far as the Korean problem of the time was concerned, these five treaties represented the notorious way in which, entirely unknown to the very victim, the great powers agreed, sometimes painfully and sometimes gainfully, to make a selfish application of the biblical rule, "Render to Caesar the things that are Caesar's", thereby materialising the biological law of the sea that "the big fish eat the medium ones and the medium ones, in turn, the small ones".

¹. Further details relating to the division of Korea may be seen in "A Historical Survey on the Territorial Division of Korea", pp. 5-28, No. 1, Vol. 8 (1963), Korean Journal of International Law, by Keie-Hyun Loh.

b. After 1945

The 35-year domination of Korea by Japan (1910-1945), which was preceded by a preparatory period of corresponding length (1876-1910), ended in 1945, when the Second World War ended upon the latter's acceptance of the terms of surrender as specified by the Allied Powers in the Cairo Declaration \(^1\) (December 1, 1943) and in the Potsdam Proclamation \(^2\) (July 26, 1945). It was in these statements that the post-war independence of Korea was guaranteed.

The liberation of Korea from Japanese rule in 1945, however, did not mean anything like immediate independence, but brought forth an entirely unforeseen phenomenon, namely, the division of the peninsula along the 38th parallel. This extremely sinister line had been intended to be purely a temporary military expediency designed for the sole purpose of disarming the residual armed forces of Japan in Korea. The eventual bi-polarisation in international politics, however, gave rise to a rather rapid deviation from the purpose for which the imaginary line was drawn, and has finally left the country what it is today. After a three-year period of transition (1945-1948) under the United States Military Government in the south, with the north under the Russian counterpart, the Republic of Korea was founded in 1948 as a result of a general election held in the south under the supervision

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1. The Cairo Declaration: "The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall be free and independent".

2. The Potsdam Proclamation: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu and such minor islands as we determine".
of the United Nations. In December of that year, the General Assembly of the United Nations adopted Resolution 195 III, by a majority of 43 to 6, recognising the government thus formed as the only one representing the free will of the majority of the Korean people. In the light of what was implied by the division of the country, however, the genuine aspiration of the people for independence was, at best, only half fulfilled at the birth of the Republic.

This is an oversimplified sketch of events in the history of Korea up to 1948 from 1876, when, by apparently inconsequential paradox, history began to expose this most vulnerable country to a most strenuous test. This chronology would nevertheless mean little unless viewed in connexion with what had in the meantime taken place in the hearts of the Korean people with regard to their mental attitude towards Japan. As the annexation was practically forced in the absence of a power-for-power match between the two neighbours, the determination of the people to regain independence had been most valiantly and persistently demonstrated by means of incessant struggle against Japan both at home and abroad. The internal resistance was symbolised by what is now called the Sam-Il (March 1) Movement of 1919, its anniversary being now a national holiday, and the struggle from without by the untiring armed attacks against Japan by exiled Koreans along the border

2. This annexation was classified as a 'voluntary merger' by Oppenheim (op. cit., pp. 156, 158, 549), a view which could only be based on a total disregard for, or ignorance of, the truth.
3. This was a nation-wide uprising on March 1, 1919, on which occasion a declaration of independence was read, only to invite bloodshed and more ruthless measures of suppression in consequence.
areas as well as by the declaration of war against Japan in February 1945 in
the name of the unrecognised exile government. ¹

When the long-aspired-to sovereignty was restored even in the way
it was, every single event that had taken place since 1876 was recollected
with sharp and vivid clarity. Throughout the long span of Korea's history,
the resentment of the people against a foreign state had never been so strong
as against Japan at the time the Republic was born. It was, in brief, the
feeling of a people who had been deprived of everything, including language
and culture, ² and whose independence was realised by virtue of the compulsion
of a third party, in contrast with the post-war independence of other former
colonies which had been achieved by agreement between the former ruler and the
ruled. Apart from the feelings caused by the extremes of physical
deprivation, especially towards the end of the War when Koreans had to exist
well below subsistence level, through no fault of their own and for no
advantage to their country, there was a resuscitation of poignant moral
indignation in the realisation of the malice at the heart of the Japanese
attempt to pass on to Korea what she had earlier experienced at the hands of
some Western powers during the early days of her open-door policy.

This long-accumulated national sentiment was further strengthened by
the undoubted influence of a most conspicuous individual who was guiding the
destiny of the nation. ³ As far as post-war relations with Japan were

¹ The declaration was made in Chinkimg, China, but was not recognised by the
Allies; cf. Dullea, Record of Proceedings, Conference for the Conclusion
and Signature of the Treaty of Peace with Japan, U. S. Department
Publication No. 4392 (1951), p. 84.
² Towards the end of the War, every Korean was forced to alter his name into
Japanese form, and the use of the Korean language was strictly forbidden.
³ Syngman Rhee: he served three terms in the Presidency (1948-1960), was
elected for a fourth term, but was compelled to resign in the face of
concerned, the extraordinary charisma which he commanded among the people by virtue of his past struggle against Japan for Korean independence was singularly directed towards an unmitigated anti-Japan-ism without the slightest sign of compromise. It was not only one of his two daily languages, the other being anti-Communism, but was even put to use, where necessary, in diverting the attention of the people at times of internal political crisis. Thus one of the nearest neighbours of the young Republic was at heart the farthest away. And it was at the height of this sentiment that the dispute over fishing rights made its calculated appearance in January 1952, as is discussed below.

2. Fishery Relations up to 1910

In view of the fact that the controversy over fishing rights between Korea and Japan has a history much longer than is generally understood, it is deemed appropriate to trace the fishery relations up to the time of the annexation of Korea by Japan in 1910, and thereby to identify the non-political aspect of the undercurrent which greatly complicated the recent arguments. The ultimate cause of the fishery dispute can be rightly said to have had its origin in the predestination of geography.

Firstly, the strait which separates the two states is so narrow that neither of them could safely launch any serious venture into the sea without arousing the concern of the other. Secondly, Japan having been virtually the eastern end of the world up to very recent times when the trans-Pacific passage was made practicable, it was invariably to the west that she had to turn to for contact with a foreign power, either for culture
or for invasion. Over a long period of time, however, history did to a large extent mitigate the probability of what would have otherwise taken place earlier in the relations between Korea and Japan. The overlordship of China was an ever-present reminder to both of them of the possible consequence of any attempt to breach the peace in the region. Furthermore, her suzerainty over Korea, which was loose and only ceremonial in time of peace, was very strongly operative in time of war in favour of either in distress.

Another historical reason may be added as one of the mitigating factors; that is to say, the Koreans are believed to have entered the peninsula not by sea but on foot from the north in the beginning and do not therefore have sufficient record to justify pride as a great user of the sea. While they constantly busied themselves in the engagements against the untiring Manchurian invaders from the sinister north, the waters in the east, west and south always remained rather foreign to them except merely as a natural barrier for defence, even after the shores and islands had long since been haunted by sea-faring friends and enemies as well for purposes of fishing or nautical surveying.

In 1692

The first in the series of Korea-Japan disputes over fisheries took place in 1692, though it was then not in the form of a fishery dispute as such, but as a territorial dispute regarding the ownership of the Ullung Island (Dagelet Is.) some 70 miles off the east coast of Korea. The Korean ownership of this thitherto obscure island was in fact only a matter of reconfirmation rather than of any serious controversy, as was proved by the simpleness of its settlement. Indeed, the dispute would not have occurred
but for the fact that the Korean inhabitation of the isolated island had been only sporadic throughout centuries. The gainfulness of fishing in the waters around it, however, had already been common knowledge among the fishermen of the nearest Japanese coasts, who haunted the areas quite regularly, armed with fishing licences issued by the Japanese shogunate then in power. The earliest issuance of such a licence is said to date back to as early as 1618, according to Japanese records.¹

It does not appear to have been until the latter part of the 17th century that Korean fishermen also began to haunt the same areas and eventually to run into occasional conflict with the Japanese. When, towards the end of the century, the number of Korean fishermen visiting the areas increased, the intensity of feeling arising from the presence of the Japanese in the areas also increased accordingly, and finally led to the involvement of both governments. In one of the conflicts in 1693, two Koreans were forcibly taken to Japan, to be released afterwards, which was the first incident of fishermen-kidnapping between the two states.²

It was also in 1693 that Japan instructed her lord of Tsushima (the Japanese islands in the Korea Strait) to make clear to Korea the Japanese claim to ownership of the Ullung Island, and therefore to demand the prohibition of Korean fishing operations in the areas. The Korean response to the Japanese request was at first ambiguous, since the Japanese

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² Details of this incident and the activities of these two Koreans on their second visit to Japan may be seen in the part for September 1696, Vol. 30, Shookchong Shillok (Chronicle of King Shookchong — the 19th king of the Lee Dynasty of 1392-1910); B. D. Lee, History of Korea (3rd ed., Seoul, 1955), pp. 519-521.
name by which the island was referred to in the request was so foreign to Korea. Furthermore, the doubtful importance of a far-off island did not seem to Korea at the time to warrant a serious dispute with an otherwise friendly neighbour state. At the repeated requests of Japan to prohibit Korean fishing there, however, Korea was aroused to the point of realising the real identity and importance of the island in question, and made a strong protest against what appeared to be flagrant pretense. Hereupon, in 1696, the shogunate withdrew the claims and informed Korea of its decision to prohibit Japanese fishing in the disputed areas.

In 1876

The period of almost two centuries following the above incident does not appear to have witnessed any serious occurrence in the fishery relations between the two states. 1 The next event which should be mentioned, though not directly related to fishery, was the treaty of amity concluded in 1876. The relevance of this treaty to fishery relations is found in its Article 7, by which Japan was entitled to conduct an unlimited survey of Korean coastal waters and islands for the purpose of compiling charts. It should also be noted that Articles 4 and 5 stipulated the opening to Japan of two more Korean harbours, namely, Wonsan and Inchon, in addition to Fusan which had already been opened. 2

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1. Strictly speaking, however, the chronicles of each monarch might reveal some incidents of minor significance regarding fishery during this period. The original publication of the chronicles (Chosun Wangjo Shillok), which consist of 1,893 volumes, in Chinese, are being compressed into 49 volumes by the Tomkutang Publishing Co., Seoul (Vols. 9 and 10 under distribution in December, 1968).
2. Wonsan, Fusan and Inchon were the major ports of entry and exit, situated in the east, south and west of the peninsula respectively.
What should be noted with interest at this point is the fact that, aside from other peculiar stipulations in this unequal treaty, measuring the depth of the sea and the height of the rocks in the Korean waters almost seemed to the Korean leaders to be an idle man's idle hobby or more properly the usual interest of the sea lions. Under the circumstances, therefore, little could have been done towards evading the signing of such a treaty, even if they had been fully aware of the real implication of what superficially did not appear to be the beginning of an insidious overture. It was not surprising, then, that within five years Korea found herself engaged in one of the permanent troubles with Japan, the endless controversy over fishing rights. It resumed during the early 1880's, to be continued up to the time of annexation in 1910 when its nature changed.

In 1881

In 1881, the Japanese fishing in the waters around the Ullung Island once again became a matter of concern to Korea. This time, however, the issue was settled more simply than that of 1692, as Japan agreed to withdraw her fishermen from the areas upon a protest from Korea. Although, on the face of it, it was only a rather trivial affair, it was in fact the beginning of a series of renewed and prolonged disputes which have occurred ever since. The intensity of Japanese fishing in Korean waters at the time and the growing tension in fishery relations in consequence can be seen from subsequent developments.

In 1883

In July 1883, there was concluded between Korea and Japan a trade agreement under the title of "Regulations under which Japanese Trade is to be Conducted in Korea."

Article 41 of this agreement defined the coastal areas of one state where the fishermen of the other could operate, and specified in loose terms the conditions for fishing in such areas. The areas thus designated on the Korean side covered virtually all Korean waters, with the exception of some marginal areas of the west coasts where fishing was not a productive trade. In contrast, however, the designation of the six areas in Japanese coasts, the limited waters opposite the coasts of Korea declared open to Korean fishing, was merely a padding in the format of the agreement, because both parties were undoubtedly aware of the fact that, so far as fishing was concerned, very few Korean fishermen would have had to go as far as to the Japanese coasts even in response to a wholly genuine invitation.

Simultaneously with the above, a further trade agreement was concluded under the peculiar title of "The Rules agreed upon by Japan and Korea for the Treatment of Japanese Fishermen committing Offences on the Korean Coasts." The necessity for such an agreement was self-evident. Its purpose was to specify the criminal jurisdiction applicable to Japanese fishermen on Korean soil, categorically depriving Korea of any right to deal with Japanese offenders against Korean law in Korea. Although, in the light of the fashion of the time, consular jurisdiction was a popular practice between

2. Ibid., Vol. 74 (1882-1883), pp. 151-152.
haves and have-nots of power, the six-item agreement was so worded as to anger even a pro-Japanese Korean and to shame an anti-Korean Japanese.

In 1884

The most serious fishery dispute of the pre-annexation period, however, arose from Japanese fishing in the waters around the Cheju Island (Quelpart Is.) some 50 miles off the south coast of Korea. The abundance of fishery resources in this area had long since been known to the fishermen of the Japanese west coasts, who, finding it hard to resist the temptation, had been haunting the area regularly and extensively. Their liberal attitude towards territorial jurisdiction was a common knowledge among the fishermen of the Island. As a matter of fact, it may be added in passing, the Korean and Japanese negotiators of the 1965 fisheries treaty found it so hard to reach agreement on the demarcation of fishery zones there, that they had to leave it to a provisional settlement. It was in 1884 that an upsurge of Japanese fishing around Cheju led to a strong protest from Korea. Japan's offer of negotiation thereupon brought forth a lull, but this was only the beginning of a long-drawn-out dispute which no other area of Korea ever witnessed and which eventually caused bloodshed between the Islanders and Japanese fishermen and in consequence a serious deterioration in the relations between the two states, as is mentioned below.¹

In 1886

By this time, the conflict of interests between Korean and Japanese fishermen appears to have become fairly acute and prevalent throughout the

¹. Under the heading "In 1887".
major fishing areas of Korea. Japanese diplomatic documents show that among the Japanese fishermen haunting the southwest coasts of Korea were those who had built living quarters on land, which were all burnt down by the indignant local fishermen. The problem of fishing around the Korean peninsula had by now become quite international as well in the sense that, besides these ensuing confrontations with the Japanese, there were some incidents involving fishermen of other states, namely, China and the United States. The Chinese who landed on the west coasts of Korea demonstrated their grasping behaviour to the resentment of the local population. On the southwest coasts, the Americans were engaged in pearl fishery, at the sight of which the Japanese pressed Korea for the acquisition of similar privilege. Thus Korea was on the verge of having to face the penalty of possessing the resources but not having the means to exploit them by herself.

In 1887

The two decades beginning in 1887 witnessed the culmination of these developments in the so-called Cheju fishery incident. It was a testing period for the coastal population of the Island. The turmoil started in August 1887, when groups of Japanese fishermen landed at several points on the Island for supplies of food and water. At one point on the west coast, they were looting livestock, and they shot dead an Islander who interrupted them. On the east coast, a group of Japanese fishermen were on a wilder rampage including the violation of women and shooting another man dead. Similar acts

2. The sources on which this section is based are: Yongsook Won, Korea-Japan Talks (Seoul, 1965), pp. 217-222; and NGR, Vol. 20 (1887), pp. 296-329; Vol. 25 (1892), pp. 370-396; and Vol. 30 (1897), pp. 1197-1218.
of plunder took place in a few other areas of the Island. Sometime afterwards, there took place an extraordinary incident on the sea off the north coast, where no less than 16 fishermen of the Island were shot dead by the Japanese. Shocked by these atrocities, the whole Island rose up in protest against these acts of wanton killing, and requested the government to declare a permanent prohibition of Japanese fishing in the waters around the Island. After a cooling period of over a year, upon persistent requests from Japan, the Korean government tried in vain to appease the situation.

With fairly frequent recurrence of incidents, this tumultuous state of affairs continued to cause anxiety to both governments nearly up to 1910. The fisheries agreement concluded in 1889, referred to below, was not much heeded by the Japanese fishermen in the Cheju areas. Even the Japanese government was eventually so concerned about their unrestrained violence that it sent enquiry teams in 1893 and 1905, whose reports were candid enough. In between, there was submitted in 1897 another report from the Japanese consulate in Pusan to Tokyo, describing the deplorable situation caused by the Japanese fishermen in Cheju.

The reports of 1893 and 1897, put together, reveal the following points of interest. Firstly, two-thirds of the Japanese fishing vessels operating in the area were not in possession of fishing licences and thus evaded tax. Secondly, the bottom-fish resources of abalone and sea-cucumber, which were not only the main staple of the local fishing interests carried on by fish-diving women but also the main target of the Japanese fishermen,

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1. Traditionally this is the only region in Korea where fish-diving wives support their baby-sitting husbands, and hence the nickname of the Island: "the island of three-plenties, winds, stones and women."
were in danger of exhaustion within three to five years, unless the Japanese overfishing were checked. Thirdly, Japanese fishermen - intellectually inferior to those of Korea - treated Koreans with threats and violence, and even with piratical acts at times. Fourthly, improperly dressed or naked at times, but always in possession of offensive tools, they invited the contempt of the local population whose tradition regarded their appearance and behaviour as barbarous.

In 1888

In spite of the fact that the Inchon area was outside the zones designated as open to Japanese fishing in compliance with article 41 of the 1883 trade agreement, it had nevertheless begun to be haunted by them at random, arousing the Korean government to the point of formally protesting. Inchon being so near Seoul (only 20 statute miles), and being, as one of the major harbours of Korea, so important for purposes other than fishery, any event of this nature taking place around it was not to escape the attention of the people. The controversy over the Japanese violation of the trade agreement was finally settled upon the conclusion in 1888 of a 9-article provisional agreement limiting the amount of Japanese fishing in the area.1

In 1889

For the purpose of regulating general fishery relations and disputes, a 12-article treaty was concluded in 1889, which was relatively comprehensive.2

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It was also in compliance with article 41 of the 1885 trade agreement, which prescribed: "The dues to be paid by the fishing vessels..... shall be determined by mutual agreement after the expiration of two years from the date on which the present Regulations take effect." This treaty concerned itself mainly with the fishing within three miles of the coasts of both states, for which a licence had to be obtained upon payment of dues at prescribed rates (Arts. 1 and 2). It did not therefore go much farther than specifying what Japan would have done anyway in favour of her fishing interests operating in Korea. For example, the consular jurisdiction for Japanese fishermen found its usual place (Arts. 6 and 11), as did the right for them to sell their catch in Korean ports (Art. 3). Needless to say, it was also padded with the formal reciprocity entitling Korean fishermen to the same privileges as their Japanese opposite number in Korea, with the exception of consular jurisdiction. As has been mentioned above, however, this kind of reciprocity meant in substance very little to Korean fishermen.

It should also be added here that, for reasons given above, the provisions of this treaty were found difficult to put into practice in the Cheju area for some time, as any other agreement regarding fisheries would have been, under the atmosphere then prevalent on the Island. This may be seen from the unsuccessful attempts of Japan, over a number of years following the conclusion of this treaty, to reach agreement towards resuming Japanese fishing in the area. One of the Korean answers in the negative, upon Japan's enquiry in 1890, gave two reasons for the rejection: firstly, being predominantly women's trade, the fishing in the Cheju area could not be left to be disturbed by Japanese men's fishing; and secondly, it would be grossly unfair for Japan's

mechanised fishing to be allowed to compete with Korea's manual fishing.

In 1900 and 1904,

Two agreements were signed in 1900 and 1904, each extending the localities of Japanese fishing respectively in the Kyunggi Province areas and the remaining coastal areas as yet undesignated. These were therefore the extensions of article 41 of the 1883 trade agreement, thus freely opening all areas of Korean waters to Japanese fishing. The 20-year mandatory life of the 1904 agreement was merely another padding over its usual extent.

It is also of interest to note Japan's enthusiasm at the time to go to any length to share Korean fishery resources. In October, 1904, a peculiar proposal was sent to Tokyo from the Japanese consulate in Pusan, which suggested the opening what might be called Japanese fishery settlements on Korean coasts, initially and provisionally with 50 households of some 200 people. It was to be done under the pretext of military necessity (the Russo-Japanese war having broken out in February of that year), and was to be placed outside the control of the local Korean fishery co-operative. This premature thinking was not accepted by the Foreign Ministry in Tokyo.

In 1905

Aside from its intrinsic merits, the above agreement of 1904 can be said to have successfully concluded Japan's calculated efforts to encircle the Korean peninsula with her net of fishing rights. The next step to be expected as a natural sequence under the circumstances was now to move forward inland. In August 1905, that is, three months before the conclusion of a

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2. NCR, Vol. 37-1 (1904), pp. 419 et seq.
protectorate treaty, a 9-article agreement was signed under the title of "Agreement respecting the Coast Trade of Korea"\(^1\), which entitled Japan to rights of navigation along the coasts and in the rivers of Korea for the purpose of trade. Although it thus appeared to have little to do with fisheries, the facts were otherwise, as may be seen from what happened in three years' time.

In 1908

By means of military victories over China in 1895 and Russia in 1905, Japan successfully removed the two main obstacles in the way of her attainment of a monopoly over Korea. Thus, by 1908, Korea had been a Japanese protectorate for three years. The relationship of equality having thus ceased to exist, Japan felt it simply pointless to remain bound by the series of treaties that had been made with Korea before the change of circumstances in her favour. In the context of fishery relations, this new aspect of the situation was reflected in the form of Japan's proposal to integrate all existing agreements - "outdated due to advanced technology" - into one simple and comprehensive instrument.\(^2\)

As a result, there was signed in October 1908 an agreement, the title of which is sufficiently suggestive of the changed relationship of the two states: "Agreement between the Korean Government and the Residency-General of Japan regarding the Fishing Industry of the Subjects of Korea and Japan."\(^3\) This 4-article agreement did not designate the localities of

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3. BFSP, Vol. 101 (1907-1908), p. 1032; came into effect on November 11, 1908, simultaneously with the Korean Fishery Law and its Enactment (cf. footnote below).
Korean and Japanese fishing in any regional terms, but in such all-inclusive and reciprocal terms as "on the coasts, in the bays, and on the rivers and lakes" (Art. 1). The agreement of 1889 as well as all other ones relating to inter-fishing were annulled (Art. 4), with the exception of the provisions on consular jurisdiction for Japanese fishermen in Korea (Art. 3). It should also be added here that the idea of concluding this agreement originated on the occasion of the drafting by the Japanese Residency-General of a Korean fishery law, and its enactment, both of which were promulgated on November 11, 1908. ¹

The above law and its enactment consisted of 16 and 27 articles respectively, and were in fact the first legislative measures for the regulation of the fishing industry in Korea. Fishery was divided into five different categories, each classified according to the type of its operation and grounds (Art. 2); and the right of fishery duly obtained was instituted as a property right (Art. 5). It can not be overlooked, however, that these were drafted by the Japanese Residency-General for a purpose which was not easily perceived even by those who were to enforce them, still less by those against whom they were directed. What the drafters had in mind was - and they were successful in their efforts - to allocate the Korean fishing grounds in a deliberate way, that is, the coastal areas to Koreans with non-power vessels and the near and distant sea to the Japanese with power vessels.

¹ The Japanese version of the texts may be seen at pp. 774-779, Vol. 41-1 (1908), NGB., titled the Korean Fishery Law (Law No. 29) and the Enactment to the Korean Fishery Law (Ordinance No. 72, Ministry of Agriculture, Commerce and Industry).
Chapter 8 - Fisheries Dispute

1. Background

With an announcement issued on January 18, 1952, entitled the "Presidential Proclamation of Sovereignty over the Adjacent Seas", Korea placed under her control certain areas of the seas adjacent to her territory. It was not only a declaration of sovereignty over the continental shelf but also an establishment of exclusive conservation and fishery zones around the insular and peninsular territories of Korea. It should not be overlooked that the declaration was made at the height of the Korean War (1950-1953), "urged by the impelling need of safeguarding, once and for all, the interests of national welfare and defense". The line of demarcation thus defined in the announcement reached varying distances from the shores, extending to some 200 miles at the farthest on the east side. For the simple reason of geographical proximity and for the serious reason of political-economic interests, Japan regarded herself as almost the only, and certainly the immediate, party to be affected by the consequences of the Korean measures, and within 10 days (on January 28) made her reaction felt in the form of a diplomatic protest with resort to the principle of the freedom of the high seas. Thus began the famous Korea-Japan fishery dispute, which had to undergo a 14-year period of sheer futility (1952-1965) before it was finally settled in 1965 by means of a treaty together with four other major issues.

1. The Preamble of the Proclamation.
2. The other problems were: basic relations, property claims, the status of 600,000 Korean nationals in Japan, and the return of art objects to Korea.
pending between the two states.

Of these five issues, the controversy over fishery rights was the greatest obstacle in the way of restoring relations between them and was naturally the last to be agreed upon in the extremely painstaking course of negotiations. Because of its peculiar nature, a treatment of this dispute which proceeded simply on the basis of what was said in the above proclamation could not fail to reach superficial conclusions as to the legality or illegality of such measures. The whole issue was in fact deeply set in an extra-legal frame. This had been repeated often enough by the legal minds and practices on both sides of the Korea Strait, each side having been inevitably spurred by the overtones of strong national sentiments. A proper understanding of the dispute, however, is not possible without first looking into what had, up to the time of the Korean announcement, taken place in connexion with the fishery relations between these two unfriendly neighbours.

a. Fishery Restrictions in Japan (1945-1952)

During the period of Allied occupation (1945-1952), Japanese fishing was placed under certain restrictions imposed by the Occupation Authorities up to the time immediately before the restoration of her sovereignty on April 28, 1952, when the San Francisco Peace Treaty came into effect. The restrictive measures were implemented by means of what came to be called the "MacArthur Line", by which the fishing activities were limited in terms of the period, area, instruments and species designated. The building of fishing vessels was also under control. At the beginning, it was not a simple restriction, but was a complete prohibition of fishing
operations by order of the Allied Powers on August 20, 1945, given for reasons of military security immediately after Japan's surrender on August 15. This was not specifically intended to prohibit fishing, but was a general order placing all navigation craft at a standstill.

The post-war food crisis in Japan being what it was, however, the restrictions had to be eased at an unusual frequency, especially during the first two months. The decree of September 14, the first of a series, permitted fishing vessels of limited capacity to operate within 12 miles of the coast. But the first significant extension of the fishing zone was made on September 27, which permitted fishing in the areas eastwards to 150 degrees of east longitude and southwards to 30 degrees of north latitude. This was informally called the first extension, and the line of delimitation thus drawn the MacArthur Line. The second large-scale extension was made on June 22, 1946, when the areas were increased eastwards to 160 degrees of east longitude and southwards to 24 degrees of north latitude; and the third took place on September 19, 1949, when the extension reached the central Pacific as far eastwards as 180 degrees of east longitude. Finally, by May 1950, tuna fishing was allowed as far south as the Equator. The line of demarcation on the west between Korea and Japan, could not change to any significant extent because of the narrowness of the Korea Strait.

At this point, it is of much interest to note that, the occupational

venture and enthusiasm of fishermen being what it is throughout the world, especially that of Japanese fishermen with their traditional supremacy in trade, the Line was not much respected by the fishermen of Japan, in spite of frequent warnings by the enforcing authorities and the occasional seizure of their fishing boats by Korea and China. Up to 1965 when the Korea-Japan fisheries treaty was signed, 326 Japanese fishing vessels with 3,904 fishermen were seized by Korean coast-guards for violation of these restrictions and the Korean proclamation of 1952. Out of these, 94 vessels with 1,120 fishermen were captured before 1952. It is also noteworthy that, despite these frustrating circumstances for the Japanese fishing industry as a whole, fisheries production had recovered very nearly to the level of the pre-war peak of 1936, by the end of 1951 - 4 months before the restoration of her sovereignty.

b. The San Francisco Peace Treaty (1951)

The problems of fisheries in Japan did not, however, attract much interest or concern from foreign states up to 1950, except in the way of controls by the Occupation Authorities and the occasional seizure of fishing boats by the two neighbours of Japan. The years from 1945 to 1950 were, therefore, a period of rehabilitation through internal efforts. It was not until the advent of the war in Korea in June 1950 - within 5 years

1. The decline in fishery production in Japan began after 1937, when the Chinese war broke out and Japan had to concentrate on war efforts. For further details of the post-war fishing industries in Japan, cf. Japan Year Book, ibid.; and The Japan Annual, Tokyo, 1954, pp. 234-238.
of the end of the Second World War — that the Allied policy towards Japan found itself under pressure from the new developments in the Far East, especially in China, and in consequence had to undergo a substantial change in a direction not hitherto contemplated. This change was finally materialised in the form of a treaty of peace with Japan. Indeed it is in this treaty that the major issues in the relations between Korea and Japan since 1951 have their legal origin. For this reason, a discussion of the Korea-Japan fishery dispute makes it necessary, first of all, to examine (albeit briefly) how the Korean problem was dealt with in the treaty itself as well as in the process of its negotiations.

From the beginning, Korea unmistakably realised that the consequences of the treaty then under preparation would doubtless determine the course of her future relations with Japan, and directed strenuous efforts towards obtaining all possible assurances that her problems would be given fair treatment in the provisions of the treaty. When, at the initiative of the United States, the treaty negotiations had made rapid progress and the Anglo-American draft of July 12, 1951 was informally notified to Korea, she reacted very promptly by forwarding her official views to the United States in the form of a memorandum on July 13. One of the 10 points in the Korean statement, which included some extravagant claims, was on fishery relations with Japan:


A definite clause must be provided in the treaty with Japan in regard to the fishery demarcation line between the two nations.¹

As far as the fishery problems were concerned, this move was prompted by a lively anticipation on the part of Korea that the abolition of the MacArthur Line upon the coming into effect of the peace treaty would liberate the fishermen of Japan from all the limitations thus far imposed on them, and that they would then, in all probability, fill the fishing grounds around Korea as they did before and exhaust the fishery resources in Korean waters to the point of seriously depleting an essential source of food for Korea. This concern was further aggravated by the undeniable fact that the highly advanced fishing techniques of Japan defied (as they still do) any comparison with those of Korea. This was so not only in narrow terms of actual fishing techniques, but also with regard to the capacity of fishing vessels and indeed in every aspect of the fishing industry as a whole.

Encouraged by the provisions of the Anglo-American draft relating to Korean problems and aware of the gravity of the issues pending settlement with Japan, Korea - in the midst of a war for survival - continued earnestly to try to ensure that her requests were reflected in the draft of the treaty. The above memorandum of July 13 was followed by a second one on July 22 and by a third on July 28. Each of these later memoranda (consisting of 5 and 3 points respectively) was substantially the same as the first one, except in respect of the economy and clarity of the language used. Reference to fishery problems in each was invariably persistent.

The anxiety of Korea over this issue can be seen from the extravagant way in which it was mentioned in the third memorandum:

(3) Japan should agree to the continued existence of the MacArthur Line until a new fishery treaty is concluded between the two nations.¹

These efforts of Korea were aimed at avoiding problems before they arose rather than allowing them to develop and grow in complexity. All the circumstances of the negotiations favoured the expeditious conclusion of the treaty; and, in the event, Korea neither gained as much as she had hoped nor lost as much as she had feared from the terms affecting her particularly. From the point of view of Korea, the treaty could at best achieve little more than providing the legal grounds on which her problems might be settled by means of direct negotiations with Japan, and it was precisely this that she had intended to avoid, being not unaware of what that would then entail.

Apart from other provisions, the importance of the two articles in the treaty directly related to fishery problems, and therefore of obvious relevance to the present discussion, warrants their quotation in full:

**Article 9:** Japan will enter promptly into negotiations with the Allied Powers so willing for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

**Article 21:** Notwithstanding the provisions of Article 25 of the present Treaty, China will be entitled to the benefits of Articles 10 and 14(A) 2; and Korea to the benefits of Articles 2, 4, 9, and 12 of the present Treaty.²

Whether Korea's aspirations were fulfilled or not, her standpoint

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1. Min, on cit., p 93; Tong-A Ilbo (Korean Daily), July 28, 1951.
2. Article 2: territorial liquidation; Art. 4: property claims; Art. 9: fisheries agreements; Art. 12: trade relations.
was only that of a potential beneficiary. In this connexion, it is also deemed appropriate to quote one of the major architects of the treaty, in order to ascertain the viewpoint of the benefactor. The following passage very aptly represents the attitude of the Allies towards the Korean problem in the course of the treaty negotiations:

Article 21 makes special provision for Korea. The Republic of Korea will not sign the Treaty of Peace only because Korea was never at war with Japan. It tragically lost its independence long before this war began, and did not regain independence of Japan until after Japan surrendered. Many individual Koreans steadfastly fought Japan. But they were individuals, not recognised governments.

Nevertheless, Korea has a special claim on Allied consideration, the more so as it has not yet proved possible for the Allies to achieve their goal of a Korea which is free and independent. Korea is, unhappily, only half free and only half independent; and even that fractional freedom and independence has been cruelly mangled and menaced by armed aggression from the North.

Most of the Allied Powers have been seeking to make good their promise of freedom and independence and, as members of the United Nations, to suppress the aggression of which Korea is the victim. By this treaty, the Allies will obtain for Korea Japan's formal recognition of Korea's independence, and Japan's consent to the vesting in the Republic of Korea, of the very considerable Japanese property in Korea. Korea will also be placed on a parity with the Allied Powers as regards post-war trading, maritime fishing and other commercial arrangements. Thus the treaty, in many ways, treats Korea like an Allied Power.

c. The Need of Fishery Provisions in the Peace Treaty

Korea was not alone in the kind of anxiety that led her to believe that abolition of the MacArthur Line would simply lead to an influx of Japanese fishing vessels into the fishing grounds around Korea.

eventually resulting in the virtual extermination of marine resources, and that preventive measures were therefore indispensable. This anxiety was sufficiently justified by the fact that the Japanese fishermen have long since regarded the Korean waters, especially the southwestern areas, as abundant in resources and vulnerable to unfettered exploitation, to say nothing of the convenient shortness of their distance from the west coasts of Japan. This concern was rightly shared by all the fishing states that surround the Pacific; and it was by no means without foundation. The pre-war practice of Japan regarding fisheries on the high seas was the cause for this unusual concern on the part of the Pacific states, which found it to be in their interest to introduce into the treaty of peace provisions to the effect of those finally adopted in Article 9.

At the time of drafting the treaty, influential factors were memories of Japan's abrogation in 1940 of the North Pacific Fur Seals Convention, her reluctance to join international efforts for the regulation of whaling, and her 'invasion' of the salmon fisheries off Alaska and the pearl fisheries in the northern waters off Australia. So the preparatory period of the treaty witnessed the resurgence of a chorus of opposition from every fishing state of the Pacific area to the conclusion of a peace treaty without incorporating in it effective measures to prevent the recurrence of the omnipresence of Japanese fishermen.

1. Convention between Great Britain, the United States, Japan and Russia, respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean, signed at Washington, July 7, 1911. Text in: British and Foreign State Papers, Vol. 104 (1911), p. 175; and AJIL, 1911 Supplement, p. 267. Japan's abrogation was based on the allegation that the increased stock of seals was now causing damage to Japanese fishing in the Pacific.

The strongest opposition arose in the northeastern sphere of the Pacific where the fishing industries of the United States and Canada had already experienced a heated controversy in the late 1930's when Japan launched a survey of the Alaskan salmon fisheries under a 3-year plan beginning in 1936. The appearance of the Japanese in the Bristol Bay seems to have been seriously misunderstood by the oversensitive fishery interests on the coasts as being an actual commercial fishing operation, carried out under the pretext of a survey and in disregard of the conservation measures taken by the coastal states. The exaggerated reports coming from the sea caused a considerable stir on land, resulting in the introduction of abortive bills in the Congress, angry diplomatic exchanges, and even the threat of direct violence to the Japanese 'invaders'; and Japan had to retreat in 1938 with an assurance to the United States of her withdrawal from the controversial areas. Contributory to this great commotion was

1. Details of this case are given by Larry Leonard, International Regulation of Fisheries (Washington, 1944), pp. 121-136; briefly by Joseph W. Bingham, The Continental Shelf and the Marginal Belt, AJIL, Vol. 40 (1946), p. 175; and, with reference to the abortive bills introduced in the Congress in connexion with the extension of maritime jurisdiction, by Philip G. Jessup, The Pacific Coasts Fisheries, AJIL, Vol. 33 (1939), pp. 129-138. The following series of abortive legislative initiatives are symbolic of the serious attempts in the United States to extend maritime jurisdiction over the continental shelf without actually employing the term "continental shelf", which was not then received as a legal term. Bills introduced to the Congress by Bone (S. 2679, 1937; S. 1120, 1939); Dimond (H. R. 7552, 1937; H. R. 8344, 1937; H. R. 883 and H. R. 3661, 1939); Copeland (S. 3744, 1938); Wallgren (S. 1941, 1942); McNary (S. 271, 1943); Bailey (S. 930, 1943).

It is also interesting to note an example of the exaggerated reports wirelessed from the sea to those on land by the infuriated captain of an American schooner to his brother in May 1938 (quoted by Jessup and Leonard from Pacific Fisherman, Vol. 36 (1938), p. 17): "Bering Sea covered with Japanese boats and nets north of Black Hills. No cutters around. We have God-given instinct to shoot straight. Please ship dozen high power rifles and plenty ammunition ...."
also the anti-Japanese sentiment among the people of North America, which began to increase anyway because of Japan’s military invasion of China in July, 1937. In fact, the aftermath of this controversy was such that, far from fading away, it persisted and became vividly operative as one of the motives which prompted the famous Truman Proclamation of 1945.

Fearing the probable return of the Japanese upon restoration of their sovereignty, the General Conference of the Pacific Northwest Trade Association proposed restrictive measures against Japanese fishing by adopting a resolution in April 1950 that "no peace treaty should be entered with Japan by either Canada or the United States until and unless definite and binding commitments are made by Japan which will adequately protect the interests of Canada and the United States in their coastal fisheries not only within but beyond territorial waters." This proposal was followed by another one in the name of the Pacific Fisheries Conference, which resolved in November of the same year that "in the treaty of peace with Japan, or in a separate treaty to be concluded prior to or at the same time, suitable treaty provisions be made which will ensure that Japanese fishermen will stay out of and husbanded the fisheries of the North Pacific Ocean which have been developed by the United States and other countries of North America."

After all, the controversy seems to have been more for prevention than for cure. On the part of Japan, however, it would have been extremely difficult to justify the motive of the survey of the Alaskan salmon fisheries, aside from resorting to the freedom of the high seas, as they did and always do, and insisting that the purpose was purely for survey without violating the international law of the sea.

Australia was equally serious in her endeavour to avail herself of this opportunity to seek protection for her pearl fisheries by averting a resumption of the pre-war competition with the Japanese. Her efforts in this regard do not, however, appear to have been very successful, because her claims to rights of exclusive fishing in her continental shelf were not heeded by Japan, but were invariably refuted under cover of the freedom of the high seas.

Another group in more immediate and direct opposition consisted of Canada, Indonesia, the Netherlands and Norway. Their concern was expressed directly at the San Francisco Peace Treaty Conference of 1951 in the form of a confirmation of, or a proposal to amend, the draft of Article 9 which, to them as well as to Korea, did not appear to be sufficiently effective to limit Japanese fisheries. It is of much interest to note that none of


2. U.S. State Department Publication, *op. cit.*, Record of Proceedings:
   a. The delegate of Canada: "Under its terms, Japan agrees to enter negotiations with interested Allied Powers for the conclusion of a fisheries agreement. Canada will implement this provision by attempting to reach an agreement with the Japanese Government on this matter with the least possible delay. It is, however, the understanding of my Government that until such official conventions are negotiated with both Canada and Japan signatories, the undertaking, expressed in the exchange of letter on the fisheries question between Mr. Toshida and Mr. Dulles under the date of February 7, 1951, the effect of which was extended to cover all interested parties on July 13, 1951, will still obtain" (p. 217)

   b. The delegate of Indonesia: "Likewise, my Government would have proposed amendments to......especially Article 9 which, in the opinion of my Government, should contain a provision to the effect that, pending the conclusion of arrangements relating to fishing and fisheries on the high seas, Japan......should abstain from fishing in the seas between and surrounding the Indonesian islands without special permission from my Government." (p. 222)
these objections or proposals was taken into proper consideration, and the article was adopted as drafted. Undoubtedly Japan's potential and past record as a fishery state led to the inclusion in the treaty of peace of special provisions regarding high seas fisheries, which otherwise would not have been treated together with other issues proper in such treaties. In this particular case, however, the gravity of the issue seems to have prompted the fear that its amplification in the treaty would probably entail prolonged negotiations, whereas it was considered preferable that the treaty should be concluded without unnecessary delay. This point was made clear by what Dulles said upon his return home from Japan in March 1951:

It has been suggested that, particularly along the Pacific coast, the treaty of peace might itself attempt permanently to regulate the problem of Japanese participation in high seas fisheries. To attempt that would almost surely postpone indefinitely both the conclusion of peace and the obtaining of the results which are desired.

Three questions were directly addressed to the Japanese delegate, including the following:

**Question 3:** "Is the Japanese Government prepared promptly to enter into negotiations with Indonesia for the conclusion of agreements providing for the regulation or limitation of fishing and the conservation of fishing on the high seas...?" (p. 223)

The reply by the Japanese delegate: "The answer to these questions is 'yes' since that means in our opinion a fair interpretation of Articles 14 and 9 of the treaty..." (p. 278)

c. The delegate of the Netherlands: "Regarding Article 9, I will confine myself to the observation that the present wording does not set any limitations to Japanese fishing activities......Therefore, future bilateral or multilateral agreements......will not find a basis for such limitations in this treaty. This omission is to be regretted.

"Here one will have to depend largely upon Japan's willingness to arrive at a fair agreement..." (p. 197)

d. The Norwegian delegate: "The Norwegian Government has noted further that the draft treaty places no restrictions on Japanese whaling......An increase of the Japanese whaling fleet......would evidently contribute to that over-expansion of the whaling industry which already has had such deplorable results." (p. 142)
No quick results can be won by attempting to make the peace treaty into a universal convention on high seas fishing.

When I was in Japan, the Prime Minister advised me that the Japanese Government stood ready to negotiate fisheries agreements as soon as peace restores to Japan the possibility of independent sovereign action. He said that in the meantime the Japanese Government would prohibit Japanese nationals and Japanese vessels from going into conserved fisheries in all waters, and he mentioned specifically those off the coasts of the United States, Canada, and Alaska.

The Japanese now see the importance of avoiding practices which in the past brought Japan much ill will, and if we can hold to our tentative timetable, there can, I believe, be an early and equitable settlement of this thorny problem.

When, in the early stage of drafting, it became apparent that the restriction of Japan's high seas fisheries was going to be one of the major issues in the treaty, she made a timely demonstration of her willingness to enter into negotiations for fisheries agreements with other states so willing. In the light of subsequent developments in fishery relations with Japan and other states including Korea, the diplomatic exchanges between Japanese Prime Minister Yoshida and United States Special Ambassador Dulles have such particular and important significance that they merit partial quotation at some length here:

1. Cf. the Yoshida-Dulles correspondence quoted hereinafter.
3. Already in September 1950, the United States disclosed a 7-point principle which would be reflected in the treaty, one of the points reading: "5. Political and Commercial Arrangements: Japan would agree to adhere to multilateral treaties dealing with narcotics and fishing." USSD Bulletin, Vol. 23 (1950), p. 881.
The Japanese people largely depend upon fish for their food supply. They have, therefore, a very special interest in the conservation and development of fisheries. The Japanese Government recognises that the problem of conserving and developing fisheries located in the high seas is a difficult one and that these fisheries may be quickly exhausted unless there is concerted action for the conservation and development of fisheries. We are aware of the fact that certain countries have adopted international agreements and voluntary self-denying ordinances to prevent the exhaustion of high seas fisheries which are readily accessible to fishermen of their own country, and that if these conserved fisheries were to be subjected to uncontrolled fishing from other countries, the result would be international friction and exhaustion of the fisheries themselves.

Accordingly, the Japanese Government will, as soon as practicable after the restoration to it of full sovereignty, be prepared to enter into negotiations with other countries with a view to establishing equitable arrangements for the development and conservation of fisheries which are accessible to the nationals of Japan and such other countries.

In the meantime, the Japanese Government will, as a voluntary act, implying no waiver of their international rights, prohibit their resident nationals and vessels from carrying on fishing operations in presently conserved fisheries in all waters where arrangements have already been made, either by international or domestic act, to protect the fisheries from overharvesting, and in which fisheries Japanese nationals or vessels were not in the year 1940 conducting operations. Among such fisheries would be the salmon, halibut, herring, sardine and tuna fisheries in the waters of the eastern Pacific Ocean and Bering Sea.

I trust that the foregoing voluntary arrangements will constitute convincing evidence of the desire of the Japanese Government to deal with this whole problem in an equitable manner, designed to promote good will and the mutual interest of all who, directly or indirectly, depend for their livelihood upon fishing in the high seas.

Undoubtedly this act of Japan manifesting her willingness was most welcome to Dulles, as may be seen from his reply of the same date:

"It is a good omen for the future that the Japanese Government should already now indicate its willingness voluntarily to take measures for the protection of conserved fisheries,"
The primary idea of the above Yoshida correspondence was to clarify beyond doubt Japan's willingness to enter into negotiations for fisheries treaties with the United States and Canada in particular, and to abstain from fishing in certain areas of the high seas in the meantime. But its redundancy of language gave rise to adverse effects which caused it to be susceptible of interpretations by other states beyond what it had intended to convey. As far as Japan's fisheries agreements were concerned, therefore, it has cost, economically and otherwise, what would have been impossible to calculate in numerical terms. It has also caused, on numerous occasions, a considerable amount of effort and concern on the part of those Japanese fisheries negotiators whose responsibility it was to defend and justify Japan's high seas fisheries policy from a standpoint quite other than that suggested by the terms of the correspondence. It also aptly defines the necessity to respect the conservation measures taken by coastal states in the areas of the seas adjacent to them. Furthermore, it is interesting and ironical as well to note, in passing, that this letter almost unwittingly prophesied, at the same time, what would happen in Korea-Japan fisheries relations under the very circumstances it so sinisterly predicted.

d. The North Pacific Fisheries Convention (1952)

From its very beginning and throughout the whole period of the fisheries dispute between Korea and Japan, the North Pacific Fisheries Convention, concluded in 1952 among the three major fishing states of the Convention area, namely, Canada, Japan and the United States, had so dominantly affected the sudden advent as well as the tedious progress of the Korea-Japan battle of nerves, that a discussion of the background of this
dispute can not safely overlook the significance of this Convention. This is because it was the first case in which Japan, in compliance with Articles 9 and 21 of the Peace Treaty signed only two months before, brought herself face to face with the obligation to enter negotiations for fisheries agreements with the Allied Powers so willing and with Korea as well. Furthermore, mindful of what the automatic abolition of the MacArthur Line the following April would mean to her fisheries, Korea had to watch the progress of events with the utmost interest and vigilance.

In the meantime, on the basis of these developments and in co-ordination with Canada, the United States had been making preparations for a fisheries treaty with Japan, and in July 1951 made an enquiry whether Japan was ready to enter negotiations thereon. Hereupon, Japan not only replied in the affirmative, but also extended an invitation to Canada and the United States for a conference at Tokyo in November. At the same time it was made clear by a statement of the Japanese Government that her abstention from fishing as defined in the above Yoshida correspondence of February was in fact intended to be applied in all parts of the world, instead of being confined to the areas therein referred to. This confirmation was thought necessary to clarify the ambiguity, in the above letter, which was indicated by other states concerned with fisheries agreements with Japan.

The Tokyo conference which started on November 4, 1951 ended with the adoption on December 14 of the International Convention for the High Seas Fisheries of the North Pacific Ocean, which was signed by the participant

3. The Treaty came into effect on June 12, 1953; UNTS, vol. 205, p. 68.
states on May 9, 1952, after the coming into effect of the Japanese Peace Treaty on April 28, 1952. This Convention is one of the two important fisheries treaties of the early post-war period, the other one being the Northwest Atlantic Fisheries Convention of 1950, if importance is measured in terms of the novelty of devices for the regulation of international fisheries. In the case of this North Pacific Fisheries Convention, the new device it represented was what has since come to be called "the abstention principle", under which "special treatment is accorded to fisheries already fully utilised and fully conserved. Each signatory agrees to abstain from exploitation of specified fish stocks which are already exploited to the maximum by one or both of the other parties provided the latter are carrying out programs for the conservation of the stocks and agree to continue to carry out such programs. The Convention recognises three stocks, salmon, halibut, and herring, off the coasts of North America as meeting these conditions. Accordingly, by the terms of the Convention, Japan agrees to abstain from fishing salmon, halibut, and herring in specified waters off the coasts of North America, and Canada agrees to abstain from fishing salmon in the Bering Sea east of 175 degrees west longitude. Thus, for the first time, the so-called principle of abstention was incorporated in a tripartite international fisheries treaty.

The appearance of this principle, which signified the beginning of a new era in the international law of fisheries, was by no means an isolated device or a sudden invention, but was the outcome of a controversy between

Japan and the United States which had stemmed from the former's invasion of the Alaskan salmon fisheries in 1936. It was therefore a realisation, in the form of an international agreement, of what had ever since been so persistently sought by the proposers of the numerous abortive bills in the United States Congress, aiming at extending maritime jurisdiction for the protection of fishery resources in the controversial waters. In this context, the Truman Proclamation of 1945 with respect to coastal fisheries not only turned out to be the prelude to this principle, but also played the role of a link that maintained continuity between this international agreement and the earlier internal legislative attempts. Its arrival was also expedited by the turn of events in history, the defeat of Japan in the Second World War having decisively weakened her ability to prevent its coming. It was thus a three-stage escalation, that is to say, what was started at the Bristol Bay incident was revived in the form of a municipal executive proclamation and was finally materialised by the conclusion of a treaty with the very party because of whom the necessity of the extraordinary internal measures originated.

Fully aware of the inevitable consequences which would result from this treaty, Japan had to make every effort within her reach under the circumstances of the negotiations, to salvage whatever was there to be had from the situation under which her own choice was already so limited, thereby to obtain as much compromise as possible in regard to the extent of her abstention. This she had to do under the pressure of two impelling reasons, one internal and the other external. The internal reason was prompted from the significance of the treaty which was the first to be negotiated on an equal basis after her surrender six years before, as well as from its importance in determining the future course of her fisheries.
As serious was the external reason which had to do with Japan's abortive determination never to establish a precedent which would doubtless weaken her position, as actually did happen, in the negotiations for fisheries agreements with other states vigilantly awaiting their turn. From the record of proceedings, a few points may be indicated, in this regard, which seem to have undergone intensive or prolonged arguments in the course of the 40-day negotiations.

**Firstly,** a point of terminology: Japan was concerned about the implication of the term "waiver" (of fishing rights under certain circumstances, U.S. draft Art. I, I), which was in consequence replaced by "abstention", thereby to give it the impression of a voluntary act, not one under duress. It may be questioned whether this replacement makes any substantial difference in effect other than by way of rhetoric.

**Secondly,** with regard to the mandatory life of the treaty, the proposals of 15 years by the United States (draft Art. XII, 2) and 5 years by Japan (draft Art. XII) met each other halfway at 10 years (Art. XI, 2). This was an achievement on the part of Japan, but it turned out to be not necessarily so in reality, as is mentioned below.

**Thirdly,** it is a matter of great interest to note that the principle of the freedom of the high seas (which was - as it still is and will continue to be - a constant mainstay of Japan in every argument on the use of the sea) did not find its usual place in this peculiar treaty. By the nature of this treaty, it was removed from the Japanese draft (Preamble) on the grounds of its irrelevance in an agreement the primary idea of which was the conservation of fishery resources by means of abstention.

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1. See the end of this chapter.
Its incompatibility with the abstention principle is self-evident.

**Fourthly,** with respect to the obligation of conservation, the United States proposed (draft Art. I, 3) unilateral abstention of Japan from fishing certain stocks off the Canadian and United States coasts, having regard to the long-standing efforts of these two states to conserve them. Japan's objection to this proposal resulted in the compromise that the non-abstaining parties should also assume an obligation by continuing their conservation measures (Art. V, 2). There is not a grain of substance in this compromise.

**Fifthly,** regarding the stocks in the areas adjacent to the territorial waters of coastal states (U.S. draft Art. I, 1, c. proviso), Japan seems to have fairly successfully opposed recognition of the preferential claims of coastal states, probably in fear of the way in which it would be interpreted by other states, especially by some of her Asian neighbours. Instead, she had to agree to abstain from fishing certain stocks which she had not substantially exploited during the 25 years preceding the entry into force of the treaty (Art. IV, 1, proviso). Here, too, the opposition to one and the acceptance of the other did not make any significant difference. This was bound to be so, because it was the very stocks of fish thus referred to in the treaty that Canada and the United States were determined to protect, by means of the treaty, from being shared with Japan at random.

In this connection, however, it is of unusual interest to note that Art. I-2 stipulates: "Nothing in this Convention shall be deemed to affect adversely (prejudice) the claims of any Contracting Party in regard to the limits of territorial waters or to the jurisdiction of a coastal state over
In the sense that the existing arrangements of the coastal states, such as the Truman Proclamation in particular, could be regarded as such preferential claims, the only result of the above Japanese opposition should be said to have been the insignificant consequence that no further preferential claims would be introduced in the treaty. Furthermore, Japan's fear that this provision would eventually place her at a disadvantage in her fisheries relations with other fishing neighbours, Korea and Russia among others, was reasonably justified by what actually took place, that is to say, Korea employed it promptly and not infrequently, as did Russia afterwards, in defence of the legitimacy of her Presidential proclamation of 1952, to the considerable annoyance of Japan.

1. This paragraph is virtually identical, in wording and in heading, with the one in the Northeast Atlantic Fisheries Convention of 1949 when it made its first appearance in its present stereotyped form, and has since gained a fairly wide currency in many of today's fisheries treaties, bi-lateral and multi-lateral. Some other examples may be: Anglo-Russian Fisheries Agreement (Exchange of Notes, No. 1), 1956; Russo-Japanese Fisheries Agreement (Art. 1-2), 1956; West Pacific Fisheries Agreement between Mainland China, North Korea, Russia and North Vietnam (Art. 1-2), 1956; US-Japanese Fisheries Agreement (Exchange of Notes, Item 2), 1967; and Japanese-Mexican Fisheries Agreement (Art. 9), 1968.


b) Though not in direct reference to this provision, Russia is reported to have quoted the terms of this treaty as recently as during the 12th (1968) annual meeting of the Russo-Japanese Northwest Pacific Fisheries Commission, which was held in Moscow from March 1 to April 27 to determine the annual quota of salmon and tuna in the Convention areas. Japan's quota for 1968 was one of the lowest since the Convention was concluded in 1958. Russia's response to Japan's request to increase the quota seems to have been invariably to point to Japan's inability to present the same demand to Canada and the United States because of the abstention principle in the North Pacific Fisheries Convention of 1952 (Japanese Daily, "Yomiuri", April 21, 26, 27 - leader, and 28, 1968; The Times, April 19, 1968).
Sixthly, regarding the designation of stocks and areas for
Japanese abstention in the Annex, Japan demonstrated unswerving opposition
to the United States proposals such as she had never shown at any other point previously. Hereupon, the proposing party was also as persistent, if not more, for the simple reason that the raison d'être of the treaty itself was to be found nowhere else. Notwithstanding the heated tug-of-war which at one point jeopardised the whole prospect of negotiations, agreement was reached without substantial changes being made to the United States proposals, except that the proposed line of demarcation of Japanese abstention was moved eastwards by 5 degrees from 180 degrees of longitude to 175 degrees of west longitude. Japan's own proposal being 170 degrees of west longitude, this was another compromise in which each party met the other halfway.

Under the circumstances of the time when the treaty was being negotiated, Japan was in no position to resist incorporation of the new principle into an international agreement, her bargaining position under Allied occupation having been definitely weak, though not to the point of being under duress. Furthermore, there was little reason to dismiss the fear, on her part, that refusal to accept the unexpected intensity of the principle might affect, though not decisively, the Canadian and United States ratification of the Peace Treaty itself. In the face of a genuine aspiration to regain her sovereignty, of which she had been deprived for no less than six years, therefore, the problem of fishing rights in certain parts of the high seas had of necessity to be left in some obscurity.

1. Shortly before the opening of the conference, the Occupation authorities sent a memorandum to the Japanese government, authorising its delegation to act in an ad hoc sovereign capacity.
On the part of the sponsor of the principle, however, there was no
indifference or lack of consideration for the probable shock Japan would
have to absorb upon being presented with the new principle. In this regard,
it appears to have been probable that, even without Japan’s offer to assume
the functions of host, Tokyo would have been chosen anyway for the conference
site, in order for the other two contracting parties to enable their Japanese
counterparts to have readily available for it such detailed advice and
particulars as it would need to cope with the challenge. 1

The purpose of the present chapter would not require further
amplification of this treaty, but a brief addition about what has since been
taking place with regard to its practical aspects would place in better
perspective the informal relationship between this treaty and the Korea-Japan
dispute over fishing rights. When the treaty was made public in Japan,
there ensued bitter criticism by the general public who regarded the whole
arrangement as nonsensical. The Government had to make an enormous effort to
produce arguments to the contrary, which were based on its own unpersuasive
interpretations of the controversial points in the treaty. 2 With resort to
some rather ostentatious wording such as in the Preamble, (e.g., "...each of
the Parties should assume an obligation, on a free and equal footing, to
encourage the conservation....") it insisted, but without much success, on
its success in preserving in safety the central principle of the freedom of
the high seas. Needless to say, however, it was not long before the Japanese
fishing industry began to feel rather sorely the effects of abstention, even

2. Nichibeika Gyogyochoyakuno Kaisetsu (Observations on the Canada-Japan-US
Fisheries Treaty) by the Japanese Marine Fisheries Association, Tokyo,
1953, pp. 69, 72 and 74, in particular
though it could not be denied that, from the implications of the above Yoshida correspondence, there was sufficient reason to believe that the principle of abstention was of her own making, not without the knowledge of its eventual coming.

Be that as it may, long before the lapse of the initial 10-year mandatory life of the treaty, Japan regarded it as unduly overtaxing to continue to comply with the provisions and began to voice repeatedly the need to renew the treaty or even to terminate it in compliance with Sect. 2, Art. XL Thus, Japan has been literally exhausting every means to free herself from the spiderweb, and the negotiations at the annual meetings of the North Pacific Fisheries Commission are said to have been therefore as serious sometimes as those at the inception of the treaty itself. The grounds of Japan's growing dissatisfaction were finally recognised by the other two parties, who in turn agreed to open negotiations towards a new treaty. The drafts which were prepared by both sides still seem to contain elements that defy an easy compromise.

2. The Beginning and Progress of the Dispute

a. The Presidential Proclamation of Korea (1952)

When the Anglo-American draft of the Peace Treaty with Japan was informally brought to the attention of Korea in the middle of July, 1951, she

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instantly realised that the difficult problems pending solution between Korea and Japan were going to be left to settlement by direct negotiation, contrary to what she would have preferred to do. Indeed she had striven to avoid such an outcome. Hereupon, a two-phase measure was immediately launched by Korea to meet the newly-emerging situation. While, as has been mentioned earlier, seeking by means of diplomatic representations to the United States to have her views reflected in the final provisions of the treaty, she made some advance preparations for the direct talks with Japan to be held upon the entry into force of the treaty.

When, in September, 1951, the treaty was finally concluded and entitled Korea to the benefits of its Articles 2, 4, 9, and 12, by virtue of Article 21, she became imbued with a euphoric mood of optimism, feeling herself as one of the honorary Allies and assuming that the future talks with Japan would take the form of another treaty of peace. This peculiar sentiment led her to expect further that the talks would have to be marked, at their outset, with an apology from Japan for the flagrant act of exploitation of Korea for 35 years. In point of reality, the extent of unfriendliness which dominated the relations between the two states at the time could have reasonably warranted the otherwise inappropriate name of a 'peace treaty'.

As a matter of fact, a Korean diplomat in Washington had been quoted as saying that "The Republic of Korea is scheduled to conclude a peace treaty with Japan in due course of time after the signing of various treaties in San Francisco. But no preparations are under way at this moment for the treaty." These indirect overtures on the part of Korea led Japan to

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clarify her own view on this matter by announcing that "Japan does not think it necessary to conclude a separate peace treaty with Korea... because there was no war between the two nations. What, therefore, the Japanese Government should do is to recognise the Korean Government." 

It was in this prevailing atmosphere that the preparatory talk between Korea and Japan started in Tokyo on October 20, 1951, with the Allied Command represented by its observer. The Command had earlier (October 9) requested the Japanese Government to enter into negotiations with Korea for an agreement on the problems of nationality and treatment of the 600,000 Korean nationals in Japan, and had actually been instrumental in achieving the opening of this first meeting of the two states. It should be noted at this point that the initial agenda for the meeting did not include problems relating to fisheries: there were two issues which required more immediate settlement, namely, the legal status of Korean residents in Japan, and the return to Korea of the 663 shipping craft which were operating in Korea as of August 1945 but were taken to Japan thereafter in violation of the Allied proclamation. No agreement was reached during this meeting which lasted till December 22, apart from the adoption of the agenda for regular talks, which included five important issues: basic

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2. These are some of about 2,000,000 Koreans who were mobilised for various war efforts in Japan during the war. By its memorandum of January 9, 1951, the Allied Command classified them as "Special Status Nationals", together with the nationals of 14 other states then in Japan. The chaos arising from the obscurity of the nationality of these Koreans was one of the problems which called for the immediate attention of Korea, Japan and the Command, when the coming into force of the Peace Treaty was imminent. When, in January 1959, Japan announced the repatriation of some of these Koreans to North Korea, the relations between the two states assumed a new stage of ill-will and deadlock.
relations between Korea and Japan, the legal status of Korean nationals in Japan, the return of shipping craft, fishery problems and property claims.

Though the fishery problems were not discussed at the initial stage of the preparatory talks, but were to be brought up in due course, it was in fact during this meeting that the dispute over fishing rights gained a rather sudden, even improvised, momentum. The Korean delegation noticed the extremely serious atmosphere in which the negotiations for fisheries agreements with Canada and the United States were under progress. As a matter of fact, both conferences were taking place in the same premises, the Japanese Ministry of Foreign Affairs. When Korea suggested the opening of discussions on fishery problems, Japan evaded the issue by means of a pretext that she was not yet prepared to touch upon them. The abruptness with which Japan responded to the proposal for the discussion of this particular issue led to a fatal mistake on the part of Japan. The Korean delegation was not unaware of the fact that Japan had gone so far as to invite Canada and the United States for negotiations on fishery problems, which were now being discussed on the other side of the same building at the same time.

Furthermore, it was not entirely beyond the ability of the Korean delegation to imagine what would result from the talks with the other guest delegations. The situation could not fail to be a matter of grave concern to the Koreans, who returned home with obvious suspicions and anxiety about the motive underlying Japan's evasion of this serious problem. As far as Korea was concerned, therefore, it was more than apparent that this attitude of Japan was not only in plain disregard of Articles 9 and 21 of the Peace Treaty, but was also in direct contradiction to what she had earlier manifested through the Yoshida correspondence and the statement that
confirmed it. In contrast, however, the Korean advances for fishery discussions appeared to Japan to be a calculated act of brutal exploitation of the circumstances under which she had to be negotiating fishery issues with the other two delegations in the eve of the restoration of sovereignty. Therefore it was no time, on her part, to overburden herself with another fishery negotiation, still less with one of her former colonies.

Shortly thereafter, that is to say, on January 18, 1952, to Japan's great surprise, was made the famous or notorious Presidential Proclamation of Sovereignty over the Adjacent Seas, which was hailed at home as a very timely and practical measure designed to forestall the undoubted influx of Japanese fishing vessels in the waters around Korea to the fatal detriment of Korean fisheries.

It is deemed appropriate to mention two points here in immediate connexion with the timing of and the need for the announcement. Firstly, it appears that its timing was not entirely arbitrary, but was reasonably related to the reported rumours in Japan to the effect that the Occupation Authorities and the Japanese Government had agreed to abolish the MacArthur Line around January 21, 1952. Secondly, from the standpoint of Korea, the eagerness with which Japan was awaiting the abolition of the MacArthur Line restrictions was extremely susceptible of identification with her undeniable avidity to exploit once again the rich fishery resources around Korea, which had been relentlessly subjected to constant overfishing by Japanese trawlers before the War but had barely been restored to productivity by virtue of the

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1. I. Y. Chung, "Legal Character of the Peace Line", *Sasangge* (a Korean-language politico-literary monthly), June 1960, p. 257. The MacArthur Line was finally lifted on April 25, 1952, three days before the entry into force of the Peace Treaty.
War and the MacArthur Line. 1

That the Alaskan fishing grounds were to be closed to the Japanese as a result of the treaty with Canada and the United States, was also contributory to deepening the Korean concern, as was Japan's evasion of opportunities to treat fishery problems during the two-month preliminary meetings earlier. Spurred by the impelling need to preserve one of her richest resources in the face of these pressures, Korea found it to be in her interest to launch a provisional measure, pending negotiated arrangements with Japan through the coming talks scheduled to be held from February of the year. On the part of Japan, this measure or its timing was therefore interpreted to have been tactically designed for the purpose of strengthening the bargaining position of Korea at the talks.

Thus, the immediate motive of the extravagant Presidential announcement can be deduced from the three factors that underlay the circumstances of Korea at the time. Firstly, the treaty of peace with Japan having been signed and awaiting its entry into force the next April, the restrictions on Japanese fishing by means of the MacArthur Line were bound to be lifted, thereby leaving the seven seas of the world again at the mercy of

1 In this connexion, it is interesting to note the opinion of a foreign observer (Burdeek H. Brittin, International Law for Seagoing Officers, U.S. Naval Institute, 1956, pp. 78-79): "As a matter of interest, the area which the Koreans are attempting to protect furnishes fishing only during the winter months when the fish migrate from the China Sea to the Yellow Sea. During the years of occupation of Korea by Japan, this area was so badly depleted by the Japanese beam trawlers that the fishing in the area was practically unproductive due to the destruction of bottom feeding grounds and sea grasses. During the war period and the period of occupation, nature had rectified this destructive overfishing and productivity was largely restored. Therefore, from the conservation angle, the Korean Government has a point in advocating the necessity of controlling fishing in the area. It might be also added that Korean fishermen do not use trawling methods but rely on hand-fishing which has no bad effect on fishing grounds."
Japanese fishermen, to whom the Korean seas had always been a playground. Secondly, Japan failed to show the slightest sign of willingness to enter "promptly" into negotiations for a fisheries treaty with Korea, while, on the other hand, she had invited Canada and the United States to conclude a treaty with terms which, in the judgment of her own people, made it unique as an unequal fisheries treaty. To Korea, this indicated nothing but an intolerable duality of standards in Japan’s compliance with the provisions of the Peace Treaty. Thirdly, Korea was left with no practical alternative to employ towards protecting her marine resources which, as a 'bonanza' in its state of ever-readiness for exploitation, always fell prey to Japanese fishermen across the Strait.

The basic attitude of Korea to these considerations was further linked with another factor that was peculiar to her circumstances of the time. To a divided peninsular state at the height of a war against the other half, it was entirely unwelcome for her surrounding seas to be studded with fishing vessels of a foreign state to which the war was merely a diverting sight to watch. In the light of what was actually taking place in connexion with the defence and security of Korea, it was by no means an unfounded anxiety. 1

Understandably, the first state to produce an immediate reaction to the Korean proclamation was Japan, which through an official of her Foreign Ministry announced its formal disapproval of the Korean claims, on January 25, relying in support of its views on the principle of the freedom

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of the high seas. On January 27, the Korean Government issued a statement in which it rejected the Japanese charge, which turned out to be only a prelude to the first formal protest to the effect that the Korean measure was utterly untenable under any of the accepted ideas of international society and therefore could not be acquiesced in by the Japanese Government.

This was only the beginning of what appears in retrospect to have been a form of political 'table tennis', with charges and counter-charges exchanged in rapid succession and in pointed language between the two states. The list of representations from both sides over a period of more than a decade reached an impressive length. If the Korean announcement of January 27, quoted above, was intended to be a legal justification of Korea's claims, the following statement of February 8 by President Rhee, after whom the line of demarcation was named, was a political justification, and it was

1. The statement reads in part:

"Variegated analyses are being made as to our recent proclamation of sovereignty over adjacent seas. However, there are well-established international precedents - such as President Truman’s proclamations on coastal fishing and on natural resources on and beneath the continental shelf, and other proclamations of the same character made by the governments of Mexico, Argentina, Chile, Peru and Costa Rica.... The protective seas as designated in the proclamation bear radically different significance from the MacArthur Line. While the MacArthur Line limits the area within which Japanese fishing boats are allowed to operate, Korea’s protective seas have been established to set limitations on the Koreans as well as Japanese, in order to prevent the exhaustible type of natural wealth in the said area from being exploited.... Proclamation of protective seas does not mean extension of territorial waters into the high seas. The special character of parts of the high seas that at the same time constitute adjacent seas has been recognized by many international bodies including the United Nations Commission on International Law. We do not lack in precedents in the international community which recognize the special status of adjacent seas. Those who still adhere to the 19th century concept of the freedom of the high seas, claiming absolute freedom of fishing on adjacent seas, must be considered as being unaware of the evolution of international law."
since then that the name "Rhee Line" was replaced by a more rhetorical one, "the Peace Line", which afterwards became part of the every-day language of the people of Korea.

......The main object in establishing a boundary line on the seas is to maintain peace between Korea and Japan, and I believe Japan will naturally comply with this. During the past 40 years the seas adjacent to Korea have been ruled with exclusive predominance by Japan. Korea, however, wishes to forget completely all past ill feelings and coexist with Japan. In spite of our sincere efforts to enter into a relationship that will be mutually advantageous, the Japanese, who still cannot discard their greed, are crossing the MacArthur Line, and many fishing vessels are entering our adjacent waters and taking the resources in the sea. We cannot endure the situation as it now is. Unless this is prevented, there is a fear of conflict between the two countries becoming unavoidable. In order to prevent any unfortunate incident between the two countries, there is a positive need to have a boundary line which has been drawn impartially and with the agreement of both countries. I hope that the Japanese will understand this fully, as in the case of the MacArthur Line, and hold a friendly conference with us. But if Japan does not understand our true intention, then that will be nothing other than a disclosure of Japan's ambitions......

In a way that was most typical of his anti-Japanese sentiment, the President not only hinted his firm determination to enforce his proclamation, but also prophesied the futility of any attempt to settle the issue by means of a legal argument.

Notice was served on Korea also by the United States (February 11, 1952), the Republic of China (June 11, 1952) and Britain (January 11, 1953), each disproving of the Korean claims. The Peace Line issue being predominantly concerned with the relations between Korea and Japan, the protests from these states do not appear to have in any way affected the attitude of Korea. She probably regarded them as the routine practice of some states which, at each foreign extension of jurisdiction into the high seas, repeat for the sake of the record their usual formula to the effect that they reserve the rights of their nationals in all waters beyond the
limits - usually three miles - established by international law.

In the eventful series of events in connexion with or in parallel to this proclamation were two happenings which deserve to be mentioned at this point. One was the establishment by the United Nations Command of the Sea Defence Zone around the Korean peninsula on September 27, 1952. The other was the proclamation by the Korean Government of the Fishery Resources Conservation Law on December 12, 1952. The Sea Defence Zone was "strictly a war time measure designed to safeguard the Korean coast line.... and to bar the Korean coast to enemy agents and contraband." Ships were therefore subject to search by the United Nations forces if they entered the blockade, which was delimited by what was called "the Clark Line" after the Commander, in the fashion of the MacArthur Line and the Rhee Line. It encircled Korea within the Peace Line limits, starting at a point twelve miles offshore from the Russian border on the east coast and reaching a point twelve miles from the Manchurian border on the west. Naturally this was a measure which was as welcome to Korea as it was unwelcome to Japan. In fact, Japan showed definite concern about it, especially in connexion with the ambiguity of its relationship with the Peace Line as well as with Japanese fishing within the Zone. Japan's effort to argue that the Zone as specified in the announcement should have nothing to do with fishing was of little avail, due to the peculiar circumstances under which the measure had to be taken, and her fishing vessels were therefore definitely barred from entering it.

Russia was another party that protested (November 4, 1952) to the United States, placing "upon the Government of the United States the entire

2. Clark, op. cit., p. 156.
responsibility for the consequences of this new act of aggression."

Ironically enough, however, it was the Korean Government that exhibited the most emphatic objections with regard to the Zone at the time it was lifted on August 27, 1953, upon the advent of the armistice in Korea on July 29. The public statement of an official spokesman of the Korean Government, as quoted by Clark himself who termed it "the pay-off line" to him, gives sufficient proof of Korea's sensitivity to matters relating to her coastal waters, whether for fishing or for defence:

We have always regarded General Clark as highly competent and a responsible commander. It is, therefore, ironical and regretted that now, near the conclusion of his major mission against communism, he should be unaware of what a valuable present large areas of unguarded seas can be to the enemy.

...The Sea Defence Zone should be restored immediately, for protection of Free Korea and the UN. The Republic of Korea will, of course, for protection of itself and its friends, continue to enforce the Peace Line proclaimed by President Rhea.

Events took place accordingly, when Korea demonstrated that she meant business with regard to what was implied in this statement by actually proceeding to seize Japanese fishing vessels from the early part of September of that year. The seizures had been going on even before this incident, but from this time it became an activity of the Korean patrols of enhanced importance. Tension mounted sometimes to the point of calling for emergency meetings in the Japanese Government and sometimes creating a mad race of Japanese fishing vessels to leave the Peace Line areas within the time declared by the Korean patrols. Eventually Korea formed a Coast Guard on January 1, 1954, and Japan armed hers.

The Fishery Resources Conservation Law was a follow-up measure

2. Ibid., pp. 156-157.
3. UN Doc. St/Leg/Sen. B/6(1957).
that was prompted by Korea's need to strengthen juridical procedures, in
order to be able to deal with the violators of the Presidential proclamation,
in a way they were thought to deserve. The areas defined as the
jurisdictional waters in the Law were therefore identical with the areas
covered by the Peace Line. It was required thereby that a fishing permit
should be obtained from the Korean Government for any fishing activity in the
said areas, under pain of penal servitude or imprisonment not exceeding three
years or a fine not exceeding the amount designated, with the additional
penalty of the confiscation of the vessels and the catch. The growing
deterioration in the relations between her two allies appears to have
constantly embarrassed the United States, which showed definite concern over
the promulgation of this peculiar law passed without a single dissentient in
the National Assembly.

b. The Korea-Japan Talks (1952-1965)

In the post-war period of Korean history - the years between the
liberation of Korea from Japan in August, 1945, and the downfall of Syngman
Rhee's Liberal government in April, 1960 - were characterised by an
unmitigated hatred and distrust of Japan among the people of Korea. This
should be said to have been a natural consequence and to be expected in a
nation that was dominated by a foreign power with hardships comparable to few
other examples throughout the history of colonisation. The historically
accumulated resentment was further enhanced by the inspired anti-Japanese
overtures of the government under the leadership of Syngman Rhee, to such an

1. Y. S. Kim, White Paper on Korea-Japan Talks, Republic of Korea Government,
1965, p. 205.
extent that Japan had to be hated for Korea to be loved in the every-day life of the people of Korea.

Compelled by the pressing need on both sides to settle the five pending issues, however, during the latter part of the above period there were made four serious but not necessarily sincere attempts at agreement, each of which merely typified a battle of inspired words with endless speeches of denunciation. There simply did not exist the calmness of atmosphere or maturity of judgment in which any of the problems could have been discussed without the frustrating interference of national prejudices.

Consequently, it had to be only after a drastic change in the Korean government in April, 1960, as a result of internal irregularities, that the incompatible relations between the two extremely unfriendly neighbours began to assume a new aspect towards possible reconciliation. Every issue was nevertheless so complicated in its inherent nature and so vulnerable to the variety of caprices invented by both states sometimes purposefully and sometimes accidentally, that it took five years of strenuous efforts and enormous patience to end the fourteen years of futile and sporadic negotiations and conclude a treaty in 1965, thereby marking a new phase in Korean-Japanese relations. Therefore, it can not be denied that, on the part of the Korean government, the treaty was concluded only with an extraordinary courage and determination in the face of considerable opposition from within, stemming from the deep hatred of Japan rooted in the heart of the people of Korea.

It is deemed appropriate to give here a sketch of the progress of the talks, in order to describe the atmosphere in which the problems of fishing rights were argued in the guise of negotiations or settlement. As the fisheries treaty was part of a package deal that covered virtually all
major issues pending agreement, with the exception of the dispute over the
ownership of the Tokdo Island (Takeshima), it would not be proper or
possible in this summary of the seven Korea-Japan Talks to separate the
progress of the fishery dispute from that of other issues.

The First Talk was held in Tokyo, as were all the subsequent ones,
from February 15, 1952, pursuant to the agreement reached during the
preliminary sessions the year before. At the time of its opening, it was
the uncommonly naive and optimistic expectation of both sides to conclude
the negotiations by the time the Japanese Peace Treaty was to come into
force the following April. It would have been a miracle, however, had there
been any single point on which both sides could come to agreement, since the
talk was opened in the height of mounting animosity in Japan due to the
Korean proclamation of what came to be called the Peace Line in January.
The difference of opinion on every issue under discussion could have hardly
been wider. Heated arguments took place on problems regarding fishing
rights, property claims and basic relations.

Needless to say, the controversy over fishing rights was focussed
on the allegations of the legality of the Peace Line by Korea and their
denial by Japan, each ingeniously stretching international law to suit its
own interests. There was no point of contact, the tirades from each side
crossing that of the other, thereby creating constant parallels in the
course of the arguments. The Korean claims to the rights of properties to
which the Korean authorities and individuals were entitled from Japan by
virtue of Article 4 (a) of the Peace Treaty were unexpectedly challenged by
a Japanese counter-proposal of similar but legally untenable nature.

1. Details are given at p. 240.
had to withdraw it at the preliminary session for the Fourth Talk in December 1957, when it was made clear by the United States that the same provision in the same article of the Peace Treaty entitled Japan to no such claims from Korea. With regard to the problems of the basic relations between Korea and Japan, Korea insisted on the necessity to liquidate the past by means of Japan's admission of her wrongful rule of Korea, whereas Japan persistently preferred the discussion of future relations only. Of these controversial issues, however, it was the Japanese claim to the rights of her properties in Korea that led this First Talk to a rather sudden disruption.

Thus, the first formal meeting of the two states was little more than a confrontation of extremes, so that when its last session rose on April 25 with the patience of both sides exhausted, no one in either state showed the slightest sign of surprise at the extent of the deadlock reached.

The Second Talk, which was held from April 15 to July 23, 1953, after a year's interval from the First, was somewhat accidental in the way it was opened. As the deterioration of relations between Korea and Japan were undoubtedly detrimental to the efforts of the United Nations to end the war in Korea as well as to the conduct of the United States Far Eastern policy, it occurred to General Clark, then commanding the United Nations Forces in Korea, that "a face-to-face informal discussion between Rhee and Prime Minister Yoshida of Japan might help pave the way for a fishing agreement that would be beneficial to each country, and therefore to my country." ¹

As it was beyond everybody's imagination at that time that Rhee would ever permit any Japanese to set foot on Korean soil, except perhaps to deliver a most genuine apology to him for the past, however, Clark made a

¹ Clark, op. cit., p. 158.
cautious approach to invite him to Tokyo as his personal guest and was successful in having his invitation accepted to his surprise. Thus, it was during his first visit - after Korean independence - to Japan in early January, 1953, that, following a sociable talk with Yoshida, Rhee made a welcome statement expressing his hope of a reopening of the Korea-Japan talks. He made it clear that his offer was based on his realisation of the immediate necessity for the two states to join efforts to meet the challenge of communism. In this context, it was quite likely that he would not have made the overture but for the occasion of his visit to Tokyo.

Among the five routine issues to be argued about in this talk, this time it was the problems of basic relations and fishing rights that caused the fragile meeting to stumble upon another deadlock scarcely less rigid. On the part of Korea, it was thought that the first step to be taken in the way of restoring friendship between the two states was for Japan to declare null and void the forced treaty of annexation concluded in 1910. This Korean demand was squarely matched by Japan's insistence on Korea's immediate removal of the Peace Line as the first such step. Ironically enough, neither side failed to be sufficiently aware of the inevitable stubbornness with which the unacceptable demand of one would be entertained by the other.

The only slight progress made throughout the three months

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1. Rhee's objection to any Japanese entering Korea for any purpose was such that on September 30, 1952, he dismissed his Prime Minister Chang for having received in his office a Japanese friend, formerly Mayor of Seoul, in the guise of a sailor. At the slightest hint of the likelihood of meeting some Japanese leaders during his visit in Tokyo, Rhee responded to Clark: "...it can be arranged...but not included in the program as a part of the purpose of my visit. I would like it announced as only a friendly visit...with no political significance attached to it" (Clark, op. cit., p. 159).
confrontation was on the problem of the legal status of Korean nationals in
Japan, which was of relatively modest importance, compared with the above two
grave issues. When the negotiations for an armistice in Korea were nearing
an agreement, which actually came into force on July 27, 1953, and in
consequence the Korean question was going to be discussed at a political
conference to be held in Geneva the next year, Japan proposed to suspend the
talk, in order to determine her attitude on the basis of the outcome thereof.
Thus, the second attempt at settlement of the problems ended with another
failure against the expectation of very few.

The Third Talk, which started on October 6, 1953, at the request of
Japan, was probably unique in the shortness of period it lasted, the length
of deadlock it entailed, and the acrimony of argument it witnessed. When, at
the advent of the armistice in Korea on July 27, 1953, the Sea Defence Zone
around the Korean peninsula was withdrawn by the United Nations Command on
August 27, there followed a marked increase in the number of Japanese fishing
vessels boldly crossing into the Peace Line areas. This aroused Korea to the
point of issuing warnings to the Japanese vessels to leave the areas under
pain of being dealt with as might be deemed necessary. The Korean navy was
eventually aroused to activity in the middle of September and actually
proceeded to clear the sea by seizing Japanese vessels. When the sweeping
operation continued into October, Japan found it opportune to reopen the
suspended talks with Korea, in order to seek settlement of the Peace Line
problem.

Japan made a proposal during this talk of establishing a negotiated
conservation zone in place of the Peace Line, which was not at all acceptable
to Korea. Though the meeting was thus to concentrate mainly on the fishery
problems, the discussion of this issue nevertheless made no significant
progress. Instead, it was the problem of property claims that played a fatal role in this talk and finally caused it to end very suddenly on October 21, only two weeks after its resumption. In the Property Claims Subcommittee, Japan repeated with renewed persistence her claims to the rights of her properties in Korea, and in consequence the argument reached an unforeseen stage of excitement on the part of both delegations. The acrimonious debate culminated when the Head of the Japanese Delegation, Kuboda, committed a grave indiscretion with a disastrous slip of the tongue, entirely unbefitting to the occasion and the capacity in which he was speaking. On October 15, he made history in the tedious narrative of the Korea-Japan negotiations, by saying at one point that the Cairo Declaration was merely an expression of the war-time hysteria of the Allies, that the Japanese rule of Korea was beneficial to Japan as well as to Korea in her economy, and that Korea's independence before the conclusion of a Japanese peace treaty was in violation of international law.

When Japan failed to comply with Korea's strict demand to withdraw the intolerable blunder, the last session of the talk rose on October 21, only to be followed by a deadlocked period of no less than over four years up to April, 1958, when the next formal talk was held. The tragi-comedy was mildly referred to in Japan as "the Kuboda speech incident", but in Korea as "the Kuboda's insane speech incident", and commanded numerous headlines in both states thereafter.

The Fourth Talk was opened on April 15, 1958, after a deadlock of

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1. It was only on December 31, 1957, that Japan, having by then felt enough weight of its harmful effect on her effort to restore friendship with Korea, formally withdrew this infamous speech as well as her claims to the rights of properties.
over four years, and was suspended twice before it had to be closed in
April, 1960, when the outbreak of student demonstrations in protest against
alleged irregularities in the general election in the previous March led to
the downfall of Syngman Rhee's Liberal government in Korea. The long period
of deadlock that preceded the opening of this Talk and the two abrupt
suspensions that took place during its futile period of two years signified
the fragility and frigidity of the relations between the two nervous
neighbours.

The historical and geographical relationship of the two states made
it always impossible for either of them to remain indifferent to the growing
deterioration of friendship. The series of almost daily happenings on both
sides were enough cause for concern and exaggeration, and neither side was
ever short of excuses to blame the other for what would have not mattered at
all even between states with twice as much cause for resentment in past
relations. During the period of deadlock, there were four problems which
particularly prevented the restoration of friendly relations, but which gave
rise to the necessity to resume negotiations, regardless of the prospect of
agreement being so slim, namely, the argument over the ownership of Tokdo
Island, the repatriation of Korean stowaways detained in Japan and Japanese
fishermen convicted in Korea, the so-called Kuboda incident, and Japan's
claims over her properties in Korea.

Regarding the Tokdo Issue, Japan proposed in September, 1954, and
Korea opposed in October, that the issue be brought to the International
Court of Justice. On the part of Korea, it was thought entirely senseless
to dispute over the ownership of what indisputably belonged to her: she even
refused to regard the matter as a dispute as such.

Regarding the repatriation of detained nationals of both states,
Japan demanded of Korea in August, 1955 the release of over 500 fishermen imprisoned in Korea for having violated the Peace Line. Korea responded with a similar demand for the release of over 1,400 Koreans detained in Japan mostly on the grounds of illegal entry. In fact, the efforts of both sides to secure the release of these victims of their political confrontations led to the holding in April, 1953 of negotiations preparatory to the Fourth Talk. By this time, the number of prospective repatriates reached 1,433 Koreans and 691 Japanese, and the negotiations closed with a signed agreement on their release, but failed to be carried on due to a snag arising from Japan's insistence on the forceful repatriation to Korea of law-breaking ex-convicts.

Regarding the Kuboda speech incident and Japan's claims to the rights of her properties in Korea, it was made emphatically clear by Korea in the course of the above preliminary negotiations that the immediate step towards resuming the deadlocked talks must first of all be for Japan to withdraw the Kuboda speech and her property claims from Korea. Finally, it was on December 31, 1957 that, convinced of the seriousness of the Korean attitude in this regard, Japan made a formal withdrawal of the infamous speech of her senior delegate four years before and the claims over her properties in Korea. It was also on this date that the United States sent a clarification to Japan to the effect that, in accordance with Article 4 (b) of the Peace Treaty, the latter was not entitled to the rights of her properties in Korea.

The two-year period of the Fourth Talk was as eventful as that preceding it. Immediately after its opening, Japan made two friendly

1. The texts of the agreements are at pp. 221-222, No. 3 (1959), JAIL (Japanese Annual of International Law).
overtures of some significance. On April 16, 1958, in compliance with the
promise made on December 31, 1957, she returned part of the works of Korean
art, 106 in number, which had been taken out of Korea during the annexation.
Even though, compared with what was probably still to be returned, the
number was thought to be no more than the tip of the iceberg, the idea was
genuinely welcomed on the part of Korea. It was also during this Fourth
Talk that Korea's tenacious demand for the return of the 'looted' art objects
in Japan led to separating the issue from that of property claims and
instituting it as an independent item of the agenda. The other act of
friendship was the visit in May of Japanese Prime Minister Kishi's personal
envoy to Korea, who happened to be the first Japanese ever to be admitted in
Korea in an official capacity and granted an audience of President Rhee, the
greatest hater of Japan that the history of both countries ever saw. During
his stay in Korea, Mr. Yatsugi made public Kishi's statement to the unexpected
effect that "the annexation of Korea by Japan was a matter of regret." In
the light of the then prevailing state of the relationship of the two states,
this was received in Korea not without surprise and wishful thinking.

The somewhat friendly mood which was created by these advances of
Japan, however, failed to survive the outbreak of a comparatively
insignificant event in Japan in July, 1958. The Japanese government decided
to free part of the Korean detainees on the politically delicate grounds of
their preference to return to North Korea. For obvious reasons, Japan's
attitude towards North Korea was, just as it still is and will be as long as
Korea remains divided, one of the issues to which the Republic of Korea could
hardly be more sensitive. In few other ways could Japan or, for that matter,
any other state with diplomatic relations with the South, bring a complete
coolness into their relationship than the slightest hint of what might be
regarded as a "two-Korea" attitude. Thus, the Talk was suspended for almost three months until October 1, when it was resumed and without any significant progress continued till its winter recess scheduled from December 20 to January 25, 1959.

As, in the meantime, an extremely acrimonious political controversy between the two states had made its untimely appearance, the talk was not resumed as had been scheduled on January 26, 1959. Korea was infuriated by the Japanese move to carry on what was called a voluntary repatriation to North Korea of some of the Korean nationals resident in Japan. When the Japanese Foreign Ministry announced on January 30, and the Cabinet confirmed on February 13, that the repatriation would be treated as a purely humanitarian issue based on the principle of free choice of residence, and would therefore proceed as planned, irrespective of the Korea-Japan negotiations on other issues, in coordination with the International Red Cross, the attitude of Korea towards Japan assumed a new aspect of frigidity. In consequence, notice was served on Japan that the planned Talk would be discontinued, that the measures to enforce the Peace Line against Japanese fishermen would be enhanced, that the repatriation of detained Japanese fishermen would be suspended, and that the repatriation of Koreans to North Korea would be interfered with by force.

On the part of Korea, however, it was not long before she found herself face to face with the difficulty of resisting the unforeseen side-effects resulting from the above gesture of unrealistic political face-saving. Firstly, the repatriation to North Korea was going to be carried on in disregard of the Korean protest, and the fact that the International Red Cross was involved in it could not be overlooked. At this point, the United States also felt it to be in her interests as well as those of Korea and Japan to
reverse the growing deterioration in the relations between Korea and Japan. Secondly, over and above these relatively less direct reasons was one which compelled Korea to reconsider the whole situation: her economy began to be seriously affected by Japan's retaliatory trade policy towards Korea. Thus, on July 30, Korea proposed to Japan an unconditional resumption of the suspended talks.

Though the Fourth Talk was thus reopened on August 12, 1959, progress was slow because of Korea's continued dissatisfaction on the issue of the repatriation of Koreans to North Korea. The only substantial progress made was the agreement on the exchange of hostages - Korean stowaways in Japan and Japanese fishermen in Korea - and the resumption of trade relations, as a result of which the detainees were exchanged by early April, 1960, and Japan agreed to import rice from Korea in late June. Upon the outbreak of the student revolution on April 19, 1960, which led to the removal of Syngman Rhee from presidency, the Talk closed automatically.

As far as the problem of fishery relations was concerned, the tedious period of this Fourth Talk also failed to bring forth any improvement; on the contrary, it actually worsened the situation. The cause of this failure lay in its predominant importance over other issues. Japan was cautious not to bring it to the fore at a time when the general relations of the two states were not favourable enough to do so, inasmuch as Korea showed little sign of compromise. The only operative part of the negotiations regarding the fishery issue was Japan's proposal on October 28, 1958 - and Korea's refusal on December 12 - of a provisional fisheries agreement at the Fisheries and Peace Line Committee of the Talk. It was based closely on the so-called six-plus-six principle unsuccessfully discussed at the first Geneva
The Fifth Talk opened on October 25, 1960, in the form of preparatory discussions for the regular talks, but had to be discontinued without any regular sessions held, due to the outbreak of another revolution in Korea on May 16, 1961. Though, in terms of achievement, this Talk also ended as a failure, the negotiations that took place during its short period of seven months were carried on in an atmosphere entirely different from that of any other previous talks. In this sense, it marked a turning point in the previously futile relations between Korea and Japan, from an unyielding confrontation to a possible compromise.

The collapse of Syngman Rhee's 13-year old regime in April, 1960, as a result of the unselfish and unassisted uprising of students meant the collapse of a permanent barrier between Korea and Japan. Needless to say, therefore, the events in Korea sufficiently warranted an uncommonly great excitement on the part of Japan, for the simple reason that, intrinsically complicated as the issues pending solution between the two states were, they were further aggravated by the invincible obstinacy with which the historical anti-Japanese resentment of Korea was so positively dramatised into the everyday life of the Korean people by the extraordinary influence of a particular individual.

The drastic change in the internal politics of Korea gave rise to a marked improvement in the attitude of both states in their relations towards each other. Even the provisional regime that was in charge of the Korean government as a care-taker, pending formation of elected leadership under the

new constitution being prepared, voiced immediately after the revolution its wish to restore friendship with Japan. On her part, Japan was also quick to avail herself of the new situation to explore the possibilities of securing the release of her detained fishermen, opening her diplomatic mission in Seoul, and sending her press and commercial interests to Korea. When the new government was formed in Korea in August, 1960, Japan's approach to Korea was more realistic. In the form of a good-will mission, her Foreign Minister paid an official visit, and in doing so became the first envoy of ministerial rank to set foot in Korea since Korea gained her independence from Japan in 1945. It was then that both sides agreed on the resumption of the Korea-Japan talks in October.

The talks thus resumed on October 25, 1960 continued until December 21, when it went into recess, resuming on January 25, 1961. The agenda included the usual items discussed in previous talks. Understandably, the discussions at this Fifth Talk were more productive in substance, and their atmosphere more amicable. For the first time, there took place an item-by-item discussion of the eight-point Korean proposal on the issue of property claims, and the negotiations on the fisheries issue turned to examining the problems of marine resources.

When the talks had barely progressed to its operative stage, there began to develop some concern and scepticism within Korea that the new government - still immature and somewhat unstable - might drift into committing itself too deeply and too early in its negotiations with Japan. The seemingly dormant feeling of distrust of Japan was making its persistence felt, and this soon culminated in the adoption of a four-point resolution on Korea's diplomacy with Japan by the Lower House of the Korean National Assembly on February 3, 1961, to the great disappointment of Japan. The resolution
emphasised that the negotiations with Japan should be conducted only gradually; that the Peace Line should be enforced for purposes of defence, conservation of marine resources and protection of fishing interests; that formal relations should be restored only after the settlement of other pending issues; and that economic cooperation should be confined within the current scope of trade, pending solution of other problems with Japan. In brief, this was only a revised version, if not merely a repetition, of Syngman Rhee's daily utterances.

Japan was deeply disturbed by the resolution, particularly by its second item, and made its attitude clear that further negotiations would be difficult unless she were assured of progress in the issue concerning the Peace Line and fisheries. Undoubtedly, this was to both sides the most important of all problems - so much so to Korea that she felt it impossible in the circumstances to enlist sufficient internal support for it, and therefore decided to concentrate her efforts on the problem of property claims. After all, both sides had to compromise at this stage; and they agreed to deal with both issues simultaneously. The negotiations continued with a view to terminating the preliminary sessions in May and opening regular talks in September of the year. It was on May 16, 1961 that another revolution - this time by the military - frustrated the schedule.

The Sixth Talk began on October 20, 1961 and continued sporadically until April, 1964, with an interval between March and August, 1962. If, as had been mentioned, the first four Talks were entirely fruitless due to the gross prematurity of political atmosphere, and the fifth due to the short tenure of power of the new government, it was during this penultimate sixth Talk that substantial progress towards agreement was made. The achievement at this Talk can rightly be attributed to the new method of negotiation by
both sides. For the first time since the talks began in October, 1952, the deeply-embedded obstacles that rendered abortive all the talks at a functional level were removed by means of top-level political negotiations.

Immediately after the revolution in May, 1961, the military régime clarified its attitude towards the Korea-Japan problems by stating that it would seek a solution in accordance with the preference of the people. Apparently this was only a non-committal statement, but its implications were nevertheless sufficiently indicative of the interest of the new government in one of the most complicated issues in the affairs of the country. Subsequent announcements were also in favour of reopening the suspended talks with Japan, and in July formal representations were made to Japan, expressing Korea’s willingness to restore friendship.

As for Japan, it was a matter of keen interest to witness a second change of government within thirteen months in Korea. At each change, of course, her immediate concern was to discern as soon as possible the solidarity of the new régime as well as its prospective policy towards her, and then to explore by means of formal representations the possibility of opening her diplomatic mission in Korea. Unlike the occasion of the first revolution of 1960 when she made this approach within a fortnight, this time it was over two months after the May 16 revolution before she felt assured of the future of the new government and repeated the usual inquiry on July 21. On each occasion, Japan’s attitude was for the most part determined after that of the United States, which was ambiguous and even sceptical during the first few weeks of the second revolution in Korea.¹

¹ It was not until July 27, 1961 that the United States government made its formal statement in support of the military régime in Korea.
Obviously, the advances from both sides were more promising this time than ever before. The above inquiry of Japan regarding the opening of her mission in Korea was not met with a flat refusal as it had been on previous occasions, but with a compromise proposal on August 20 that, instead of a resident mission which would adversely stimulate the feeling of the people of Korea, occasional official tours of Japanese government personnel would be found agreeable. Furthermore, the initiative for the resumption of the suspended talks was taken by Korea, whose envoy made a semi-formal approach to Japan in early September and stated that the deadlock over the Peace Line and fisheries problem would be made easier of solution once Japan demonstrated her good intentions with regard to Korea's claims to property rights. Subsequent negotiations led to agreement that the Talk would be reopened around September 20 and that each delegation would be headed by an influential personality of each country.

So far as Korea was concerned, however, these positive gestures and overtures were not to be taken as signifying the disappearance of the past resentment against Japan, but rather reflected the genuine desire of the new regime to normalise relations with Japan in the face of ineluctable necessity. The persistence of a certain fragility in the relations between the two states can be seen from the fact that the occasional detention of Japanese fishermen on the grounds of having violated the Peace Line continued to take place at irregular intervals and that resumption of the Talk failed to take place as had been planned (that is, around September 20), for the unusual reason that the personality selected by Japan to head her delegation - the Chairman of Japan's Trade Promotion Association - did not meet Korea's expectations. In its determined efforts to normalise relations with Japan, therefore, the new Korean regime found itself face to face with a situation
of more than ordinary difficulty. On the one hand, it had to avoid the appearance of being too expeditious in its appeasement of Japan, in order to be able to call on reasonable support internally, and, on the other hand, it had to make advances sufficient to bring Japan to the point of agreement.

The talk finally reopened on October 20, 1962, when it was agreed that the negotiations at a functional level would be coordinated with those at a political level. The friendly atmosphere of the negotiations was greatly enhanced by Korea's release of all the Japanese fishermen on November 5, which was an overture genuinely welcomed by Japan. This was done shortly before the top-level talk on November 12, which was occasioned by a visit to Tokyo of General Park, then heading the military regime, on his way to the United States. After his meeting with Japanese Prime Minister Ikeda, he confirmed in his statement what had been mentioned by the Korean envoy earlier, that is, that the Peace Line issue would be dealt with flexibly once Japan gave proof of her good faith with regard to Korea's property claims.

Thus the negotiations at a functional level continued till February, 1962, with a year-end recess in between. In late February, both sides felt the necessity to cope with the limitations of functional level negotiations by referring the issues to a meeting at ministerial level. It was during the middle of March that the Foreign Ministers of both states met in Tokyo, in order to seek agreement on the problems of fisheries and property claims. However, the differences of opinion regarding the property claims were such that the meeting lasted less than a week, the only point agreed upon being the desirability of another political level contact as soon as possible. Hereupon, the negotiations at both levels came to a standstill, which was followed by repeated detentions of Japanese fishermen by Korea.

In the course of the five-month deadlock, Japan made strong
representations to Korea, requesting her to discontinue the detention of her fishermen and to resume functional level discussions as a means of paving the way for political level negotiations. It was on August 21, 1962, that both sides met again. The progress of the talks was, however, so slow and precarious that, on September 14, General Park once again made his attitude towards the Korea-Japan problems unmistakably clear by stating that, for the success of the negotiations, the statesmen of both sides would have to be prepared to withstand a certain amount of criticism from their own peoples. Thereafter, he dispatched a special envoy to Tokyo for a decisive talk on the property claims issue with Japanese Foreign Minister Ohira on November 12. ¹

This meeting ended with a basic agreement regarding the amount of claims which Japan would provide Korea, as specified in what came to be called the Kim-Ohira Memorandum, thereby virtually settling in principle one of the hardest problems (next to fisheries problems) between Korea and Japan.

When, towards the end of 1962, the issue of property claims was thus virtually settled, leaving the procedural aspects to further negotiations, the talks naturally focussed on the fisheries issue. On December 5, both sides produced their drafts of fisheries agreements. The proposal of Korea meant that most of the Peace Line areas were designated as her exclusive fishery zones, which considerably disappointed Japan. In the same way, the Japanese proposal of a 12-mile fishery zone was unacceptable to Korea. This time again, as at the time of the Fourth Talk in 1958, Japan based her proposal on what was the suggestion which attracted most discussion at the second Geneva Conference in 1960, namely, the Canadian and United States proposal.²

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1. The Korean envoy was C. P. Kim, then Director of the Korean Central Intelligence Agency.
As both sides showed little sign in their proposals of making concessions, the negotiations on a fisheries agreement did not make any significant progress until June, 1963. Between February and April of 1963, discussions had centred on the problems of marine resources and the status of the fishing interests of both states, and thereafter on a new aspect, namely, the problems of fishery cooperation. On July 7, Korea made another proposal, which consisted of two major points: to modify the exclusive fishery zone to the limit of 40 miles, and to specify the scope of fishery cooperation in terms of the amount of $178 million. Japan's persistence in her original 12-mile principle remained unchanged upon this new proposal of Korea. Instead she suggested that, if Korea accepted the proposed limit of 12 miles as an exclusive fishery zone, she would favourably consider the problems of fishery cooperation as well as methods of joint control in the areas adjacent to the exclusive zones.

At this stage, there took place another meeting of Foreign Ministers in late July, with a view to seeking agreement on the obdurate issue of fisheries. This was, however, another abortive contact, as was proved by the joint communiqué issued upon the completion of its two simple sessions: it merely re-defined the differences of opinion between the two states. There was disagreement on the method of approach to the problem. Korea insisted that the problems of fishery cooperation and the measures of joint control in the areas adjacent to the exclusive zones should be discussed prior to any attempt to negotiate the breadth of the inner zone, whereas Japan insisted on the reverse order of discussion. It was self-evident why the two states set

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1. The details of this abortive proposal are given in the April 5, 1964, issue of the Minju Kongwhabo (Democratic Republican Forum) - the weekly organ of the party in power, published in Seoul.
such store by the order of discussion.

After the above meeting of Foreign Ministers in July, 1963, both sides had to concern themselves principally with internal affairs, in preparation for the coming general elections in November. In the case of Korea, the elections were to mark the transfer of government by the military to elected civil leadership before the end of the year. In anticipation of greater progress in the negotiations between the new governments, however, the functional level talks continued to deal with technical problems on fisheries into the early part of 1964. In the meantime, the new régime in Korea affirmed its willingness to resume the talks with Japan as soon as possible.

Towards the end of February, 1964, Korea suggested the opening of a higher level meeting to be attended by cabinet level personnel in charge of fisheries affairs, for the sole purpose of breaking through the limitations of functional level negotiations. Japan agreed to holding such a meeting on the understanding that there was no disagreement regarding the four points on the basis of which the fisheries issue had been expected to be settled and that the meeting would therefore be devoted to reaching agreement on the method of applying these points to the geographical and operational peculiarities of the region. The four points which were eventually incorporated into the fisheries treaty of 1965 were as follows:

1) international practice would be duly respected; 2) the maximum sustainable yield of resources would be maintained; 3) control of fishing would be based on fair and practicable methods; and 4) the past situation regarding the safety of operations would be taken into due consideration. Obviously, this was a device by which Japan aimed at removing the Peace Line, inoffensive as the language that clothed it might have been.
The meeting of the two Ministers of Agriculture and Forestry was held from March 10 to April 6, 1964. At it discussions were less reserved and more exhaustive than ever before. The important points considered included the method of drawing base-lines to define the proposed exclusive fishery zone of Korea around the ever-controversial Island of Cheju, the method of regulating operations within the proposed joint control zone, and the nature of fishery cooperation. Due to the intrinsic difficulty of the issue and the growing intensity of internal opposition in Korea to the talks as a whole, however, the meeting had to be discontinued and therefore no decisive agreement was reached.

From late March, 1964, tension mounted in Korea, when students rose to oppose what they thought to be the "humiliating diplomacy" deployed by their government in its relations with Japan. The situation eventually worsened to the point at which the government had to proclaim martial law in June in order to restore peace. Thus ended another round of Korea-Japan talks rather abruptly.

The Seventh Talk - during which there was finally registered the historical conclusion of the 14-year old negotiations - was opened on December 3, 1964, and continued till June 22, 1965, when no less than 25 documents consisting of the five major treaties and annexed papers were signed or exchanged in Tokyo to the great relief of both states. The peculiar character of the Korea-Japan relations as well as the extraordinary tenacity and toil that had to be employed in the unpredictable course of the negotiations can be seen even from the colourful wording of the titles of the major treaties, namely, the Treaty on Basic Relations, the Agreement concerning the Settlement of Property Claims and Economic Cooperation, the Agreement concerning Fisheries, the Agreement concerning the Legal Status and Treatment
of Korean Nationals Resident in Japan, and the Agreement concerning Cultural Assets and Cultural Cooperation. ¹

As it was the tense internal situation in Korea, not the differences of opinion at the negotiations, that unexpectedly terminated the previous round of negotiations in early April, 1964, there was no change in the wishes of both states to resume the meeting as soon as practicable. On the part of Korea, there were other gradually impelling reasons for which the expeditious conclusion of treaties with Japan was deemed very desirable. The new cabinet of Japan also made it clear that it would seek to bring to an end negotiations with Korea, as may be seen from Prime Minister Sato's speech to the Diet on November 21, 1964. Furthermore, it was also the earnest desire of the United States for Korea and Japan to restore friendship as soon as possible. In the circumstances, therefore, all that was necessary for the resumption of the talks was the recovery of internal stability in Korea, which was realised in the early autumn of the year.

When the talks opened in early December, 1964, the discussions centred on the issues of basic relations, the legal status of Koreans in Japan, and fisheries. The discussions on fisheries in December mainly took the form of confirming what had been agreed upon at the ministerial meeting in March and April. Intensive discussions were held at the beginning of the next year,

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¹ The English translations of the Korean and Japanese texts are in *International Legal Materials* (Basic Relations: No. 1, Vol. 4, Jan., 1965; Fisheries: No. 6, Vol. 4, Nov., 1965; Property Claims, Legal Status, and Cultural Assets: No. 1, Vol. 6, Jan., 1966) and *JAIL* (No. 10, 1966), the latter including most of the annexed documents as well. It should be pointed out, in passing, that a detailed enquiry into the agreements and annexes solely on the basis of either of the above English translations would have to proceed with awareness of the fact that they were produced by different translators - one by a Korean and the other by a Japanese. Further, the above texts are not identical in wording or phrasing and therefore require frequent comparison either with each other or with one or other of the originals, Korean or Japanese.
regarding the method of limiting the catch within the proposed joint control zones and the jurisdiction of fishermen violating the prospective agreement. Despite the devoted efforts of both delegations, however, the progress of the negotiations was not satisfactory, due partly to the restrictions on the authority entrusted to the negotiators.

At this stage, the determination of both governments to bring to an end the deplorable history of the prolonged talks was so resolute that on February 6, 1965, there was a meeting of Prime Ministers in Tokyo, at which means of expediting the negotiations were candidly explored. As a result, events took place in rapid succession thereafter. On February 18, the Japanese Foreign Minister paid a visit to Seoul for another meeting with his opposite number and made an apologetic statement in connection with Japan's past relations with Korea. On February 20, in Seoul, there was an historical initialling of the draft of the basic relations treaty. It was also agreed then that another meeting of Ministers of Agriculture and Forestry would take place in Tokyo from March, to expedite the fisheries negotiations.

The second ministerial talks on fisheries were held from March 3, and most of the difficult points were agreed upon before the end of the month. The fisheries dispute, which was a singularly frustrating obstacle throughout the whole period of the 14-year negotiations, having thus virtually come to an end, the remaining three issues also made progress as rapid. These developments led to the need for another meeting of Foreign Ministers in Tokyo, for the purpose of recapitulating all the agreements made in different committees of the talks. Finally, it was on April 3, 1965 that the drafts of the four agreements were initialled in Tokyo.

For the initialled agreements to be made final with regard to their formalities, there had to be procedural discussions for a further period of
over two months till June 22, 1965, when the actual signing took place in
Tokyo, thereby concluding an extremely difficult negotiation that started on
October 20, 1951. When the instruments of ratification were exchanged in
Seoul on December 18, 1965, the damaged friendship between Korea and Japan
gave way to a new era of cooperation. At this point, it may be noted that
this restoration of a friendly relationship is popularly referred to in both
states as the normalisation of relations, an apt term which cannot be properly
appreciated, except in the light of what it had meant for both sides to be
without such a normalisation and what it had cost them to attain it.

a. The Recapitulation of the Agreements

As has been mentioned above, there were originally seven major issues
pending settlement between Korea and Japan, namely, 1) the basic relations,
2) the legal status of the Koreans resident in Japan, 3) the return of the
Korean artefacts in Japan, 4) the ownership of Tokdo Island, 5) the fisheries
dispute, 6) property claims, and 7) the return of shipping craft to Korea.
On a broad basis, the nature of the first four can be said to have been
political and that of the other three economic. In the course of the 14-year
battle of nerves and words, however, they had been integrated into what
appeared to be a single issue, so that the settlement of one or more of them
in disregard of the rest was not conceivable, at least on the part of Korea.
This was because, despite the apparently self-contained character of each
problem, they were so closely interrelated one with another, especially within
the group - political or economic - to which each belonged. Thus, it
became inevitable to seek a settlement of all the issues by means of a package
deal.
For the above reasons, it is deemed necessary to recapitulate at this point the settlement of each problem — except of the fisheries dispute which is discussed separately in Chapter 9 — and thereby to ascertain the interrelationship between the fisheries issue and the other seemingly unrelated ones.

**The Basic Relations:** The title of this treaty, the Treaty on Basic Relations, bears a peculiar connotation in the context of the relations between Korea and Japan. Though, by definition, it was merely an ordinary treaty of amity and commerce, it was thought at the time of the negotiations that, in the light of the strong anti-Japanese resentment in the heart of the Korean people, use of such terms as "amity" or "friendship" in the title of any treaty with Japan would doubtless invite serious opposition on the grounds of prematurity or even condescension. Under the circumstances, therefore, it was also unthinkable for Korea to agree with the Japanese proposal to express the agreement on their basic relations in the form of a joint communiqué instead of a regular treaty, because the former would be as binding as was the Russo-Japanese example of 1956. Korea's firm determination to define the relationship with Japan in unequivocal terms, in order to preclude the slightest chance of future complications, was self-evident, as may be seen from the discussion below of the aims of Articles 2 and 3.

Five of the seven points specified in the operative part of the Treaty on Basic Relations were mostly procedural and ceremonial. It is the other two that deserve to be mentioned here. Article 2 confirms that all the treaties and agreements concluded between Korea and Japan on or before the date of annexation on August 22, 1910, are "already null and void." Article 3 confirms that "the Government of the Republic of Korea is the only lawful
Government in Korea as specified in the Resolution 195 (III) of the United Nations General Assembly."

It should be noted that both sides gave differing views on the meaning of the expression "already null and void", Korea insisting - with the emphasis on the word "already" - on the invalidity of the treaties and agreements 'from the beginning' and Japan denying it. Another point of disagreement is on the interpretation of the expression "the only lawful Government in Korea", which need not have been used had Korea not been a divided country at the time.

The Legal Status of Koreans in Japan: The primary idea of the agreement was for Korea to obtain Japan's explicit guarantee not to discriminate against over 600,000 Koreans resident in Japan. The demand of Korea was justified by the fact that these Korean nationals were part of over 2,000,000 Koreans who had been forcibly taken to Japan between 1941 and 1945 to man Japanese war industries but whose return home could not be facilitated by Japan in post-war circumstances, and that they have ever since been living in Japan in the face of deplorable social and economic discrimination.

Under the provisions of the Agreement, these Koreans have been assured the right of permanent residence in Japan as well as protection from


2. The Korean text of the treaty reads, for "in Korea", "in the Korean peninsula." Further amplification is not considered relevant here.
arbitrary repatriation, save in the case of conviction for treason, trade in
narcotics, or other crimes resulting in imprisonment exceeding seven years.

The Return of Korean Artefacts: The unrestrained drain of Korean
cultural assets to Japan during the period of annexation has left an
infraredable resentment in the heart of the Korean people. The removal of
historical records and works of art from the royal archives of former
dynasties and from religious establishments has always been a matter of
permanent regret. Still more hurtful to Korean feelings was the excavation
by the Japanese of ancient grave yards which, according to the Korean
tradition of ancestor worship, constituted an act of unpardonable blasphemy.

Article 2 of the Agreement, which is padded with provisions on
cultural cooperation between Korea and Japan, specified the return of 1,384
items of art objects to Korea within six months from the coming into force of
the treaty. In view of the fact that a greater quantity still remains in
private ownership in Japan, however, it should be added that the home-coming
of the above number by no means satisfied the sentiments of Koreans.

Though there are some precedents for the return of cultural assets
to their country of origin from the country that acquired them by forcible or
other improper means, such return does not appear to be necessarily an
established practice as such in international law, but is rather a matter of
ex post facto agreement between the helpless giver and the merciless taken.

1. As a matter of fact, almost all the extant proc elains of Korea were the
ones thus excavated by the Japanese, the others having failed to survive
repeated ravages and plundering by foreign invaders.

2. Many examples are given by Fumio Ikeda, "Bunkazai, Bunka Kyoryoku Kyotei"
(Cultural Assets, Cultural Exchange Agreements), JIJD, Vol. LXIV (March,
1965), pp. 64-75.
In the case of Korea and Japan, however, the volume of loss was so great and its happening so recent that the issue had to be dealt with solely in consideration of the serious emotional involvement of the Korean people and the historically inseparable cultural ties of the two states. In this sense, despite the similarity in title, the Korea-Japan treaty is different, in essence as well as in form, from the numerous other cultural agreements of the post-war period.

The Ownership of Tokto Island: The Island, situated about 50 miles and 35 miles from the nearest territories of Korea and Japan respectively, consists of two uninhabited islands and numerous naked rocks around them, totalling about 500 yards square in size. The insignificant physical value of the Island may be explained by the fact that historically it used to be called by a series of different names, which were given by different rulers in Korea as well as by different foreign navigators - e.g., Takeshima by Japan in 1693, Boussole and Liancourt by France in 1787 and 1849 respectively, Olivutsa by Russia in 1854, and Hornet by Britain in 1855. The controversy over its ownership started in 1952, when Korea confirmed its ownership by drawing the Peace Line outside of it. Between 1952 and 1965, there were exchanged some 60 representations between the two states, Korea denying Japan's groundless allegations of ownership and Japan protesting against what she regarded as Korea's illegal occupation of her territory.

Having been in actual control of the Island since 1954, Korea demonstrated her ownership by every conceivable means, including the protection of fishing in the areas, the erection of battery and light house,

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the placement of personnel with arms and communication facilities, and the issue of commemorative postage stamps. These activities of Korea, some of which led to shooting accidents, invariably prompted protests from Japan and denials from Korea, each side insisting on the illegality of whatever was done by the other for or concerning the Island.

However, it should be noted that none of the agreements signed in 1965 contains any direct reference to this issue, nor has there been any serious confrontation in this regard since then. This can be attributed to the fact that, apart from its political implications, the practical value of the Island in waters so remote and comparatively unproductive was not thought by either side to be significant enough to compete for at the risk of delaying or worsening the prospect of settling other vital problems. The virtual silence of both states on this issue during the post-normalisation period of three years (1965-1968) can also be explained by a similar reason: both sides have been highly cautious and cooperative in the implementation of the other agreements, in order not to affect the friendship for the restoration of which they had had to make such an enormous sacrifice.

Be that as it may, Korea considers it entirely absurd for Japan to dispute the ownership of the Island by insisting that the issue is definitely a case of territorial dispute which should be settled by a due process of international law. Under the present circumstances, therefore, the problem may be observed from two practical points of view, namely, the conflicting interpretations of both sides regarding the Protocol concerning Settlement of Disputes signed together with other agreements in June, 1965, and the municipal legislative measures taken respectively by both governments in compliance with Article 1 of the Fisheries Agreement which enables each state to establish a 12-mile fishery zone around certain part of its territory.
Firstly, the above Protocol specifies, in simple and general terms, the procedures by which disputes between the two states may be settled. When all the other issues had been agreed upon in 1965, however, both governments found it necessary to clarify internally the absence of any direct reference to this problem in any of the agreements or annexes. Korea maintained the view that, Tokdo being an integral part of her territory, the agenda of the Korea-Japan Talks never included this issue and that the Protocol therefore concerned itself solely with the settlement of disputes which might arise over what was dealt with in the agreements of 1965. In contrast to this was the Japanese interpretation that the very raison d'être of the Protocol was to be found nowhere else but in regard to this issue, especially in view of the fact that other agreements on such matters as fisheries, property claims and economic cooperation, have their own ad hoc provisions defining the procedures for settling disputes, these being more liable to disagreement in implementation.

Secondly, in compliance with Article 1 of the Fisheries Agreement, both sides have established 12-mile fishery zones in some areas of their territories. In the promulgation of neither state is there, however, any explicit designation of such a zone around Tokdo Island. Insisting on the ownership of the Island, therefore, each side regards the isolated imaginary circle of some 450 square miles in the Sea of Japan as its own exclusive fishery zone.

Though, in consideration of its comparative insignificance, both states appear to have been seemingly indifferent to the issue since the

1. Korea Annual, op. cit., p. 120.
restoration of relations in 1965, it would be somewhat premature to rule out, on the basis of the Korean control of the Island, the possibility of this currently dormant controversy being resuscitated at the initiative of Japan, if an opportunity presents itself in her favour. From a practical and technical point of view, it can be further said to be by no means less probable, within the framework of the Fisheries Agreement, that the fishing operation of one state in the zone would doubtless provoke the other to the point of instant protest.

**Property Claims:** By virtue of Article 4 (a) of the 1952 San Francisco Peace Treaty with Japan, Korea was entitled to negotiate special arrangements with Japan regarding the disposition of the properties and claims, including debts against Japan, of the Korean authorities and individuals. This was the legal ground of Korea's persistent claims to the rights of properties from Japan. These claims were specified under eight headings and presented to Japan at the First Korea-Japan Talks in 1952.

In this connection, the character of the claims as conceived by the people of Korea was noteworthy. Though the Peace Treaty did not entitle Korea to any formal reparations from Japan, the popular concept in Korea regarding the claims was peculiarly moulded by the anti-Japanese leadership of Syngman Rhee's Liberal government into the erroneous belief that, at least on moral grounds, Korea definitely deserved reparations from Japan for the incalculable damages incurred in consequence of her forcible annexation. As a matter of fact, it should be admitted with reasonable candour that this was a considerable retardment to the progress of negotiations in the property claims issue.

As has been briefly mentioned earlier in connection with the First Talk, Japan responded to the above Korean proposal with a similar counter-
proposal claiming the rights of properties and titles in Korea of her authorities and nationals. This was squarely in contradiction to Article 4 (b) of the Peace Treaty, which had stipulated that she recognised the validity of the dispositions of all the Japanese properties, public or private, made by the United States Military Government in Korea. In fact, the Japanese properties in Korea, which were popularly called "the enemy properties", were all confiscated by the above Military Government, pursuant to its Proclamation No. 53, December 6, 1945, and were afterwards transferred to the newly-formed government of Korea in compliance with the Initial Financial Settlement between Korea and the United States signed on September 11, 1945.

In reliance on Article 45 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the second paragraph of which prohibits the confiscation of private property, however, Japan insisted on her rights of claims so persistently that Korea found it necessary to seek a legitimate interpretation of Article 4 (b) from one of the drafters of the Peace Treaty, the United States. The opinion thus sought by Korea was given in her favour and led to the eventual withdrawal of the Japanese claims. Though consequently the legal validity of the Korean claims could not be directly contested, Japan had been exhausting every conceivable means to establish the ground of her counter-claims against Korea, in order to assess a basis for compensation to set off against whatever she would eventually have to concede to Korea.

When the prolonged argument over the tenability of claims by both sides was thus clarified in favour of Korea, she had to cope with another

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1. The U. S. State Dept. Memoranda to the Korean Ambassador in Washington, April 29, 1952, and to the Korean Foreign Minister, December 31, 1957, the latter confirming the former.
difficulty which was more baffling. It concerned the formalities of peculiar procedures. Japan insisted, not without reason, that the Korean claims would have to be not only supported by legally valid evidence but also limited to those pertaining to such areas of Korea as were under the effective control of the Republic of Korea. As the former of these two points was a formal legal matter and the latter a political matter, it was the first one that was harder for Korea to comply with or argue against, for the simple reason that the demand for satisfactory evidence was apparently a reasonable one for Japan to make, whereas, under the prevailing situation of a divided and war-ravaged Korea, it was virtually impossible to meet such a demand.

Hereupon, it became inevitable for both sides to seek settlement by means other than legal and factual, i.e., a breakthrough 'package' deal, as was actually done at the above-mentioned negotiations between the Korean presidential envoy and the Japanese Foreign Minister. It was on this basis that the final agreement was made to the effect specified in the Agreement and its annexes.

At this point, it is of interest to note that the issue was finally settled in a way that was dual in character in the sense that the Agreement was an integration of two fundamentally heterogeneous elements, namely, the property claims and economic cooperation. This was due to the fact that, throughout the course of the negotiations, Korea had placed dominant emphasis on the reparative character of the settlement, whereas, for obvious reasons, Japan had made every effort to avoid it. In other words, the

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1. Referring to the Preamble of the Agreement, the Korean Minister of Economic Planning Board, K. Y. Chang, testified at the National Assembly on August 5.
attitude of Korea was to get part of what was due to her, while that of Japan was to give what she did not necessarily have to give, both the giver and receiver making strenuous efforts to save face. It was therefore the conflict of concept regarding the cause or formality of settlement that gave rise to the necessity to combine both elements - one being complementary to the other - in such a way as would consequently provide each side with the satisfaction that its claims had been met.¹

The settlement of the issue, which was stipulated in detail in a four-article principal Agreement and six Annexes specifying and clarifying its terms, made it clear in Article II-1 of the Agreement that the arrangements thus made were final and complete in respect of every problem pertaining to the claims of properties from either side.² Among the series of provisions are also found two points which deserve particular mention because of their direct reference to the settlement of the fisheries issue, namely, Japan's withdrawal of reparative claims for her fishing vessels seized by Korea and the designation of a fishery cooperation fund in her commercial loan to Korea.

Firstly, though not in the form of a regular claim at the

1965, that the provisions on economic cooperation were subordinate to the settlement of property claims and that the supply of $300 million to Korea on a non-repayable basis was of reparative character in substance.

1. In passing, therefore, it may be noted that the duality in this Agreement bears a similarity to that in the agreement on artefacts and cultural cooperation, in the sense that the return to Korea of works of art was only remotely related to what is meant by international cultural exchanges nowadays.

2. Art. II-1 of the Agreement concerning the Settlement of Properties and Claims and the Economic Cooperation between Korea and Japan, June 22, 1965: "The Contracting Parties confirm that the problem concerning properties, rights and interests of the two Contracting Parties and their nationals... is settled completely and finally."
Korea-Japan negotiations, Japan produced an estimate of her loss incurred as a result of Korea's seizure of her fishing vessels. The gross approximation presented in monetary terms stood at £20 million, including such imaginary loss as was deemed to have been caused by the unemployment of man-power and the detention of facilities. But it was evident that, even if the claims with regard to this loss had been made formally, it would have been flatly denied by Korea, regardless of the basis of its calculation, on the grounds of the detention and confiscation having been carried on by means other than illegal from the Korean standpoint. Pursuant to the idea of the above Article II-1, therefore, it was stipulated in one of the annexes that the problems — settled finally and completely as referred to therein — included the Japanese claims arising from the Korean seizure of fishing vessels on or before the date of the signing of the Agreement that no such claims could therefore be raised against Korea.

Secondly, with regard to the cooperation for the development of fisheries in Korea, when Japan agreed to provide Korea with a commercial loan in the amount of upwards of £300 million, it was specified that part of it, i.e., £90 million, would be designated for use towards improving the fishing interests of Korea. This provision merits particular mention because of the plausible motive it represented. It was prompted by the genuine desire of both states to enhance the fishery productivity of Korea.

1. Item 2 (h) of the Agreed Minute annexed to the Agreement: "It is confirmed that the problem concerning property ...... which is settled finally and completely as mentioned in paragraph 1, includes any claim arising from the seizure by Korea of the Japanese fishing vessels on or before the date of the signing of the Agreement, and that, therefore, no such claim can be raised against Korea."

up to a level reasonably proportionate to the undoubted abundance of resources in her waters. This desire was, in turn, prompted by the realisation of the fact that one of the fundamental causes of their acrimonious dispute over fishing rights was indubitably the inferiority of the Korean fishing industry as a whole to that of Japan.

The Return of Shipping Craft to Korea: As has been mentioned earlier, this was a Korean request to Japan to return the 668 shipping craft, amounting to 82,965 tons, which were registered or anchored in Korea at the time of the Japanese surrender in August, 1945, but which were removed from Korea in disregard of the proclamations by the United States military authorities then occupying Korea and Japan. The legal ground of the Korean claim was therefore identical with that on which Korea based her claims to the rights of other properties, though the controversy about the ships was dealt with separately from the beginning.

As in the case of other claims presented by Korea, this one also was met with a countercharge by Japan requesting Korea to return the five ships lent to her after the War as well as the Japanese fishing vessels seized by her for violating the Peace Line. Here again, the arguments centred around the legitimacy of the claims of both sides, each insisting on the tenability of its claim. In the early stages of the general negotiations, however, agreement was reached to conduct a factual investigation in respect of each vessel listed in the Korean request.

The above investigation continued into the period of the Sixth Talk, only to reach the conclusion that it was virtually impossible even to trace the whereabouts of the majority of the vessels, still less to establish an exact case-history of each, due to the lapse of 20 eventful years which
the size and age of the craft were not deemed likely to have enabled them to survive.

When, towards the end of 1962, the property claims issue had been agreed upon, and in consequence the prospect of settlement of other problems had become correspondingly better, Korea had to re-examine this issue in terms of its advisability. Firstly, even if returned as requested, the practical value of the vessels would have had to be reconsidered in the light of the depreciation which they would have undergone since 1951 when the claim was first raised against Japan. Secondly, the intrinsic merit of the issue was therefore hardly thought to warrant any further efforts on the part of Korea to continue the argument at the risk of damaging the prospects of settlement of other more vital issues. Thus the claim faded into obscurity and was not heard of after the Sixth Talk.
Chapter 9 - The Korea-Japan Fisheries Agreement (1965)

1. Structure

The Fisheries Agreement between Korea and Japan, which was signed in Tokyo on June 22, 1965, came into effect on December 18, 1965, when the instruments of ratification were exchanged in Seoul. Its minimum mandatory life as defined in Article X-2 is six years including a one-year period from the date on which either party notifies the other of its intention to abrogate it. It consists of a 10-article principal text and a 5-item annex, both of which are supplemented by a variety of complementary documents under the following headings:

1) four Exchanges of Notes on straight baselines, exclusive fishery zones, identification markings of fishing vessels, and fishery cooperation;
2) an Agreed Minute specifying 10 different points referred to in the principal text;
3) a Record of Discussion clarifying some terms susceptible to ambiguous interpretations;
4) two Letters on non-governmental arrangements for the safety of operation; and
5) four Verbal (sic) Notes exchanged upon the signing of the Agreement, providing additional specifications on a number of points.

Thus the physical structure of the treaty as a whole may be said to be sufficiently indicative of the extremely complicated relations of the contracting parties prior to its conclusion. This point is much more apparent in its contents, which give the impression of being a complex of uncommonly scrupulous regulations not without superfluities. For the purposes of the present analysis, however, a comprehensive view of the treaty
may be obtained by recapitulating the specifications of the annexes under the major provisions of each principal related article.

The Preamble

There are five points mentioned in the Preamble, two of which can hardly be ruled out as being merely ceremonial in the light of their particular implications, namely, the confirmation of "the principle of freedom of the high seas" and "the desirability of eliminating causes of disputes which may arise from their geographical proximity and the intermingling of their fisheries."

Exclusive Fishery Zone and Straight Baseline

Article I represents the nucleus of the whole treaty, as it defines the right of each party to establish a 12-mile exclusive fishery zone along its coastal baselines. Further to this provision should be cited three of the annexes as below.

Firstly, pursuant to the stipulation that, in case of the necessity for either party to employ straight baselines for the demarcation of its fishery zone, the lines should be drawn only after consultation with the other party, one of the Exchanges of Notes recognises four straight baselines drawn along the Korean coasts (map no. 2).

Secondly, for reasons to be explained later, the demarcation of the Korean fishery zone around the ever-controversial Cheju Island resulted in such a serious conflict of opinion between the two parties that they had to agree to leave the issue to a temporary arrangement as specified in another Exchange of Notes, which reads in part: "As a provisional measure, the waters enclosed by the lines delimiting the fishery zone to be established by the Republic of Korea and the following lines shall for the time being be
treated as part of the fishery zone of the Republic of Korea" (map no. 3).

Thirdly, by means of a Verbal Note, the Foreign Minister of each party assures the other of its readiness to be fair and just in the treatment of fishing vessels violating the exclusive fishery zone of the other.

Joint Regulation Zone

Article II establishes a joint regulation zone adjacent to the exclusive fishery zone of Korea (map no. 1). Article III outlines the provisional measures which are to be taken within this zone until conservation measures deemed necessary for the maintenance of maximum sustainable productivity are introduced on the basis of scientific findings. For obvious reasons, it is with these temporary measures that the Annex and each of the other supplementary documents - the former in its entirety and the latter in part - concern themselves in considerable detail.

Firstly, the Annex specifies in numerical terms the provisional measures referred to in Article III, by placing various restrictions on the fishing operations of both parties within the joint regulation zone, which include maximum limits on the number and size of fishing vessels, mesh size, the brightness of fish-luring lights, licences and identification markings, and fishing periods.

Secondly, two of the 10 items in the Agreed Minutes (Items 1 and 2) deal with further details, which include measures regarding the prohibition of off-shore transfer of licences and identifications, the exchange of quarterly reports on the midday position of vessels, the limits of annual maximum catch, the designation of landing ports for the catches within the joint regulation zone, and the mutual inspection of such landings.

Thirdly, another Exchange of Notes specifies the size, lettering, noctovision, and the fixing positions of the licences and identifications,
and the issue is further to be adjusted, as referred to briefly in one of the items - (a) - of the Record of Discussions.

**Fourthly**, another Verbal Note, by the Ministers of Agriculture and Fisheries of both states, specifies what may be regarded as voluntary restrictions of each party to be applied to certain types of fishing, mackerel-fishing and whaling in particular, within the limited areas of the joint regulation zone during certain periods of the year. These voluntary measures, which Japan offers to apply to her fishing in the specified areas of the zone, are more restrictive than those on the Korean fishing in the same areas.

**Enforcement and Jurisdiction**

Article IV stipulates that, in the waters outside the exclusive fishery zone, the right of enforcement and jurisdiction, including stopping and visiting fishing vessels, rests solely with the authorities of the party to which the vessels belong. It further calls for the discretion of both parties to institute domestic measures including appropriate penalties, with a view to ensuring the faithful observation by its nationals of the provisional measures for regulating fisheries. This article is supplemented by the provisions of two annexes.

**Firstly**, Item 3 of the Agreed Minutes recommends both parties to exchange immediate notice regarding any suspected violation of the provisional regulative measures by the fishing vessels of the other party (paragraph a), to arrange joint patrol system (paragraph b), and to provide each other with facilities to view the above domestic measures being enforced (paragraphs c and d).

**Secondly**, Item (b) of the Record of Discussions indicates that the above-mentioned viewing of the domestic measures being enforced by the oth-
party may include the inquiry about the issue of licences and identifications.

Joint Resources Survey Zone

Article V establishes immediately outside the joint regulation zone another belt of waters under the name of the "joint resources survey zone". The outer limits of this third zone and the surveys to be conducted therein are specified neither in the article nor in any of the annexes, these two points being left to further negotiations by the joint fisheries commission to be formed in compliance with Article VI. 1

Joint Fisheries Commission

Article VI establishes the Joint Fisheries Commission consisting of a 3-member national section from each side. Despite the ostentatious enumerations specifying the functions of the Commission in Articles VI and VII, it is made abundantly clear that its authority is at most merely advisory. The only reference to the Commission in the annexes is in Item 4 of the Agreed Minutes, which concerns itself solely with the selection of the personnel to head its secretariat.

Safety of Operation

Article VIII calls for the discretion of each party to initiate measures deemed appropriate to ensuring safety of navigation and fishing operations as well as expeditious settlement of maritime accidents between the fishing vessels of both parties. This general stipulation is supplemented by two of the annexes.

Firstly, Item 6 of the Agreed Minutes recommends exchange of

1. For the subsequent agreements about this third zone, see infra, Section 3, e, (v).
information between patrol ships of both parties relating to the operation of fishing vessels within the joint regulation zone.

Secondly, through the Exchange of Letters on Safety of Operation, which enumerates various points, both parties express their willingness to recommend their respective fishing interests to enter into non-governmental arrangements regarding the safety of operation and the maintenance of order at sea.

Settlement of Disputes

Article IX stipulates the procedures by which disputes between the two parties relating to the interpretation and implementation of the Agreement may be settled. Settlement is to be sought in the first instance through diplomatic channels, and this failing, by means of arbitration in which the participation of some third state(s) is mandatory. Both parties agree to abide by the award of the arbitration commission. Item 5 of the Agreed Minutes defines in simple terms the character of the third state(s), by specifying that such state(s) should be one(s) with which both parties maintain diplomatic relations.

Termination of the Agreement

Article X stipulates that the Agreement, which should be ratified, will remain in force for a mandatory period of 5 years, which is to be followed by another period of a year from the date on which either party expresses its intention to abrogate it.

In addition to what has been enumerated above, three of the annexes contain further provisions which are only remotely or indirectly related to the principal articles and their supplements.

Firstly, Item 7 of the Agreed Minutes recommends the exchange of
information - as well as consultation where necessary - regarding types of coastal fishing other than those referred to in the provisional regulative measures within the joint regulation zone.

Item 8 (a) calls upon each party to take the measures necessary to ensure that its fishing vessels do not engage in operations in disregard of the so-called drag-net and trawling prohibition zones of the other party. However, Item 8 (b) provides an exception, which authorises Korea to carry on, to a limited extent, drag-net fishing and trawling within such areas of her prohibition zones as overlap with the joint regulation zones in the Yellow Sea and the Sea of Japan.

Item 8 (c) stipulates measures to be taken by the patrol ships of either party against the fishing vessels of the other which are found operating within its prohibited zones referred to in (a). Such vessels may have the infringement called to their attention directly and the fact promptly communicated to the patrol ships of the other party. Due regard is to be paid to such communication and the consequent measures taken are to be notified back. This is the only provision, apart from that of Item 3 (a).

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1. a) The prohibition zones of Korea date back to 1911, when the then Japanese Governor-General in Korea established them for conservation purposes along limited areas of the Korean peninsula (Decree No. 68, June, 1911), and extended them along the whole of the coastal waters of Korea in August, 1912. The present prohibition areas referred to in the treaty of 1965 (map no. 1) represent the final extension in 1929 (Decree No. 109, Dec., 1929). The irony was that, at the time of the negotiations for the Agreement, Japan found it impossible to refute the necessity or even the scope of the very prohibition zones that she created around Korea earlier. Further details with a map are given by Won (op. cit., pp. 196-200).

b) The latest demarcation of the Japanese prohibition zones was a revision in January, 1963 (Decree No. 6 relating to Art. 52, Para. 1, Fisheries Law of 1949) of the one established in 1932 by her Ministry of Agriculture and Forestry. In compliance with Item 2 (a) (ii) of the Annex of the Agreement, a slight modification was made in 1965 (Decree No. 372, Dec., 1965). Further details are given by M. Okuno. Sekaino Nakano Nihonogyo (Japanese Fisheries in the World) (Tokyo, 1964), pp. 135-136.
of the Agreed Minutes, by which the patrol ships of one party are authorised to have direct contact with the fishing vessels of the other.

Item 9 confirms that innocent passage through territorial waters and exclusive fishery zones is guaranteed in accordance with international law, provided, in the case of fishing vessels, that fishing gear is stowed.

Item 10 recommends the conclusion of arrangements relating to rescue at sea and emergency refuge, as well as cooperation against such contingencies pending completion of the arrangements.

Secondly, a further Exchange of Notes confirms the understanding reached between the two parties relating to fishery cooperation, which is to include exchanges of information and experts, with a view to improving their fisheries.

Thirdly, Paragraph (c) of the Record of Discussions carefully rules out the probability that, in the light of the limited operational capability of the Japanese minor-scale coastal fishing vessels operating mainly in the areas between the Korean Island of Cheju and the Japanese Island of Tsushima, the present status of such Japanese coastal fisheries as are not subject to the joint regulative measures would ever undergo any great change in the future.

2. Relationship with the Peace Line

a. Some Comments on the Peace Line

In isolation from the other issues between Korea and Japan, the prolonged controversy over fishing rights was unique not only in the firmness of determination with which both sides had endeavoured to protect their conflicting national interests, but also in the extent to which their
relations deteriorated in consequence of it. Its actual process was represented by the series of acrimonious allegations adduced by Korea to defend the tenability of the Peace Line and by Japan to disprove it. As far as the international maritime fishery was concerned, therefore, both had to profess themselves to be the most ardent supporters of the law of the sea, as well as its most honest interpreters. In fact, however, they could have almost been branded as its main victimisers, on the grounds of their repeated attempts to secure its disintegration and to emphasise and support only that part of it which happened to suit their line of argument.

Thus, during the entire period of the negotiations for settlement, the attention of Korea was cautiously directed towards preserving as much of the Peace Line as could be salvaged under the circumstances, whereas that of Japan was aimed at demolishing as much of it as she could. These strenuous efforts of both sides can be seen throughout the majority of the provisions in the Fisheries Agreement, which, as a result, had to be formulated in a way apparently inappropriate to the small area of waters to which it applies.

Even apart from the provisional character of most of the important provisions to be applied within the joint regulation zone, however, the treaty itself was, strictly speaking, only a provisional settlement of the issue by means of an agreement designed to remain in force for a minimum of six years. This aspect of the treaty was further enhanced by the absence of any reference in the principal articles or in the annexed documents, relating to whatever change the legal status of the Peace Line may be thought to have undergone as a result of the new arrangement. For these

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1. The absence of a reference to the Peace Line in the treaty was not entirely accidental. The conflicting interpretations regarding the post-treaty status of the Line are also discussed below.
reasons, it is simply imperative that an inquiry into the treaty - into its major points of relevance to the international law of fisheries - has to be preceded by an analysis, however brief, of the legal character of the Peace Line.

As has been mentioned earlier, the Peace Line made its appearance on January 18, 1952, when Korea promulgated the Presidential Proclamation of Sovereignty over Adjacent Seas. On the face of it, it was just another instance of the trend shared by many states in extending jurisdiction beyond their territorial waters, inspired by the urge to be in the fashion of the time which originated from the two Truman Proclamations of 1945. Up to the time of the first Geneva Conference on the Law of the Sea in 1958, at the end of which the four Conventions on the Law of the Sea were adopted, there had been made thirty-six such claims of maritime jurisdiction as given below, of which the Korean proclamation was the twenty-sixth. Thus the Proclamation started with "Supported by well-established international precedents..." by which were meant the Truman Proclamations and those of the Latin American states, as was indicated in the statement of the Korean government on January 27, 1952, quoted earlier.

Various as the types of the above claims may appear, each of them can be said to come under one of three categories, if classified according to the broad basis of their coverage of target resources. The first one concerns the resources of the sea-bed and subsoil; and the second concerns the resources of the sea-bed and subsoil and, in addition, the superjacent waters. The third is more extravagant than the first two, being based on a more liberal definition of the continental shelf than a merely geographical one. For obvious reasons, the Korean proclamation undoubtedly belongs to the third category and is by affinity fairly close to the Chilean Presidential
Declaration concerning the Continental Shelf of June 23, 1947, or to the Peruvian Presidential Decree concerning the Continental Shelf and Coastal Fisheries in the Adjacent Seas of August 1, 1947. ¹

Even though the serious controversy which originated from the Korean proclamation assumed the appearance of a legal dispute, the extra-legal factors in it were so strongly operative from the outset that it merely happened to be argued in language borrowed from international law, with neither side being unaware of the dominantly political nature of the dispute. On both sides of the Korea Strait, therefore, legal scholarship was called to the defence of their respective national interests, so that a critical appreciation of the issue on a purely legal basis had to be regarded as untimely or unwelcome. As a result, the public concept of the issue was eventually stiffened into an erroneous assumption on both sides that the blame rested entirely with the other. The most vigorous efforts were also directed externally in an attempt to impress third parties by outrages of flagrant international injustices being committed by the other party to the dispute. Throughout this peculiar controversy, each side invariably relied on what had appeared to it to be invulnerable as a means to adopt against the

¹ One observer, Weissberg (op. cit., p. 29), remarks quite rightly that the Korean proclamation is in essence a replica of the Peruvian Decree.

The above-mentioned proclamations of other states and political entities are:

The first category: The Bahamas, Ceylon, Dominica, Falkland Islands, Guatemala, British Honduras, India, Iran, Israel, Jamaica, Pakistan, the Philippines, Saudi-Arabia and the nine Trucial States...(22)

The second category: Brazil, Ecuador, Iceland, Mexico, Nicaragua, Panama, and Venezuela...(7)

The third category: Argentina, Chile, Costa Rica, El Salvador, Honduras, Korea and Peru..(7)

(Sources: Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER.B/6; of the High Seas, Vol. 1, ST/LEG/SER.B/1; and Supplement to ST/LEG/SER.B/6, A/CN.19/5, 1960)
other, namely, the newly-emerging concept of the preferential rights of coastal states, on the part of Korea, and the traditional concept of the freedom of the high seas, on the part of Japan.

However, it was obvious that, even without the frustrating interference of the political overtones accompanying the issue, the intrinsic complexity of the problem alone would have precluded a legal settlement under either or both of the above conflicting doctrines. Here it is intended, in the first instance, to attempt a critical observation of the legal character of the Peace Line, with reference to the following two rather peripheral points, which had been particularly controversial during the negotiations for settlement.

(i) Provisionality

The text of the Korean proclamation did not make it explicit that the measures were provisional. The only part that implied a measure of proximity to its provisionality was in Paragraph 3, which said that the line of demarcation was "liable to modification, in accordance with the circumstances arising from new discoveries, studies or interests that may come to light in future." The implication of the term "modification" in this passage should be taken, however, to have meant in the first instance the modification of the demarcation line, not that of the character of the proclamation itself in relation to its permanence or provisionality. On the face of it, therefore, this could have been considered to be a double-edged device which implied even an extension of the line, where necessary under the circumstances specified.

The provisionality of the Peace Line should therefore be deduced

1. A different interpretation is given by Won, op. cit., pp. 84-85.
from the fact that, due to the inevitable circumstances of the time, it had to be announced after arrangements had already been made with Japan regarding the reopening of the negotiations for settlement of the major issues between the two states, of which the fisheries problem was one of the most serious. If this fact is admitted as a sufficient indication of its interim character, it would still remain to be explained whether this alone had actually strengthened the tenability of the Peace Line to any appreciable extent. In this regard, it is necessary to compare the Korean proclamation with what was cited as one of its precedents, the Truman Proclamations concerning the continental shelf and coastal fisheries in certain areas of the high seas.

The unilateral announcements of the United States took into consideration the interests of other states particularly in connection with the establishment of her explicitly bounded conservation zones in the areas of the high seas in question, whereas the Korean proclamation was silent on this point, as were those of other states. This was one of the critical points on which Japan based her public condemnation of Korea for having fallen into the same error of misinterpreting the Truman Proclamations as the Latin American states had done. In this connection, therefore, it would be reasonable to say that the provisionality of the Peace Line would have been much clearer and its tenability so much less vulnerable to heated denunciations by Japan had it been supplemented by an explicit provision indicating Korea's readiness - as was actually the case - to modify its character in agreement with the states interested.

1. Provisionality itself can not be the legal ground of such measures. It is also doubtful whether the situation was imminent enough to constitute self-defence, as insisted on by Won, op. cit., p. 200.
(ii) The Defence Aspect

In addition to the mainly economic purposes for which the belt of maritime jurisdiction is extended by coastal states beyond their territorial waters, that is to say, for the conservation and exploitation of resources within the extended areas, the Korean proclamation represented another aspect of no less importance, that of national defence and security. Though this aspect was given only modest attention in the announcement – only in its preamble – the necessity of what would have been a sea defence zone could not be ruled out under the circumstances of the time, when in the midst of a war the announcement had to be made.

Mention should be made of two relevant points in this connection. Firstly, the Korean Marine Defence Law of March 2, 1950 (Art. 1, Law No. 104), may be said to have actually 'predicted' the eventual necessity of such a zone, when it said that the President "may, by fixing a boundary, designate some area as a 'Sea of Defence' in the case of extraordinary necessity during a time of formal or civil war." Secondly, the United Nations Command had to establish a Sea Defence Zone eight months after the Korean proclamation, in order to prevent naval offensives off the Korean coasts, to maintain security of communications, and to prevent the entry of hostile elements as well as the introduction of contraband. Accordingly, after the Zone was abolished upon the coming into force of the armistice agreement in August, 1953, the character of the Peace Line as a security necessity was greatly enhanced by Korea, as was indicated in the series of pronouncements by the government as well as in its formal representations to Japan.

As far as this aspect was concerned, therefore, Japan had to base her argument against the Sea Defence Zone and the Peace Line itself entirely on the absence of any relationship between the security of Korea and the Japanese fishing around the Korean peninsula, thereby completely disregarding the wartime situation of a divided peninsular state surrounded by ideologically hostile political entities. It was evident that both sides were thus arguing from conflicting points of view. However, it should be admitted that the character of the Peace Line merely as a defence and security measure was of a secondary order at best and that this aspect of its character was strengthened only by the subsequent developments of the Korean situation in which Japan was not directly involved. More strongly militant against the legal character of the Peace Line than these circumstantial reasons was of course the fact that necessity alone can not be a principle of international law which can justify unilateral measures on the part of a state to the detriment of the interests of other states. Thus it would have been reasonable to say that the terms of the Korean proclamation would have had to be considerably modified, in order to be able to establish sufficient legal grounds on which to justify the exclusion of foreign fishing vessels from its delimited areas.  

(iii) Special Interest of Coastal States

The character of the Peace Line as represented by its provisionality and defence aspects, discussed in the two foregoing sections, is only secondary and peripheral to its primary and substantive character as a combined proclamation of the continental shelf and fishery conservation zone.  

1. On the right to establish defence zones, see Colombo, op cit., pp. 167-168.
2. Though, on the face of it, the delimitation of the continental shelf was one of the important purposes for which the Peace Line was proclaimed, it can not be denied that its predominant purpose was in fact the conservation of fishery resources (cf. footnote at p. 282).
in the present discussion, these two important subjects of the law of the sea can not be properly discussed without reference to the problems of the special interests of coastal states, however, it is intended first to inquire into the background of this relatively new problem.

The rather sudden emergence of a post-war practice of many states to extend their jurisdiction beyond the breadth of territorial waters created one of the most controversial problems in the international law of the sea relating to maritime fisheries. This new practice has reflected the assumption that a coastal state retains special interests not only in the exploitation of the continental shelf resources but also in the regulation of fisheries for the conservation of living resources within the areas of the high seas adjacent to its coastal waters. In the case of fisheries, the conservation of resources—or its more sophisticated synonym, the maintenance of productivity—is such an unassailable good cause to every fishing state that it is hardly possible for any state to present an objection to it without being accused of a serious departure from common sense. It is on the strength of this cause that the view has been established that, for reasons primarily geographical, a coastal state is entitled to initiate conservation and exploitation measures as well as to participate in the formulation of such measures by other states with which it shares the sea areas.

However, it is not the necessity of conservation or exploitation, but its method, that is controversial between the states concerned. Thus the difficulty of agreement on the question of method has led many states to conclude that conservation and exploitation measures are to be unilateral in the first instance. Another difficulty of comparable gravity arises from the allegations or accusations that the necessity of conservation and exploration is abused or exaggerated as a pretext for excluding foreigners from the coastal
areas of the high seas which the excluded insist on being entitled to share with the excluders. The numerous post-war disputes over fisheries and the continental shelf can be said therefore to have been characterised by the conflict of interests between the traditional maritime states on the one hand and the other coastal states on the other, the interests of the former having been threatened by the strenuous efforts of the latter to monopolise the formerly open fishing grounds and continental shelves of their coastal waters.

Viewed in this context, the Korea-Japan fisheries dispute should rightly be said to have symbolised a typical cross-section of the above confrontation, in which the traditional doctrine of the freedom of the high

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1 The purposes for which states extend their fishery jurisdiction into some parts of the high seas vary from state to state and from region to region. Attempts were made to classify them by Anthony Scott, as below (The Common Wealth in Ocean Fisheries, Baltimore, 1965, pp. 183-184); another classification was given by C. F. Franklin, Law of the Sea: Some Recent Developments (US Naval College, International Law Studies, 1959-1960, Washington), pp. 116-119. Among these purposes are the following:

a) A simple desire to extend the frontiers of the country. Some nations seem primarily to regard an increase in the territorial sea as a means of increasing their territory and their potential wealth. In a sense, this might be described as an "imperialist" motive.

b) Resentment of the free fishing of other countries off their coasts. Some nations have voiced resentment of the rights of the older and more developed nations to use the waters bordering on the newer countries. This might be described as an "anti-imperialistic" motive. It is sometimes coupled with the thought that the older countries, having managed and depleted their own fisheries, now are in the process of spoiling the fishing grounds of others.

c) The coastal state needs the employment offered by fishing to occupy its large labour force.

d) The coastal state needs the food. Various states have pointed to the low standard of living, particularly the low protein intake, of their people as an argument for their being conceded the exclusive use of the adjacent high seas.

e) The coastal state depends upon the income from the fishery.

Under this classification, Korea was one of the typical examples of b).
seas began to be challenged by the new concept of the special interests of coastal states. It is necessary at this point, therefore, to trace the recent origin of this concept back to the time when it emerged from its unilateral stage in the late 1940's as a new subject of argument at international level.

In Latin America

As may be expected, the movement for the conservation and exploitation of natural resources on a multilateral level was pioneered on a regional basis by the American republics. The Ninth International Conference of the American States, Bogota, 1948, drew the attention of its member states to the necessity to conserve 'the renewable resources'. Its Resolution IX was, however, apparently in the form of a general reminder on what should be done in that regard through the joint efforts of the members, and was therefore without specific reference to marine fisheries.¹

The first extraordinary example of what may be called a joint declaration of continental shelf and fishery zone was the 1952 Santiago Agreements by the so-called CEP states (Chile, Ecuador and Peru)² which consisted of four documents including the Declaration on the Maritime Zone. Noteworthy are two (II and III) of the six operative paragraphs. These specify that the three governments "proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than two hundred nautical miles" and that "their sole

¹ The text: Bayitch, op. cit., pp. 48-49.
jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and subsoil thereof." The Declaration went on to say (Para. VI) that the principles set forth in it would be formulated into signed agreements or conventions among the three states. This was actually done in 1954, when they signed agreements in Idma and thereby "closed their ranks even tighter and decided on concerted action to put teeth into their claws." 2

Naturally the Santiago Declaration gave rise to a chorus of protests from leading maritime states, 3 which were nevertheless entirely ignored by its signatories. Their disregard of such protests - however strong - was demonstrated by what was actually taking place on the sea as well as by what they did in the form of concerted action subsequently.

Firstly, it was the United States that was to feel the immediate impact of the Declaration. Seizure of her fishing vessels under allegations of violating maritime sovereignty continued so as to require internal legislative measures, the so-called Fishermen's Protective Act of 1954, to reimburse her fishermen for the losses incurred as a result of the seizures. The efforts of the United States to seek a mutually acceptable settlement with the CEP states were not successful. It was also during this period that the aftermath culminated in the famous comedy of the Onassis case in 1954. 5 Secondly, at its fourth meeting of 1956, the Permanent Commission

2. Beyitch, op. cit., p. 16.
of the Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, founded by the CEP states in 1954, adopted a consolidated text of all the previously signed conventions.\textsuperscript{1}

Parallel to these escalated activities of the CEP states were the series of interesting developments within the Organisation of American States in respect to the continental shelf, territorial waters and other related questions. During the short period between 1950 and 1956, the whole American continent (with the exception of the land-locked states of Bolivia and Paraguay, and Canada which was not a member of the OAS) virtually assumed the role of a regional centre for 'the progressive re-development of the international law of the sea and its re-codification', with the United States as the only extremely serious dissentient. Throughout the period, therefore, there was hardly a single year that failed to witness the OAS-agencies holding impressive conferences, with extraordinary principles and resolutions along the lines of the CEP endeavours proliferating in each.\textsuperscript{2}

The\ International Law Commission

These developments in the Central and South American republics aroused the interest of international organisations having to do with the international law of the sea and its resources. When the United Nations International Law Commission began to undertake a thorough examination of the

\textsuperscript{1} Excerpts from the text: Bayitch, \textit{op. cit.}, pp. 42-47.
\textsuperscript{2} Foremost among the conferences were: the three meetings of the Inter-American Council of Jurists (1st in Rio de Janeiro - 1950, 2nd in Buenos Aires - 1953, and 3rd in Mexico - 1956), the 2nd (1954) meeting of the Inter-American Conferences in Caracas (1st in Bogota - 1948), and the 1956 meeting of the Inter-American Specialised Conference in Ciudad Trujillo; cf. MacChesney, \textit{op. cit.}, pp. 237-264. \textit{ILC Year Book}, 1956, Vol. II, pp. 236-252 contain a brief background and the proceedings of the Third Meeting (Mexico, April 12, 1956) of the Inter-American Council of Jurists, in a report to the ILC prepared by its Secretary after attendance at the Mexico meeting.
problem and adopted articles on the continental shelf and related subjects at its third (1951) session, the great controversy - originating in the Truman Proclamations of 1945 and intensified by subsequent exaggerations mainly in Latin America - ceased to be a regional problem and assumed a new character as a universal legal question concerned with the sea. If the Grotius-Selden controversy of the 17th century was a regional argument over who owned the sea, this one of the 20th century was a universal struggle over who owned what is in the sea and further underneath it. It is of interest to note at this point the oscillations of the views regarding the conservation and exploitation of maritime resources and the positions of coastal states between the ILC draft of 1951 and the finalised corresponding articles of the 1958 Geneva Conventions.

The ILC draft of 1951 did not specify the depth-limit of the continental shelf, and the rights of coastal states over it were termed in the fashion of the Truman Proclamation as "control and jurisdiction" for the purpose of exploring it and exploiting its resources. The legal character of the superjacent waters and the air space was not to be affected, nor was such control and jurisdiction of coastal states to "result in substantial interference with navigation or fishing." With regard to the interests of coastal states in fisheries, it was provided that they were to be entitled to take part in the regulation of fisheries in the area of the high seas within 100 miles from their coasts even if their own nationals were not actually fishing in such areas. Modest as this draft might have appeared on the face of it, however, this was the beginning of the acceptance, at a formal international level, of the view that a coastal state is entitled to

certain special rights in the conservation of fishery resources in the area of the high seas contiguous to its territorial waters. The equality of votes in the Commission on the proposal of a 200-mile instead of a 100-mile zone in this connection represented a serious confrontation of interests between maritime states and coastal states.¹

The ILC draft of 1953² was substantially based on that of 1951, but was more definitive in its provisions, since the Commission had taken into consideration the opinions submitted by eighteen states on its first draft.³ Here the depth-limit of the continental shelf was specified at 200 metres, and the expression "control and jurisdiction" of coastal states was replaced by the phrase "sovereign rights". The articles relating to fisheries in the 1951 draft were adhered to in substance, though it should be noted that the authority of the proposed international body to be formed within the framework of the United Nations for the arbitration of disputes as referred to it was to be strengthened, as indicated in the provisions of this draft that all states should be "under a duty to accept, as binding upon their nationals, any system of regulation of fisheries" formulated by that body.⁴

Some points in the lengthy comments - ten paragraphs⁵ - accompanying the three draft articles on fisheries are worthy of note in view of their direct relevance to the present discussion. Firstly, the

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³ Ibid., pp. 241-269. Three states (Egypt, Israel and the U.S.A.) submitted comments on the draft articles of the continental shelf only.
⁴ This proposal for a central authority with legislative power did not survive the following sessions (cf. ILC Year Book, 1956, Vol. II, p. 288, paragraph 19).
Commission admitted that the draft went "beyond the existing law and must be regarded to a large extent as falling within the category of progressive development of international law" (Para. 95). Secondly, the concept of the special rights of coastal states was observed from a more critical viewpoint, as may be seen from the following contrasting statements which merit full quotation:

In so far as it renders the coastal states or the states directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it is productive of friction and constitutes an inducement to states to take unilateral action, which at present is probably illegal, of self-protection. Such inducement is particularly strong in the case of the coastal state. Once such measures of self-protection, in disregard of the law as it stands at present, have been resorted to, there is a tendency to aggravate the position by measures aiming at or resulting in the total exclusion of foreign nationals (Para. 96: emphasis added).

The system proposed by the Commission protects, in the first instance, the interest of the coastal state which is often most directly concerned in the preservation of the marine resources in the areas of the sea contiguous to its coast. If nationals of other states are engaged in fishing in a given area— whether coastal or otherwise—it is clear that the concurrence of those states is essential for the effective adoption and enforcement of the regulations in question (Para. 96: emphasis added).

Thirdly, it is also noteworthy that the Commission emphasised the desirability of states respecting the authority of the proposed international body, by the following statements:

The Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A state which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. In fact, the Commission deems it desirable that...enlightened states should consider themselves bound, even if by way of a mere imperfect legal obligation, to act on the view that it may be contrary to the very principle of the freedom of the seas to encourage or permit action which amounts to an abuse of a right and which is apt to destroy the natural resources whose preservation and common use have been one of the main objects of the doctrine of
the freedom of the seas. This is so although the Commission is of the opinion that the articles adopted fall generally within the category of development of international law (Para. 100: emphasis added).

In the course of these developments, however, it became apparent that the problem of the international conservation of fishery resources involved matters of a technical character which require consideration on a wide international basis by qualified experts. Hereupon the General Assembly decided - Resolution 900 (IX), December 14, 1954 - to convene a technical conference, which was held in Rome from April 18, 1955. 1 At this conference, which was attended by delegates of forty-five states and observers from six states, two Specialised Agencies of the United Nations and eleven intergovernmental organisations, the problem of the special rights of coastal states was one of the most controversial points. However, it can not be denied that the position of coastal states in connection with the conservation of resources became clearer in consequence, as may be seen from its reports. Narrow as the majority (18:17:8) was, because of the two opposing trends of thought so strongly operative among the participant states throughout the session, the Conference adopted the proposal that "when formulating conservation programmes, account should be taken of the special interests of the coastal state in maintaining the productivity of the resources of the high seas near to its coast." 2

The ILC draft of 1955 3 was primarily based on that of 1953, but was

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3. ILC Year Book, 1955, Vol. II, pp. 28-34. The problem of the continental shelf was not dealt with during this 7th session.
greatly influenced by the report of the Rome Conference, and therefore included the new concept of the special interests of coastal states as adopted in Rome. In view of the slight modifications in expression imposed on this draft during the next - the 8th (1956) - session, especially with regard to the position of coastal states in the formulation of conservation measures, the provisions in articles 25 to 33 (Chapter II)¹ can be said to have implied the culmination of the extent to which the "unilateralist" view could override the "internationalist" view in an international forum.

The right of a coastal state to participate in a system of regulation even if its own nationals are not carrying on fishing in the area in question was recognised in the two previous drafts of 1951 and 1953, provided that its territorial waters were within 100 miles of the said area. This 100-mile fixed limit was removed from the 1955 draft on the ground of impracticability. Though somewhat modified by its subsequent provisions, the first paragraph of Article 29 is noteworthy:

A coastal state having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other states concerned have not led to an agreement within a reasonable period of time.

The ILC draft of 1956 was a comprehensive and systematic rearrangement of the work of its preceding sessions, covering all aspects of the law of the sea in time of peace. The Commission had intended to provide the ground work

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¹ These nine draft articles are ascribed to Garcia Amador, the Vice-Chairman of the ILC, who represented Cuba at Rome and acted as the Deputy-Chairman there (ILC Year Book, 1955, Vol II, p. 29).

² Ibid., pp. 29-30 (Art. 28).
for an international conference as recommended to the General Assembly in its 1956 report, in order to give effect to the project as a whole. The provisions in this report regarding the continental shelf and the conservation of the living resources of the high seas did not show any marked departure from those of the preceding ones. However, mention should be made of the following two points, namely, the definition of the continental shelf (Art. 67) and the concept of the special interests of coastal states in the conservation of living resources of the sea (Arts. 54 and 55).

Firstly, the definition of the continental shelf in the 1951 draft implied a departure from the geographical sense of the term in that it was based solely on the exploitability test, not on the depth-limit of 200 metres. The corresponding article of the 1953 draft, however, reversed the definition in favour of the latter criterion. It should be noted at this point that the 1956 draft adopted both standards, partly as a result of what had earlier been concluded at the Inter-American Specialised Conference on "Conservation of Natural Resources: Continental Shelf and Oceanic Waters", held at Ciudad Trujillo in the March of the same year. ¹ Secondly, the provisions of the previous draft (1955) regarding the special interests of coastal states did not undergo any substantial changes during the 1956 session, except on points of moderated semantics (such as from "...may adopt unilaterally whatever measures..." to "...unilateral measures..."; and from "...an imperative and urgent need" to "...an urgent need" for conservation measures).

The Geneva Conventions

The 1953 United Nations Geneva Conference on the Law of the Sea was the culmination of the efforts of nations to adopt a universal system of the law of the sea. At the risk of oversimplification, the sheer necessity of such an ambitious attempt can be said to have been the outcome of the frustrations experienced in the earlier efforts at national and regional levels. Thus, by the time the Conference was called, the time was ripe for something to be done by way of receiving honourably and justifying decently the potentially fatal challenge to the cardinal principle of the law of the sea, namely, the principle of the freedom of the high seas.

Monumental as the Conference was as a contemporary chronicle of the law of the sea, its resplendent success was cynically paired with a failure which was so serious as to have threatened to undo the great achievements with which it was credited - the failure to solve the inherited problem of the breadth of territorial waters. However, this negative aspect of its achievement was not entirely detrimental to the development of international law in the sense that the conflict between wider community interests and narrower national interests could have hardly been more clearly identified.

The intrinsic gravity and complexity of the problems emphasised the limitations of a conference of plenipotentiaries more acutely this time than at The Hague Codification Conference of 1930. The number of states represented this time was doubled; and the character of the extremely important issues involved was not only legal but political and technical. Thus, the two-month session, which ended with the adoption of the four Conventions, was

characterised by a mixture of legal arguments, political manoeuvring or even 'horse-trading' and technological assumptions. The actual substance of the debates had therefore to be subordinated to a painful struggle between two groups of states, each striving to gain a voting majority: one group favouring and the other opposing acceptance by the Conference of a wider breadth of territorial waters and a more influential position for coastal states in the formulation of measures for the conservation and exploitation of resources. In consequence, therefore, the Conventions had to be framed not only in general and sometimes imprecise terms, but also with the inclusion of reservation clauses and such escape phrases as "and other rules of international law", to enable particular states to avoid major embarrassments in the future.

At this point, it is deemed necessary to compare the provisions of the ILC draft of 1956 relating to the special interests of coastal states with the corresponding ones in two of the Conventions, namely, the Convention on the Continental Shelf and the Convention on Fishing and Conservation of the Living Resources of the High Seas.

Firstly, as far as the position of coastal states was concerned, the Continental Shelf Convention is more definitive than the draft on which it was based. It is also of interest to note in passing that, recognising the existence of a special régime on the continental shelf, the Conference decided to embody the articles relating to it into an independent convention at the latter stage of the session. However, it is Article 2 (2) of the Convention that has undoubtedly enhanced the rights of coastal states over

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what was stipulated in the draft. The provision reads as follows:

Art. 2 (2): The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal state does not explore the continental shelf or exploits its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state.

Secondly, the highly controversial argument over the special status of the coastal states in the conservation of resources finally closed with the adoption of related articles (Arts. 6 and 7 in particular) of the Fishing and Conservation Convention. The relative ambiguity of some of the provisions of these two articles is conducive to the view that they have actually enhanced the status of coastal states more than did the corresponding ones in the ILC draft of 1956. Their intrinsic importance and particular relevance to the point under discussion here warrant quotation in full:

Art. 6: 1. A coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal state is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas in that area, even though its nationals do not carry on fishing there.

3. A state whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal state shall, at the request of that coastal state, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.

4. A state whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal state shall not enforce conservation measures in that area which are opposed to those which have been adopted by the coastal state, but may enter into negotiations with the coastal state with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.

5. If the states concerned do not reach agreement with respect to conservation measures within twelve months, any of the parties may initiate the procedure contemplated by Article 9.
Art. 7: 1. Having regard to the provisions of paragraph 1 of Article 6, any coastal state may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other states concerned have not led to an agreement within six months.

2. The measures which the coastal state adopts under the previous paragraph shall be valid as to other states only if the following requirements are fulfilled:

(a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
(b) That the measures adopted are based on appropriate scientific findings;
(c) That such measures do not discriminate in form or in fact against foreign fishermen.

3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity.

4. If the measures are not accepted by the other states concerned, any of the parties may initiate the procedure contemplated by Article 9. Subject to paragraph 2 of Article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

5. The principles of geographical demarcation as defined in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different states are involved.

As far as the Fishing and Conservation Convention is concerned, therefore, the substance of these provisions precludes any impulse to question the existence or the recognition of the special status of coastal states in the conservation of resources in any area of the high seas adjacent to their territorial waters. The adoption of the articles was after all an extraordinary departure from the traditional principle of the freedom of the high seas and therefore brought a great triumph to the group of states that had been struggling for it since the late 1940's.
As may be expected, this has led many disputants to raise a series of controversies over the inadequacy of some of the provisions on the undeniable ground of their ambiguity or incompleteness as a set of rules to be applied to matters so vulnerable to argument. Among the points thus indicated are that no distance-limit is specified as to how far from the coast the conservation measures of coastal states can apply, that the "need for urgent application of conservation measures" (Art. 7, 2, a) should have been required to be demonstrated by scientific findings, and that these two 'loopholes' would alone leave open the probability of abuse by coastal states.

However, the fact can not be overlooked that the adoption of the provisions failed to satisfy either the 'unilateralist' coastal states or the 'internationalist' maritime states. The former were dissatisfied with the enhanced restrictive provisions such as, among others, on compulsory arbitration (Arts. 9 to 12) and the latter with the extent of injury done to the freedom of the high seas by what appeared to be a sheer rule of majority over minority. This can be seen from the list of the thirty-seven original signatories of this Convention, which does not include many states to which fishery is important. Conspicuous among the non-signatories are the ten Latin American states, the entire Soviet bloc, India, Italy, Norway, Spain, Sweden; to say nothing of Korea and Japan.

(iv) Tenability or Untenability

The legal character of the Korean proclamation could have been better examined by both states against the background of these developments. In discussing the issue in that context, however, the question might arise whether the related provisions of the Geneva Conventions might be employed in its defence by either party to the Korea-Japan fisheries dispute, without
being accused of disregarding the fact that the Korean proclamation had been made over half a decade before the Geneva Conventions. This positivist inquiry would find itself inconclusive in the case of the multilateral Conventions to which, aside from their character being predominantly 'normative' as distinct from 'contractual', neither party to the dispute had committed itself by signing, still less by ratifying or acceding to, any of them.

Another relevant point in this connection is the fact that the adoption in the world forum of the above provisions defining the special interests of coastal states under specified circumstances can be said to have been merely an authoritative confirmation of what had originated during the late 1940's and had been highly controversial up to 1953 as a new trend in the law of the sea. This particular relationship or continuity between its origin and its confirmation in the form of codification also enhances the grounds for applying these provisions to the assessment of the legal character of the Korean proclamation, especially in the light of the Korea-Japan fisheries dispute having continued for another seven years following the adoption of the Geneva Conventions in 1958.

1. It was barely on June 10, 1968 - ten years after the adoption of the four Conventions in Geneva - that Japan acceded to the two Conventions on the High Seas and on the Territorial Sea and the Contiguous Zone. Understandably, they are the less 'detrimental' to her national interests. Korea has thus far acceded to none. The number of ratifications and accessions to each of the four Conventions are (based on information from the Nationality and Treaty Department, the Foreign and Commonwealth Office, London, dated February 14, 1969):

<table>
<thead>
<tr>
<th>Convention</th>
<th>Number of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Seas</td>
<td>43</td>
</tr>
<tr>
<td>Territorial Sea and Contiguous Zone</td>
<td>36</td>
</tr>
<tr>
<td>Fishing and Conservation</td>
<td>27</td>
</tr>
<tr>
<td>Continental Shelf</td>
<td>29</td>
</tr>
</tbody>
</table>
Thus, in view of the above developments which led to the adoption of the Conventions, it is deemed appropriate to consider the tenability or untenability of the Peace Line with reference to the related provisions - and to Article 7 in particular - of the Convention on Fishing and Conservation of Resources, as follows.¹

Firstly, regarding the unilateral nature of the Korean proclamation, the inevitability of conservation measures having to be unilateral can hardly be denied in the absence of alternatives which might pertain to waters open to fishery troubles. This applies to the case of Korea and Japan with a particular connotation, due to the fact that Japan adopted a double standard in late 1951 to the deep resentment of Korea, by refusing to negotiate fishery problems with Korea on the one hand and at the same time acquiescing in the so-called abstention principle in her negotiations with Canada and the United States, on the other, as has been mentioned earlier.

However, the substance of the problem lies not in the question whether the form of the measures is unilateral or otherwise, but in their effects on the interests of other states. In this regard, the following oft-quoted opinion of the International Court of Justice as expressed in its Judgment in the Anglo-Norwegian Fisheries Case of 1951 is noteworthy:

The delimitation of sea areas has always an international aspect; it can not be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the

¹ It should be added here that, important in point of form as the character of the Peace Line as a delimitation of the continental shelf might have been, this aspect was nevertheless so obscure in point of substance throughout the entire process of the fisheries dispute that it is hardly thought to warrant further consideration in this part of the present discussion.
act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.  

Secondly, with regard to "the need for urgent application of conservation measures" as referred to in Paragraph 2 (a) of Article 7, there was no denial even in Japan that, during the Japanese rule of Korea, the seas around the Korean peninsula had been so thoroughly scooped and raked up by the Japanese fishermen that conservation measures had to be launched by the Japanese themselves. The Japan Year Book (1938-1939) records:

At present the Government is restricting trawlers in the Inland Sea, the East China Sea, and the Yellow Sea to 70 vessels...... It also prohibits trawlers, by special regulations, from operating in the near-by seas in order to keep the coastal water free from the devastation caused by the destruction of immature fish, etc.  

The Korean delegation at the 1955 Rome Conference made this point clearer, by the following observation:

The fishery resources in the area have been subject to excessive exploitation by Japanese otter trawlers since 1911. The decrease in the resource became apparent by 1921, when large-scale drag nets were introduced into the area. The consequent danger was too evident to be ignored, and by about 1929, the Japanese Government had established measures for fishery control with a view to protecting the resource; they had little success because of the ever-increasing number of fishing boats and their activities.

Whatever small amount of fishery resource remains in the seas adjacent to Korea is the result of conservation, protection and cultivation by Korea at the cost of human toil and financial burdens.

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1. ICJ Reports (1951), p. 132.
2. Japan Year Book (1938-1939), the Foreign Affairs Association of Japan, p. 480. Annual Report on Reforms and Progress in Chosen (Korea) for 1935-1936, p. 129, and the corresponding sections of the earlier issues, published by the Japanese Governor-General in Seoul, Korea, also give information to similar effect.
It should be noted, therefore, that the Korean measures were intended to protect her resources from further exhaustion by the fishermen of the very state that had earlier admitted her overfishing.

Thirdly, with regard to the scientific basis of the measures as referred to in Paragraph 2 (b), Article 7, the Korean proclamation as well as the other ones including the Truman Proclamations was not at all specific on this point. This can be explained by the fact that they were declared merely in order to assert the right to jurisdiction and control over the resources under certain circumstances, irrespective of the need for the application of conservation measures, rather than for direct application as the actual stipulations of conservation. In this sense, they could have provided the legal basis for conservation measures in the absence of such provisions as in the Convention. It should also be mentioned that the ground of jurisdiction and control is fundamentally distinct from that on which the need for conservation measures arises.

Fourthly, the direct cause of fisheries disputes has almost invariably been discrimination against foreign fishermen in the explicitly bounded conservation zone of a coastal state. From the beginning, therefore, the problem relating to the preferential rights of coastal states could not be properly considered at international level, without definite awareness of the possibility or even danger of abuse, to the disadvantage of non-coastal states. If the provision of Paragraph 2 (c), Article 7, which denounces discrimination "in form or in fact against foreign fishermen", was intended to be a prevention of such abuse, the enumerations of Articles 9 to 12 on compulsory arbitration could be regarded as a desirable method of settling disputes should such abuses occur.

The problem of discrimination against foreigners presupposes the
question whether the unilateral measures of a coastal state include provisions enabling interested adjacent states to participate in the formulation of conservation measures or to accede to them. As the Truman Proclamations were cited as the precedents for numerous subsequent unilateral measures by other states, including Korea, it is relevant to compare the Korean proclamation with those of the United States in respect of discrimination against foreign fishermen. This is especially so, in the light of the fact that protests and accusations against the Korean and Latin American measures were invariably based on the allegations that the Truman Proclamations were misinterpreted by these unilateralist states.

First of all, it is important to note from a comparison of the proclamations of Korea and the United States that one does not include such reciprocity as is seen in the other, in the sense that the terms of the Korean measures are not open to negotiated demarcation of continental shelf boundaries and joint fisheries conservation zones. As far as the Korean proclamation was concerned, therefore, it can not be denied that this lack of reciprocity was a defect that seriously weakened its tenability in international law. Not unexpectedly it was regarded as straightforward discrimination against foreigners on the high seas and was instantly made use of by Japan as a rare target of ever-poitnant refutations.

In contrast to the above comparison based on general terms, however, it is as important to have due regard to the conditions peculiar to the area of the Korean sea in question. As the Truman Proclamation concerning the continental shelf is not so relevant to the discussion at this point because of the reciprocity as defined therein being simply geographical, it is the following two points in the Proclamation on coastal fisheries that are essential to the present comparison:
1) Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other states, explicitly bounded conservation zones may be established under agreements between the United States and such other states; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements (emphasis added);

2) The right of any state to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas.

In view of the peculiar circumstances under which the Korea-Japan fisheries dispute took place, it is very clear that neither of the above two points is sufficiently relevant and applicable to the troubled waters around Korea. If the first point was intended to be applied to the areas of the high seas where fishing activities had been or might be legitimately developed and maintained jointly by the nationals of the coastal state and other states, it is obvious from earlier observations that only by a stretch of common sense beyond reason could Japan have professed herself to have legitimately developed and maintained jointly or otherwise the fishing activities in the areas of the high seas under controversy. Therefore, it would have been a gross misapprehension of the Truman Proclamation on coastal fisheries to insist that, even in disregard of the different regional conditions, it could be applied equally to the case of the very state whose only contribution towards developing and maintaining the fishing activities in the said areas was a relentless destruction of the resources therein to the incalculable detriment of the coastal state. In the numerous analyses of the problem, this point appears to have been overlooked intentionally or unwittingly.

The inapplicability of the second point above is doubly clear.
Firstly, if the first point is not applicable, the second one becomes simply meaningless in this case. Secondly, its intrinsic merit is not relevant to the regional conditions of the said areas, in the sense that the inter-fishing between Korea and Japan has always been a one-sided trade, with little likelihood of being otherwise in the future, due to environmental and historical reasons which made the Korean waters natural training ground for Japanese fishermen, whereas the Japanese waters have witnessed few wakes of Korean fishing boats.

Under these circumstances, it can be said that the problem of reciprocity or discrimination against foreign fishermen can not be rightly considered without due regard to the particular conditions of the region which have made such measures inevitable. The character of the Truman Proclamations as one of the precedents for the Korean and other unilateral measures can not therefore be generalised as being capable of universal application, however fair and tenable they may be under the regional circumstances by which they were prompted.

After all, it can be said from the foregoing observations that the problem of tenability or untenability of the Korean proclamation was merely a matter of relativity, not one absolutely in favour of either conclusion. Because of the predominantly political character of the prolonged dispute over fishing rights, however, neither party could afford to jeopardise its national interests and prestige as well, by interpreting and dispensing international law and its ever-changing trends reasonably, if not justly - still less by admitting the disputable and dubious aspects of its highly articulate allegations against the other. Each side simply exhausted every means and all of its patience in alleging its own practice to be immaculately just and lawful and that of the other to be flagrantly unjust
and unlawful, where one was as much to blame as the other. Thus, it was
undeniably a disservice to international law for the two capricious
neighbours to have employed it as a means to an end in their political
controversy.

b. After the Agreement

When the Fisheries Agreement was signed in 1965, the primary
interest of the general public both in Korea and Japan was to ascertain what
had become of the Peace Line upon conclusion of the Agreement. The concern
in Korea sprang from the sentimental worry about its abolition, whereas in
Japan it was prompted by its continued existence. The lack of any
reference to it in the Agreement gave rise to these mixed feelings and
speculations. Much as Japan would have preferred to include explicit
provisions defining its abolition in the Agreement, especially in the light
of the mandatory life of the fisheries treaty being only six years, she had
been discouraged from doing so by the consideration that the introduction of
such provisions might by implication result in a posthumous recognition of
the hitherto unrecognised Peace Line.

In the absence of any explicit mention in the treaty regarding the
post-1965 status of the Peace Line, its continued existence or permanent
disappearance has to be determined with reference to the treaty provisions
defining the exclusive and joint regulative measures to be carried on within
the Peace Line areas as well as on the basis of the pronouncements both sides

1. T. Takeshi, "Nikkan Gyogyo Gyoteito sono Jissho Megutte" (Japan-Korea
Fisheries Treaty and Its Implementation), Horitsujicho (Law Times), No. 4,
made about it after the restoration of their friendship.

In connection with the first point above, it should be noted from the provisions of the treaty that the exclusive fisheries jurisdiction of Korea now can not extend beyond twelve miles from her coastal baselines (Art. I), that in the areas outside the exclusive zone jurisdiction and enforcement measures against fishing vessels violating the provisions of the treaty rest entirely with the authorities of the party to which such vessels belong (Art. IV), and that neither the outer limits of the so-called joint resources survey zone nor the particulars of the survey to be conducted therein are specified at all (Art. V). Against the background of these provisions, it is rather meaningless to attempt to deny that the Peace Line has been in fact superseded by the treaty, with no abolitionary measures having been taken by Korea.

In connection with the second point, each side maintained a view entirely different from that of the other, as may be seen from the following quotations:

**Korea:** The Peace Line was declared for purposes of national defense and protection of marine resources. The agreement on fisheries contains effective provisions designed to protect marine resources, but the Peace Line still continues in force with respect to its other purposes.

**Japan:** It was virtually removed. Korea can not claim anything contrary to the letter and spirit of the agreement on fisheries. We can not tolerate the exercise of exclusive jurisdiction by the Republic of Korea.

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1. Even the Korean proposal to adopt as a joint resources survey zone the areas between the outer limits of the joint regulation zone and the rest of the Peace Line areas did not meet a favourable response from Japan, mainly for the psychological reason that it would leave the impression of the Line still being in existence even in the way it would have been.

2. Statements of Foreign Ministers of Korea and Japan respectively (Korea Annual, 1966, p. 120).
By the "other purposes of the Peace Line" referred to in this pronouncement of Korea was meant nothing other than those of defence and continental shelf about both of which mention has already been made. It can not be denied, therefore, that the Korean view in this regard was based strictly on the absence of any formalities which would have been necessary for the abolition of the Peace Line, and that this was thus a case of conflict between form and fact, with the former being in favour of Korea and the latter in favour of Japan. This point was reflected in the above Japanese interpretation of the issue, when it said that the Peace Line had been "virtually removed".

However, in view of the short life of the fisheries treaty and the existence of the Peace Line even in form, the relationship of the former with the latter should also be considered in respect of what would follow upon the expiry of the mandatory term of the treaty. In brief, a fairly reasonable prediction can be made on the basis of the fast-improving relations between the two states that the resuscitation of the Peace Line - even to a much lesser extent than formerly - would be possible only under circumstances which were unlikely to develop out of the present situation of Korea internally as well as externally.

3. Observations

Apart from the intrinsic merits or demerits of the Fisheries Agreement, which are examined in the following four sections (a to d), the conclusion of the treaty in 1965 after fourteen years of acrimonious controversy should be said to be a matter of particular significance in
view of the deplorable antagonism caused by the prolonged dispute and of the great sacrifice paid by the fishing interests of both parties. The peculiar character of the fisheries dispute had so seriously damaged all the other aspects of their relations over a length of time during which a great deal could have otherwise been achieved to the mutual benefit and prosperity of both. The actual sacrifice of the fishing interests of both sides resulted from the frequent seizure by Korea of Japanese fishermen and their vessels and from the economic retaliation of Japan by banning the import of Korean marine products and the export of fishing gear to Korea. After all, the mere fact that a dispute apparently so unlikely to be resolved finally came to an end in the form of an agreement is alone sufficient reason to attach to it unusual significance as an example of what is desirable for nations to do and not to do in the cause of international law and friendship.

As a result of its uncommonly complicated background, the treaty contains several outstanding features or peculiarities which differentiate it from other agreements of a similar kind. This can rightly be attributed to the factors peculiar to the circumstances from which the dispute had arisen, namely, the geographical proximity of its parties, their historical relations, their economic disparity, and the imbalance in their capability to harvest the sea resources. The following is an attempt to analyse the Korea-Japan Fisheries Agreement with reference to the four major points which have been controversial in regulating international marine fisheries by agreements between nations.
a. The Exclusive Fishery Zone

I

It is stipulated in Article I (1) that "each Contracting Party has the right to establish within twelve nautical miles measured from its coastal baseline a sea zone in which it will have exclusive jurisdiction with respect to fisheries." Though the acceptance of a twelve-mile distance as the limit of an exclusive fishery zone implied on the part of both states a considerable departure from what they had respectively struggled to attain during the course of strenuous negotiations, this was generally along the lines of the post-Geneva trend in the international regulation of fisheries through bilateral or multilateral arrangements. Though, as far as the law of the sea is concerned, this provision rightly represents the essence of the entire agreement, it is the rest of the provisions, including the various annexed documents, that are more substantial from the standpoint of the practical interests of both sides. For this reason, the latter are strongly expressive of the hidden desire with which each party had respectively sought to make available to it as much of whatever resources of the non-exclusive zone was to be subjected to competitive exploitation as a result of the agreement. Because of this unusual background, the legal character of the twelve-mile fishery zone here could be defined in a more exclusive way than that to be seen in other fisheries treaties, in which the zone is usually divided into the so-called inner-six and the outer-six mile belts, the latter zone being accessible to foreigners under specified conditions. In order to ascertain the ground of this difference between the two zones, it is necessary to trace the origin of the concept of fishery zone.
It is only very recently that the maritime belt of a state to the limit of twelve miles from its coastal baseline began to assume a new legal status and finally gained recognition as a fishery zone at the international level. Even though some states, dissatisfied with the inadequacy of the three-mile limit, sought to extend it to twelve miles for fishery purposes already at the 1930 Hague Codification Conference, the concept of a fishery zone as such may be said to be the product of the two Geneva Conferences of 1958 and 1960, its immediate authors being Canada and the United States.

As has been mentioned earlier, it owes its origin to the determined struggle during the sessions between the traditional three-miler maritime states and the mostly newly-emerged 'extensionist' coastal states over the breadth of territorial waters, and consequently made its appearance in the form of a compromise when the search for agreement had almost reached the point at which something was thought still preferable to nothing. It is noteworthy that its failure to be adopted due to the much-regretted margin of but one negative vote (54:28:5) did not substantially affect its merits, as has been shown by

1. Second Conf. Rec., A/CONF. 19/8, p. 173, Canada and United States proposal:
2. A state is entitled to establish a fishing zone in the high seas contiguous to its territorial sea extending to a maximum limit of twelve nautical miles from the baseline from which the breadth of its territorial sea is measured, in which it shall have the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea.

3. Any state whose vessels have made a practice of fishing in the outer six miles of the fishing zone established by the coastal state, in accordance with paragraph 2 above, for the period of five years immediately preceding 1 January 1958, may continue to do so for a period of ten years from 31 October 1960.

These are the two particularly relevant paragraphs out of five in the 1960 proposal by the above two states. During the 1958 session, the United States made four proposals (First Conf. Rec., A/CONF. 13/39, Vol. III, pp. 249 and 253) to the second of which the division of the twelve-mile belt into two six-mile zones dates back. The last two were revisions of the second.

the wide currency it has gained subsequently.

It is of particular interest to note at this point that, according to the great bulk of recorded debate in Geneva, the delegations of Korea and Japan produced during the two sessions what appeared to be an extension or even a dress rehearsal of their Peace Line controversy in Tokyo, one having hardly expressed its opinion on any important point without being immediately opposed by the other, thereby presenting a bird's eye view of the impasse situation before the international forum. Though the treaty itself is silent on the breadth of the territorial waters of the two states, some opinions expressed by both delegations in Geneva deserve to be noted because of their direct relevance to the problems of fishing rights between them. Their argument in Geneva on the high seas fishery also merits quotation, and allows a comparison to be made of their respective positions regarding the extension of fishery jurisdiction beyond the limit of territorial waters. Through this comparison it can also be seen how much influence the two sessions came to have on them in the way of eventually dismissing rigid adherence to extremes in favour of the compromise of a twelve-mile fishery zone.

At the 1958 Conference

a. In the First Committee (Territorial Sea and Contiguous Zone):

Korea: The International Law Commission seemed to have concluded that there was no rule of international law fixing the precise breadth of the territorial sea. That fact..., merely proved that times and circumstances changed; and the international jurists assembled at the Conference would be doing a disservice to mankind if they failed to take all the implications of those changes into account.

No rule governing the breadth of the territorial sea could stand the test of practical application unless it provided an adequate safeguard for the paramount interests of the coastal state. Several representatives had stressed how useful the three-mile limit had been in
the past — at a time when it had been consistent with prevailing conditions. But those conditions had changed, and the three-mile limit was no longer adequate. Korea, as a peninsular state deeply concerned with its security and economic needs, earnestly hoped that the Conference would adopt a principle better adapted to the varying conditions obtaining in different regions of the world.1

Japan: The Japanese government held that the three-mile limit, which had been sanctioned in practice by a great majority of states, and was embodied in many international treaties, was an established rule under international law, and that extensions beyond that limit could not be regarded as generally recognised. The primary purpose of the Conference was codification and, although it must give due thought to the changes necessary for promoting the progressive development of international law, it should always bear in mind that any departure from existing rules must only be admitted if it contributed to that development and was in the interests of the entire community. The extension of the territorial sea would mean an encroachment upon the high seas, which were open to all nations, and such a course would run counter to the development of international law; hence he sincerely hoped that agreement would be reached on a uniform three-mile limit.2

In the Third Committee (High Seas, Fishing and Conservation):

Korea: The Japanese representative had said.... that the Korean proposal was intended to monopolise coastal fishery and that the abstention principle was incompatible with the freedom of fishing on the high seas and the principle of equality. That argument seemed to attempt to justify an unrestricted exercise of the freedom of fishing to the detriment of the coastal state. The Japanese delegation had not supported the special interest of the coastal state in maintaining the productivity of living resources, and had not recognised the competence of the coastal state to take unilateral conservation measures in urgent cases; accordingly it disregarded the special situation of coastal states primarily dependent upon fishing for the livelihood of their populations.

The position of coastal states was quite different from that of countries carrying on unrestricted fishing activities off the coasts of other states with purely commercial motives.3

Japan:

The system proposed by Canada and the United States would in effect give a fishing monopoly to the coastal states, while other states would be excluded without compensation from fishing in particular areas of the high seas.

Under the proposal submitted by the Republic of Korea the single fact that the coastal state had made sacrifices in its efforts to conserve the living resources and increase their productivity would be a sufficient excuse to require other states to abstain from fishing in the area of the high seas adjacent to its territorial sea. Such a definition of "sacrifices" was so vague that it was bound to lead to abuses, since it was a widespread practice to impose some kind of limitation relating to the size of the fish, the mesh of the fishing net, fishing seasons and so forth. The proposal of the Republic of Korea tended to give the coastal state a fishing monopoly by virtue of the fact that it carried on fishing in the waters in question.

At the 1960 Conference

Korea:

There were now encouraging signs that a majority of coastal states would be willing to forgo a twelve-mile territorial sea if exclusive fishing rights were recognised to them in a wider zone of their coastal high seas. The main divergence of views persisted, but a satisfactory compromise between the position of the coastal states and that of the maritime powers might perhaps be found in a uniform rule providing for a territorial sea of less than twelve miles, but allowing coastal states to exercise control over fishing in the contiguous zone, and in an outer high-seas zone if necessary.

In deciding the question of fishery limits, the Conference would be obliged to recognise the validity of the fundamental concept that the right of a coastal state to fish in its coastal waters should take precedence over that of other states wishing to fish there. The coastal state enjoyed prescriptive fishing rights in its coastal waters and was therefore entitled to preferential treatment in them.

The circumstances and legitimate interests of coastal states varied, and, although it would be generally desirable to have a rule of universal application, any rigid formula which failed to take account of such differences would be unrealistic and hence unacceptable to many states. Certain cases undoubtedly called for special consideration and special treatment, and provision would have to be made for

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the parties concerned to adjust their interests through bilateral or multilateral agreements, with due regard for the geographical, political, economic and historical factors involved.1

**Japan:** The United Kingdom had submitted a compromise proposal providing for a territorial sea six miles broad, on the understanding that if no agreement was possible on that compromise the three-mile practice would remain the recognised rule of international law. A number of other delegations, including that of Japan, had expressed their readiness to support such a proposal in the same understanding. It was therefore wrong to assert, as some representatives had done, that the three-mile rule had ceased to be a rule of international law.

Any extension of the breadth of the territorial sea, or the creation of an exclusive fishery zone, would to that extent constitute an encroachment on the freedom of the high seas, which it was the Conference's duty to uphold in the interests of all mankind. He regretted that some countries should be primarily interested in the immediate benefits to be derived from extension of their territorial waters or fishing zones...

But proposals seeking to extend a coastal state's territorial sea, or the zone in which it would enjoy exclusive fishing rights, to twelve miles or beyond did not seem compatible with the principles of justice and equality if they excluded states which had for many years been fishing in the areas of the high seas affected, and whose economy and national livelihood largely depended on fishing in distant waters.2

However, it is important to note here that, in spite of this apparently irreconcilable confrontation, the voting attitude of each was not necessarily coherent accordingly throughout the two sessions. The significance of this gradual change, however inconspicuous, was that a compromise of some sort between them was not utterly impossible where the need for unity in the law of the sea was felt more pressingly than ever before. From the traces of incoherence in their voting attitudes on such important proposals as those...

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below, it appears that, by the end of the second session in 1960, both Korea and Japan were not entirely unaware that neither of the two extremes to which they so firmly adhered was sufficiently preferable to what was being so ardently sought by the great majority of other participants, unless both of them — one being peninsular and the other insular — were prepared to stand the substitution of anarchy for the rule of law at sea.

During the 1958 session, the First Committee (Territorial Sea and Contiguous Zone) adopted the following text for a contiguous fishing zone as article 3:

A state has a fishing zone contiguous to its territorial sea, extending to a limit of twelve nautical miles from the baseline from which the breadth of its territorial sea is measured, in which it has the same rights in respect of fishing and the exploitation of the living resources of the high sea as it has in its territorial sea.¹

At the plenary meeting, as expected, Korea voted for and Japan against this proposal, which was not adopted (35:30:20),² having failed to obtain the required two-thirds majority. In other words, Japan was opposed to recognising a twelve-mile fishery zone as defined above.

The four proposals put forward by the United States during the 1958 session were strongly demonstrative of her anxiety to seek agreement by means of a compromise and are therefore particularly noteworthy, especially the second one from which the division of the proposed twelve-mile fishery zone into the inner-six and the outer-six originated as a means of recognising the vested interests of non-coastal states within the outer-six under specified circumstances. However, it is the fourth, intended to replace the above article 3 and voted on immediately afterwards, that also warrants quotation

² Ibid., p. 39.
in part here, as a background against which to examine the voting attitudes of Korea and Japan properly:

Paragraph 2: The coastal state shall in a zone having a maximum breadth of twelve miles...have the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea; provided that such rights shall be subject to the right of the vessels of any state whose vessels have fished regularly in that portion of the zone...for the period of five years immediately preceding the signature of this convention, to fish in the outer six miles of that portion of the zone, under obligation to observe therein such conservation regulations as are consistent with the rules on fisheries adopted by this convention and other rules of international law (emphasis added).

The result of the vote was 45 in favour and 33 against, including Korea, with 7 abstentions, including Japan. In this vote, it was obvious that the proviso for opening the outer six to foreigners was utterly unacceptable to Korea under the prevailing circumstances. The shift of the Japanese vote from opposing the above article 3 to abstaining from this modified proposal should be said to be simply a parallel movement along the lines of these two proposals.

However, it is the vote on the two proposals of Canada and the United States on the breadth of territorial waters and fishery zone at the 1960 session that are more noteworthy and important for the present discussion. From the first of these has come the so-called "phasing-out" device, which was another offer to coastal states as a term of compromise. The 'permanent' vested interests of a non-coastal state within the outer six as defined in the United States proposals of 1958 were to be modified by a time-limit of ten years in this joint proposal of 1960. The highly significant fact can not be overlooked that, throughout the two sessions of 1958 and 1960 during which no

less than ten important votes took place on the breadth of territorial waters and fishery zone, this was in fact the only occasion - as shown in the table below - at which Korea and Japan found themselves both in the affirmative group, when this first proposal was adopted 43:33:12\(^1\) in the Committee of the Whole, not in the Plenary Meeting. This was significant, not because of their rather unexpected unity in voting affirmatively, but because of the fact that Korea had opposed, and Japan had abstained on, the fourth United States proposal in 1958, which was in fact less restrictive to non-coastal states, having no phasing-out device in it. In other words, it can be said that this time Korea voted for the proposal in appreciation of the phasing-out device, whereas Japan voted in favour in spite of this device. Japan, a professed champion of the three-mile limit and a bitter opponent of all other limits, should therefore be said to have for the first time, although involuntarily, demonstrated her intention to conform with the changing trend in the law of the sea. Thus, it would not have been entirely unrealistic and optimistic to have believed that, from a strictly legal point of view, the settlement of the Korea-Japan fisheries dispute was not such an impossibility as it was thought to be from a political point of view.

However, the following two points have to be noted. Firstly, Korea made it clear that her affirmative vote on the above proposal was irrelevant to her fisheries dispute with Japan:

Her delegation's affirmative vote should not be construed as meaning that it accepted the inference that adoption of the joint proposal would preclude the future conclusion of an agreement or agreements between the states concerned on fishery problems which called for special treatment. In fact, the Republic of Korea had special fishing problems to settle with its neighbouring country in accordance with the provisions of the San Francisco

Treaty of 1951

Secondly, at the second vote in the Plenary Meeting on the same proposal with amendments by Brazil, Cuba and Uruguay, Japan abstained, having presumably been dissatisfied with the three-power amendments and considering them to be disadvantageous to her.

The voting attitude of Korea and Japan in Geneva on the proposals relating to the twelve-mile fishery zone was clearly illustrative of their confrontation as well as of that between traditional maritime states and coastal states during the conferences:

A. Simple Twelve-Mile Zone: (K = Korea, J = Japan)

The 2nd Canadian proposal, 1958 ..........1st Comm... 37(K):35(J):9
                            Plenary......35(K):30(J):20

Eight-power proposal, 1958 ...............Plenary......39 :38(J):8(K)


B. Twelve-Mile plus Vested Interests in Outer-Six:

The 4th United States proposal, 1958 ..........1st Comm... 36 :38(K):9(J)
                            Plenary......45 :33(K):7(J)

C. Twelve-Mile plus Vested Interests plus Phasing-out:

The 1st Canadian and United States proposal, 1960 ......................Comm...... 43(KJ):33:12
                            Plenary......54(K) :28:5(J)

In the light of this background, it can be said that, at least to the extent of having adopted the distance of twelve miles as the limit of its

2. Ibid., p. 30 (54:28:5).
3. The unity of Korea and Japan in these two negative votes has no particular significance in the context of this discussion.
fishery zone, the Korea-Japan treaty is along the lines of what may be
called a post-Geneva trend in fisheries treaty making. The fact that the
zone was not divided into either the inner-six and the outer-six or
otherwise means that the vested interests of Japan in its outer half were
not considered at all. Under this situation the phasing-out device was
simply out of question.

At this point, it is appropriate to make some critical comments on
the intrinsic value of the above two inventions: the recognition of the
vested interests of coastal states within the outer-six and the imposition
therein of the phasing-out time-limit. Without injustice to the authors of
these particular ideas, and with sufficient awareness of the circumstances
under which they had to be introduced into the proposals in Geneva, it still
can be said that, from a practical point of view, they were merely temporary
expedients based, in the name of equality, on technicalities and ingenuity
to meet the pressure of the situation, rather than a new principle of law
which would stand the test of time and practice. They would have caused
more disputes than they had been intended to settle. Firstly, if the
numerical basis of the outer-six was admissible on the strength of its
kinship to the six-mile limit of territorial waters, the two time-limits -
a five-year precedent period of fishery participation by non-coastal states
as a condition of vested rights for continued operation within the outer-six
and a ten-year limit for phasing-out - were both purely artificial and
unrelated to any practical criteria. Secondly, they would have been an
implicit temptation for abuse of rights by the coastal states as well as by
the non-coastal participants doomed to phasing-out. In other words, the
former would tend to constrict their measures for the outer-six area in the
name of conservation of resources, while the latter would tend to overfish th-
resources of the area from which they were bound to be eventually excluded. This would in all likelihood give rise to the situation in which the provisions for the settlement of disputes thus arising would be much less effective than otherwise, that is, than without the time-limit.

If the recognition of a twelve-mile fishery zone was based on the preferential rights of coastal states with respect to the conservation of resources in the areas of the high seas adjacent to their territorial waters, the recognition of vested interests of non-coastal states on the basis of their habitual fishing therein for a certain period of time would constitute reasonable equity only in relation to the states concerned, but consequently depriving prospective new-comers of the right to fish in certain areas of the high seas. Strictly speaking, this should be said to be a weakness of this new practice, in the sense that a past participation alone can not be the legal basis of a future right discriminating against bona fide would-be parties. This weakness is further aggravated by the meaninglessness of the phasing-out device, which is in fact in contradiction to the very concept of vested interests due to the illogicality of imposing extinctive prescription on them. If the two devices were convenient as means of agreement between states, they should be left to the choice of the states concerned, rather than be given an utterly undeserved position in an international convention of no ordinary importance. Due to these weaknesses, their application in the post-Geneva fisheries treaties has resulted in peculiar regional variations, depending upon the seriousness of controversy in the treaty areas, as may be seen from the numerous examples since 1960.  

1. The twelve-mile fishery zones referred to in the following examples

Continued
international fishing in troubled waters, however, their intrinsic merits are more likely to be simply transitional over the formative period of the twelve-mile fishery zone as an exclusive fishing area of the coastal state.

An extraordinary recent development in connection with the character of the twelve-mile fishery zone also deserves particular mention at this point. If the recognition of the above vested interests of represent a variety of different arrangements to be applied within the divided zones of 6 miles plus 6 miles, 3 and 9, 9 and 3, 12 and 0, and 0 and 12.

6+6:
Anglo-Icelandic Exchange of Notes, 1961, Colombos, on cit., pp. 157-159.
German-Icelandic Exchange of Notes, 1961, UNTS, Vol. 409, p. 47.

3+2:

9+3:

12+0:

0+12:
non-coastal states and the application of the phasing-out device represent the two legally illogical aspects of the twelve-mile fishery zone, a third one has made its appearance in the fisheries treaties of the southwestern Pacific region. It is no less peculiar than the imposition by coastal states on foreign fishermen of what may accurately be described as an "admission fee" for operation within specified areas of the twelve-mile fishery zone. The two fisheries treaties which Japan signed with Australia and Indonesia in 1963 specified the sums to be paid by the Japanese fishing vessels to the governments of these two states respectively.  

In brief, this could hardly imply anything less than a deviation or derogation from the traditional concept of a fisheries treaty. If the relatively insignificant amount of "fee" would not justify a flexible interpretation of the arrangements as being an act of "mortgaging the fishing ground", or at least as the beginning of that process, it still possibly involves the danger of strengthening the possessive aspect of the legal character of the zone. The more peculiar and even mythological of the two is the Japanese-Indonesian treaty, which is said to be the outcome of a condition that Japan would supply Indonesia with what would perhaps be the least expected material to have to do with a fisheries treaty - medical equipment for the Indonesian hospitals. 

It can not be denied that, since the latter part of the present

1. Yomiuri Shimbun, Nov. 23, 1968; Nihon Keizai Shimbun, July 20, 1963. Australia charges a Japanese vessel a maximum of A$100 per annum, and Indonesia US$300 for a vessel up to 70 tons and US$390 for a vessel up to 300 tons per annum.

2. An earlier example, but not an intergovernmental arrangement, is the Tangle Collection Agreement (Art. 5) of June 10, 1963, between the Great Japan Fisheries Association and the Russian National Commission of Fisheries (the text: JAIL, No. 8, 1964, p. 93).
century, the world fisheries have come to be in need of more substantial involvement of state authorities and that the centre of the fishing industry has recently begun to shift from the developed to the developing states. Consequently, it has become difficult, if not impossible or impracticable, for states to seek settlement of fishery problems without reference to other aspects of their relations. Conspicuous examples would be the Russo-Japanese and Sino-Japanese fishery relations which are discussed later (section c, i and ii). If these developments meant an inevitable change in the character of fishery problems of the present period, the above Japanese agreements with Australia and Indonesia would mark the onset of the spread of such a change into the domain of fisheries treaties in a way that is not desirable.

II

The twelve-mile fishery zone as specified in the Korea-Japan treaty can now be compared with other examples against the foregoing background. In the sense that the treaty provided no distinction whatsoever between the inner-six and the outer-six, it can rightly be called a solid zone and its character more exclusive than that in any other treaty so far. For the following two reasons, vested rights in it could not be recognised at all. Firstly, on the part of Korea, the twelve-mile zone itself meant such a great contraction of her exclusive zone, compared with what she had claimed through the Peace Line, that further retreat was simply inconceivable even under pain of further deadlock in her relations with Japan. Much as Japan had struggled to attain a ten-year phasing-out perio-
in the outer-six, with persistent reliance on the Geneva-originated practice, Korea was absolutely firm at this point. Secondly, from the standpoint of Korea, Japan had not participated legitimately in fishing within the whole area of the Peace Line; the Korean interpretation of the Japanese operation therein was that Korean fish were 'stolen' out of the area during the period of fourteen years between 1952 and 1965, which was almost three times longer than the five-year precedent period referred to in the above Geneva proposal.

Thus, the exclusive character of the fishery zone was further strengthened by Article I (2), which rules out any objection by either party against excluding its fishing vessels found operating in the exclusive zone of the other. As a matter of fact, therefore, it was the first treaty in which Japan agreed to recognise such an exclusive right to the limit of twelve miles. In doing so, she was not unaware of its eventual consequences in respect of her fishery relations with other states off whose coasts her fishermen operate. Her concern in this regard was not unfounded in view of the fact that, though not an immediate consequence of the agreement with Korea, she had to conclude fishery treaties subsequently with Australia, Indonesia, Mexico, New Zealand and the United States, in each of which the main issue was the twelve-mile fishery zone with variegated extent of exclusiveness. Different as the character of the zone in each treaty may be from that in another, it can not be denied that such differences are not only temporary but also convergent to the ultimate point at which foreign

1 Upon Japan's insistence on her past fishery participation in the Korean waters, Korea requested her to specify the amount of catch or 'steal'. Japan declined to comply with the request (The Korean White Paper, op. cit., p. 226).
fishermen would be totally excluded from it under either of the following two circumstances. Firstly, upon expiry of the phasing-out period specified, the exclusiveness of the zone becomes automatically absolute. Secondly, even in cases in which the participation of foreigners in the zone is not modified by the phasing-out device, the permanence of such participation is almost as effectively limited by the usual subjection of the treaty to the possibility of either party abrogating it, especially in the sense that such abrogation - more likely to come from the coastal state - would result in the complete exclusion of foreigners from the twelve-mile zone rather than in the abolition of the zone itself.

In spite of this apparently substantive exclusiveness of the fishery zone as defined in the Korea-Japan treaty, a potential source of trouble has been left unheeded, namely, the right of hot pursuit undertaken by either side within its exclusive zone against the fishing vessels of the other. As, from a practical point of view, the exclusive zone of Japan is virtually meaningless to the fishermen of Korea and the joint regulation zone was established contiguous to the exclusive zone of Korea only, the trouble would be far more likely to take place in the Korean zone if the pursuit was undertaken against the Japanese fishing vessels found in violation of the agreement within the Korean zone. The problem is complicated by the fact that the legal character of the fishery zone in international law is yet to be defined in this respect and that Korea has not declared the extent of her territorial waters.

1. a. The breadth of the Korean territorial waters was once declared as three miles by the United States Military Government in Korea (1945-1948) with regard to the operational procedures of the Korean Coast Guard (Art. 3, Law No. 189, South Korean Interim Government). It became obsolete upon
The provisions relating to the right of hot pursuit in the Geneva Convention on the High Seas (Article 23) stipulate the conditions under which this right may be exercised. According to the article, the pursuit "must be commenced when the foreign ship . . . . is within the internal waters or the territorial sea or the contiguous zone of the pursuing state." It should also be noted that the Convention on the Territorial Sea and the Contiguous Zone (Article 24) specifies the purposes for which the contiguous zone may be established by the coastal state, namely, for the prevention and punishment of infringements of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea. At this point, it is now necessary to compare the legal character of the twelve-mile contiguous zone with that of the twelve-mile fishery zone, fishery not being one of the above purposes.

The nature of the events which give rise to the necessity of the contiguous zone is generally static or sporadic, because the purposes of the zone are to protect, and prevent infringements on, the indigenous interests of the coastal state. In contrast, fishery is a much more dynamic and incessant activity, so that the purposes of the fishery zone should involve a possessive and projective aspect in addition to being protective and preventive. Thus, it can be said that the concept of the contiguous zone runs into conflict with that of the freedom of the high seas to a much lesser extent than does that of the fishery zone. To this difference should

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b. For Japan's traditional practice of the three-mile limit (though without municipal legislation), cf. Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/58/6, p. 29.
be added that of their background. The concept of the contiguous zone has a longer history of gradual development in a generally affirmative climate of the community of nations, whereas that of the fishery zone in its present-day sense and limit should be said to be the accidental outcome of Geneva against the expectation and imagination of its very authors. For these reasons, the general criteria on which the contiguous zone is accepted into the regime of the high seas cannot be applied to the case of the fishery zone on an equal footing, still less when it comes to the problem of recognising the right of hot pursuit within the fishery zone of a coastal state.

As the right to undertake hot pursuit within the fishery zone has an immediate bearing on the exclusiveness of the zone, it was in Geneva a matter of keen interest to both the traditional maritime states and the coastal states whether the pursuit might be commenced from "within a conservation zone for the living resources of the sea unilaterally adopted by the coastal states in accordance with article 55." The seriousness of the controversy between them may be seen from the fact that there were as many as seventeen proposals to amend article 47 of the 1956 ILC draft and that the lengthy article had to be voted on separately for each of the seven paragraphs. Understandably, Korea and Japan adhered to their respective ends of the spectrum, the former supporting the above Mexican and the latter the Dutch proposals, which were both abortive. It should be noted, however, that at the final vote the article was adopted by 58:2:3 at the committee and by 67:0:3 at the plenary session, to become Article 23 of the High Seas.

Convention, now in force.

These developments notwithstanding, the absence of any reference to the right of hot pursuit in the treaty led each party to hold conflicting views on this point. Korea assumes and Japan denies that the pursuit may be commenced from within the twelve-mile fishery zone of Korea. The ambiguity of the treaty in this regard presents each with a possible case to make against the other, in case an actual pursuit is undertaken by Korea, even though no serious incident has so far taken place by virtue of the cautious attitude of both parties to avoid recurrence of the dispute. Japan relies on the conventional interpretation of the right of hot pursuit that it can be only undertaken from within the Korean territorial waters and that, within the joint regulation zone contiguous to her exclusive zone, Korea is not to exercise any jurisdiction over Japanese fishing vessels (Article IV). On the other hand, Korea relies on the practical aspect of the circumstances under which the provisions of the treaty should be interpreted. In this connection, the following speech made by the Korean delegate at the Geneva conference of 1958 would still aptly represent the Korean view:

Korea supported the Commission's recommendation that ships should be allowed to engage in hot pursuit to protect their rights in their territorial sea and contiguous zone. He would vote for the Mexican and Peruvian proposals. If the coastal states were granted the rights specified in article 66 in respect of the contiguous zone, and fisheries conservation rights in a conservation zone off their coasts, they should be given the necessary power to enforce those rights, including that of hot pursuit of vessels which violated them. It would be illogical to grant coastal states conservation rights without allowing them to exercise the jurisdiction and control to safeguard them.

With respect to the right of hot pursuit within the fishery zone, therefore, the following two points may be raised appropriately, by way of ascertaining the particular character of the zone from a practical point of view:

Firstly, a discussion on the legal character of the fishery zone would have to be undertaken with due regard to the conceptual changes which have taken place since the two Geneva conferences of 1958 and 1960, because hot pursuit against foreign fishing vessels within the twelve-mile zone is going to be one of the problems which have begun to leave the law of the sea in arrears in relation to the practice of states and out of touch with reality on the sea. Secondly, as has been quoted above, if the recognition of the special interests of coastal states were a fait accompli, it would be logical to provide the legal basis on which to protect them. This is the more so in view of the fact that the debates in Geneva regarding the recognition of the right of hot pursuit were not based on the concept of the twelve-mile fishery zone as such, but on that of the conservation zone the limits of which would have varied widely from state to state and from region to region. Otherwise, in the absence of any guarantee, such doctrinal discrepancy would be liable to create abuse or misuse of rights by non-coastal states to the detriment of coastal states and result in undesirable tension and even unforeseen disputes, especially in the case of such coveted and heavily fished areas as the waters off the Korean coasts.

It would be also appropriate to indicate as a final point on the legal character of the fishery zone a provision in the Agreed Minutes, though it has a somewhat remote relevance to the issue. Item 9 states that "innocent passage .... through territorial seas and fishery zones will be in accordance with the rules of international law." In form, this is a general statement, which is not appropriate to the situation in the sense that innocent passage pertains only to territorial waters, as confirmed in Articles 14 to 23 of the Territorial Sea and Contiguous Zone Convention. Though it would certainly be inadequate to extend the implication of this
provision to mean that the fishery zone in this case assumes an ad hoc character of territorial waters, it would nevertheless tend to enhance the special character of the zone as defined in the Korea-Japan treaty.

b. Straight Baseline

The treaty recognises the right of each party to adopt straight baselines for the demarcation of its exclusive fishery zone (Article I, 1). Accordingly four straight baselines have been drawn along the coasts of Korea. Two of these, along the southeast coast of the peninsula, are merely the closing lines of two inconspicuous bays which do not deserve to be mentioned here, their mouths not exceeding the distance of twenty-four miles specified in the Convention on the Territorial Sea and the Contiguous Zone (Article 7, 4). It is, therefore, the third one along the south coast and the fourth along the west coast that need to be discussed here. 1 Much more controversial than the demarcation of these two lines, however, was the determination of the exclusive zone in the waters around the Cheju Island, which consequently had to be left to a provisional settlement by the Exchange of Notes on the fishery zone of Korea, as is discussed later.

Geographically, the adoption of the above two straight baselines was justified by the fact that the indentation of the coastlines in the southern

1 (3) Straight baselines connecting in order the respective southern extremities of 1.5-metre Rock, Saengdo, Hongdo, Kanyoam, Sangbaekdo and Komundo.

(4) Straight baselines connecting in order the respective western extremities of Soryongdo, Sokyuk'nyulbido, Ochongdo, Jikdo, Sangwangdungdo and Hoengdo.
and western areas of Korea is highly irregular and fairly deep (though not to the same degree as those in Norway) and that the coastal sea along the same areas is studded with numerous islands of various sizes including many uninhabited ones. The total coastline of the approximately 600-mile long peninsula and island is about 1,290 miles, of which 578 miles are in the North. The number of islands is 3,305, about half of which (1,684) are not inhabited. Almost all the islands are situated along the west and southwest coasts, the east being virtually empty.

The argument over the adoption of straight baselines around the Cheju Island - 47 miles from the southernmost point of the peninsula - arose from a direct conflict of opinion, Korea having insisted on, and Japan opposed, the demarcation of the lines in such a manner as to include the Island in the exclusive zone of Korea, the demarcation being justified by geographical factors as well as by "economic interests peculiar to the region, the reality and the importance of which are clearly evidenced by a long usage." As a matter of fact, however, the nature of the serious conflict was not so much juridical as economic, due to the fact that the area is one of the richest fishing grounds throughout the whole area with which the treaty concerns itself, as may be seen from the map (no. 4).

It is deemed appropriate to review briefly the background to the baseline system at this point. The system does not appear to have been appreciably controversial up to the time of the Anglo-Norwegian Fisheries Case of 1951, when the International Court of Justice produced judicial

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confirmation of the Norwegian view that straight baselines drawn along the general direction of the coast under certain conditions for the demarcation of territorial waters are not inconsistent with international law. Thus there came to be a distinction between the so-called 'normal' and 'straight' baselines, the latter being not in the sense of such simple straight lines as are drawn across the mouths of bays. The fact that a normal baseline can also be straight in the case of a perfectly straight stretch of coast, however, led some writers to define the distinction in more exact terms such as the 'land baseline' and the 'water baseline' or the line 'along the coast' and 'across water'.¹ As a normal baseline does not involve complicated technicalities or measurements² or the factor of unreasonable departure from the coast such as to affect the interests of other states, the consensus of opinion about the system was taken for granted as a matter of fact. Therefore, it is the system of straight baselines that requires discussion here, in order to determine the character of the straight baselines adopted in the Korea-Japan treaty.

Firstly, the background of the 1956 draft of the ILC regarding the system is noteworthy. The basis of discussion was the Judgment of the International Court of Justice in the Fisheries Case. Regarding it as expressing the law in force, the Commission considered the matter at its 1953

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2. Art. 3 of the Territorial Sea and Contiguous Zone Convention simply confirms the low-water mark as the normal baseline. Some remarks about the exact meaning of the low-water mark are given at p. 141, Vol. 4, Digest of International Law (Whiteman); pp. 266-267, Vol. II, ILC Year Book (1956).
session, with sufficient awareness that the Judgment was made in consideration of geographical and historical conditions peculiar to the area from which the dispute had arisen. This can be seen from the fact that the amendments and additions to the second François report of 1953 included an important modification which stipulated the maximum permissible length of a straight baseline as ten miles or alternatively the limit of a five-mile distance between the line and the coast in the case of longer ones. This point was formally incorporated in the Commission's 1954 draft, but was deleted from its 1955 draft on the ground that it was too mechanical. The numerical terms were instead replaced by such unspecific equivalents as "The drawing of ..... lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain." Another important addition to the 1955 draft was the inclusion of the economic interests of the area as one of the possible conditions in recognising the lines. The final draft of 1956 was virtually identical with the previous one, except the addition of another significant paragraph recognising the right of innocent passage within the area to be freshly included in the internal waters of the coastal state.

Secondly, as might be expected, the method of drawing straight baselines was another point on which Korea and Japan were in disagreement in Geneva. The Korean delegate expressed great interest in draft article 5 at the 1958 session, saying that "the ILC had rightly recognised that, in certain circumstances, the baselines for the delimitation of the territorial

sea could be drawn independently of the low-water mark.\(^1\) In contrast, at the same session, the Japanese delegate said that "if the straight baseline method was to receive general recognition, it should be subject to reasonable limits. The maximum length of ten miles and the distance of five miles from the coast were therefore proposed, in keeping with the system originally adopted by the ILC at its sixth (1954) session.\(^2\) A proposal to the above effect was also submitted by Japan, but was withdrawn, when she joined three other states in a similar proposal, which was rejected (13:30:12).\(^3\) Obviously, the problem of straight baselines was a matter of keen interest to most other states as well. There were no less than nineteen proposals to amend the draft article, and here again all the paragraphs had to be voted on separately. It is of interest to note that, in the course of an ardent search for unity, the revised British proposal which extended the maximum length of ten miles to fifteen but without the limit of distance from the coast was adopted by 44:0:13\(^4\) in the First Committee (Territorial Sea and Contiguous Zone), only to fail to obtain the required majority at the plenary meeting (34:30:12).\(^5\) Eventually Article 5 of the 1956 draft was adopted by 63:8:8\(^6\) with slight changes in wording.

Thirdly, the provisions of Article 4 of the Territorial Sea and Contiguous Zone Convention on the straight baseline contain two paragraphs, both of which are closely related to the corresponding article of the

2. Ibid., p. 156.
3. Ibid., p. 160.
6. Ibid., p. 63.
Korea-Japan treaty:

Paragraph 2: The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of the internal (emphasis added).

Paragraph 4: Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage (emphasis added).

Two points can not be overlooked here. In the first instance, these two paragraphs which were borrowed from the Judgment in the Fisheries Case contain such ambiguities as would seriously affect their intrinsic merits, namely, "to any appreciable extent", "from the general direction of the coasts", "be sufficiently linked" and "clearly evidenced by a long usage." Lack of precision like this can not be practical at all in legal provisions, because it invites highly exaggerated interpretations by either party to a dispute, as did actually happen in the Korea-Japan case. The second point is the contradictory character of these paragraphs taken one with the other, or, in other words, Para. 4 is at best merely in the form of a proviso to Para. 2. In the argument about drawing straight baselines around the Cheju Island, therefore, Korea demonstrated a most rigid adherence to Para. 4 and Japan to Para. 2, resulting finally in failure to reach any point of agreement.

Now the problems of straight baselines as specified in the treaty can be considered with reference to the above developments. The attitude of Korea regarding the demarcation of straight baselines appears to have been fairly ambitious. Her own preference was to enclose all the islands and

1. ICJ Reports, 1951, p. 133.
rocks of the south and west coasts to the landward side of the baselines from which her twelve-mile fishery zone would be measured. Because of the fairly densely situated islands and rocks in the areas, this would not have meant an entirely unreasonable departure from the general direction of the coast, except in the waters between the mainland and the Island of Cheju. Thus, the fourth baseline drawn along the west coast was agreed to by Japan without fussay argument over the charts. Another reason for this was of course the fact that the area did not attract the immediate interest of Japanese fishermen.

In the case of the third baseline drawn along the south coast, agreement was only reached after some controversy. Japan's interest in this area was motivated by the high productivity of the area as well as by the shorter distance from her west coasts. The apparent pretexts on which she had sought to base her abortive conditions of acceptance of the Korean proposal were the relative sparsity of islands and rocks in the area and the long stretch - 46.1 miles - between two of the basepoints, Honkdo and Kanyoam (map no. 2).  

The problem of drawing straight baselines in the Cheju area was one of the hardest in the negotiations for the fisheries treaty. Japan insisted that she would only accept the above 46.1-mile baseline, if Korea agreed 1) to separate the Island from the mainland by drawing another straight baseline along the southern end of the mainland (dotted line on map no. 3) and adopt normal baselines around the Island, and 2) to exclude Japanese fishing vessels from the in-between area delimited by 126 and 127 degrees of east

1. The longest stretch in the case of Norway was 44 miles between basepoints 20 and 21 (Pleadings, etc., Fisheries Case, ICJ, Vol. I, pp. 86-87).
longitude only as a provisional measure to be reviewed after three years. She reasoned that the area would be inaccessible to her fishermen because the twelve-mile limits from both directions as well as from the islands in between would enclose all of it in the exclusive zone of Korea. This proposal, which would have separated the Island and the mainland, was flatly rejected by Korea as being wholly unreasonable. Thus both parties had to abandon the demarcation of straight baselines around Cheju and to leave the matter in the form of a provisional measure.

At this stage, both parties started negotiations with a view to finding, as a provisional arrangement, a compromise between their respective proposals for the demarcation of the exclusive zone of Korea around the Island. As may be seen on the map (no. 3), the revised draft of Korea which was based on the straight baseline method was roughly the shape of an inverted pyramid and that of Japan, based on the low-water mark, like that of a narrow-necked vase. The adjustment, which resulted in the shape of a plain mug after all, was not a simple matter of geometry, but was made difficult by the fact that the high productivity of the area was worth any amount of patience and persistence in negotiations and that, though aware of the probable conflict and dispute likely to result from the unnatural indentation as given in her draft, Japan had intended to avoid leaving a precedent possibly detrimental to her fishery relations with other states. A result of this difficulty of agreement was the peculiar way in which the straight line between the two basepoints on the west was agreed upon with such an insignificant and unnatural deviation of only 50 seconds (125°-55'-30" and 125°-56'-20") from the longitude (map no. 3).

Thus, the legal character of the straight baselines as stipulated in the Korea-Japan treaty may be assessed by reference to the following
Firstly, it is reasonable to say that the third and fourth baselines are generally along the lines of the Geneva Convention. But the same conclusion can hardly be drawn with regard to the demarcation around the Island of Cheju, because the ambiguous provisions of the Convention make it difficult to assess it according to the same criteria, and the stipulation in the treaty is purely provisional. On the other hand, however, it can be said with reasonable certainty that this provisionality has assumed a character of semi-permanence, due to the obvious reluctance of either party to take the initiative for further formal discussion of this matter. Even after the termination or abrogation of the treaty, therefore, the present arrangement would remain a definite precedent and would strongly militate against either party in its efforts to seek a permanent settlement in its favour.

Secondly, the treaty is silent about the demarcation of baselines along the coasts of Japan. This can be explained by the fact that there was not the same practical need for it as there had been in the case of the Korean coasts, for the simple reason that Korean fishermen would not visit Japanese coasts and that, upon any change of circumstances, the lines could simply be drawn. However, the important point is that, in compliance with Article I (1) of the treaty, Japan would have to consult Korea should she require to contemplate the use of straight baselines along her coasts, so long as the treaty remains in force. From a practical point of view, there is little likelihood that this would cause any difficulty. As a legal arrangement, however, it should be said to be unreasonable and extremely rare for a state to have to consult another with regard to the demarcation of straight baselines along her own coasts. This point affects both parties of the treaty,
as has already occurred with regard to Korea.

Thirdly, the peculiarity of the way in which the straight baselines were drawn can be rightly attributed to the improper way in which the negotiation on this problem took place. As has been mentioned above, the particular circumstances of both parties did not make it possible for either party to adhere to the general principles on the demarcation of baselines, so that the problem of baselines had to be negotiated only after other more substantial matters such as of the number of fishing vessels and the amount of catch had been agreed upon. In other words, the problem had had to be placed on the bargaining table first before it was brought to the drawing board.

a. The Joint Regulation Zone

The Korea-Japan fisheries treaty makes reference to the conservation of fishery resources and their rational exploitation and development (the Preamble), establishes to this end a joint regulation zone (Article II), and stipulates the provisional measures for conservation and for their enforcement (Articles III to V and annexes). Conservation of resources has become so predominant an issue in the international law of fisheries that, in form and in fact, the very raison d'être of most fisheries treaties, bilateral or multilateral, can be found only in the necessity for conservation. Though concern over this necessity grew from the early part of the present century, it was nevertheless not until after the Second World War that it began to be felt so pressingly.

Conservation for its own sake is meaningless and is therefore inconceivable except in the context of exploitation, actual or potential.
Without reasonable cooperation among the nations interested in fisheries, it has become impossible to achieve conservation to any practical extent. Thus, if exploitation is the presupposition of conservation, so is distribution that of exploitation. When it comes to the matter of sharing among nations the resources thus conserved, dispute is bound to take place. Thus, the greatest problem of international fisheries today can be said to be the conservation of resources, their distribution and the prevention of disputes arising from these two. The seriousness of these three problems is further aggravated by what has often been done in the name of conservation as well as by the sudden growth in the number of members of the community of nations, many of whose claims are not in keeping with their capability for exploitation. The progressive increase in the number of international bodies and treaties to meet this challenge betokens this.¹

An outstanding event in the chronicle of the international efforts for conservation would be the above mentioned Rome Conference of 1955, the report of which produced an exhaustive enumeration of the objectives, problems, types of scientific information required and applicable measures of conservation.² The distribution of marine resources assumes a character different from that of conservation because of its more immediate bearing on the national interests of the states concerned, and has therefore had to be left to bilateral and multilateral arrangements of more regional type.³ As for the prevention or settlement of disputes, the general practice has been to

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¹ A concise description of these developments is given by D. W. Bowett, The Law of the Sea (Manchester, 1967), pp. 20-32.
³ Major examples of negotiated distribution are given by S. Oda, International Control of Sea Resources (Leyden, 1963), pp. 65-82.
include provisions for such purposes in the arrangements primarily intended for conservation and distribution. Among the numerous examples which may be appropriately quoted for the discussion of the above three problems are three that have particular relevance to the present discussion, namely, the arrangements of Japan with Canada, China, Russia and the United States.

(1) The Sino-Japanese Non-Governmental Fisheries Agreement

The fishery relations between Japan and Communist China since 1950 have often been exposed to the political caprices affecting their other relations. As Japan had not recognised the mainland régime, either de jure or de facto, it was not possible for her to enter into negotiations for the settlement of the controversy over fishery, in spite of repeated seizures of her fishing vessels by China. As a matter of fact, China seized far more Japanese vessels than did Korea up to mid-1955, when a non-governmental agreement was signed between the allegedly private fishing industries of both states. The first incident of seizure took place on December 7, 1950, immediately after China established on December 6 of that year what came to be called the Hwatung (East China) Line prohibiting trawling in the delimited area along her east coast (map no. 5). By virtue of the earnest efforts made

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1. As the North Pacific Fisheries Convention between Canada, Japan and the United States has already been discussed (supra Chapter 8, 1, d), the discussion here is confined to those between China and Japan and between Japan and Russia.


by the fishing interests of Japan, an agreement was signed between the Japan-China Fishery Association of Japan and the Fishery Association of China in Peking on April 15, 1955.1

The conclusion of this private agreement resulted in a three-year lull for the Japanese fishermen operating in the East China Sea and the Yellow Sea until June 1958, when China refused to agree to the annual extension of the fisheries arrangements. Japan's two-China policy, based on the so-called doctrine of separating political and economic relations, angered both Chinas, Nationalist and Communist. The fourth trade agreement concluded with Peking in March 1958 disturbed Taiwan to the point of a threat to sever trade relations with Tokyo, whereupon the Japanese authorities had to make good the deterioration in their relations with Taiwan and were unable to avoid doing so in a way which was entirely displeasing to Peking, which withdrew the trade agreement on April 12, 1958. Then the 'Nagasaki flag incident'2 of May 2, 1958, became an apparent cause for China to defer the renewal of the fisheries agreement due in the next month. Japanese fishing vessels began to be seized again by China. It was not until November 9, 1963, that another fisheries agreement was signed in Peking, which was virtually identical with the previous one, except for a few minor differences such as its mandatory period being two years instead of one.3


2. The Chinese flag flying at the trade exhibition centre in Nagasaki was destroyed by a Japanese, which led to the complete breakdown of relations between the two states, though it was not the only cause (R. Kurai, "Present Status of Japan-Communist China Relations", Japanese Annal of International Relations, No. 1 (1961), pp. 91-157.

The agreement did not specify any definite conservation measures to be taken in the areas designated. Consequently, the arrangement can be said to be another example of exclusive claims being made by the coastal state in the name of conservation. The operative provisions did not go much farther than merely designating six fishing zones, operational periods and the number of vessels for each zone, and establishing measures for the safety of operations. However, there are a few points of interest and importance to be mentioned.

Firstly, through its Exchange of Notes No. 1, the Chinese delegation made it clear, and the Japanese delegation had to confirm through its contribution to Exchange of Notes No. 1, dated April 15, 1955, that China had established three prohibited zones along her coast, namely, the Military Warning Zone enclosing the Pohai Gulf, the Military Navigation Prohibition Zone closing the area of the Hanchou Bay, and the Military Operation Zone closing the area south of the 29th northern parallel (map no. 5). It should be noted that the Japanese delegation was informed of this simply by means of a notification from its Chinese counterpart and that the final agreement was signed on the Japanese delegation's acquiescence in the existence of such zones. Objection to these four enclosures including the trawling prohibition zone delimited by the Hwatung Line, which extends about ninety miles into the sea at some points, was very little heeded by the Chinese delegation. In fact, the attention of the Japanese delegation was called by the Chinese to the following points: that the notification was based on the instructions of the Chinese government, that any argument over what had been done by the government was beyond the competence of the 'private' negotiations, and that China would under no circumstances have had to obtain the concurrence of Japan
in regulating her own internal affairs. In complete contrast to the case with regard to Korea, therefore, the Japanese delegation found itself in a situation in which its standard plea — the principle of the freedom of the high seas — had to be excluded from mention entirely.

Secondly, it does not appear that the highly artificial compartmentalisation of the sea into six zones and the numerical terms given throughout the provisions were based on any convincing scientific findings.

Thirdly, it is said that China had at first proposed a division of the Yellow Sea into the Chinese zone (west of 124 degrees of east longitude) and the Japanese zone (east of 125 degrees) with a buffer zone in between; and that, this failing, she suggested establishing eight zones instead of six as finally agreed. The compromise reached was simply to put on record in the memoranda exchanged a seventh zone, in which operations were to be more limited than in the other zones. What can not be overlooked at this point is the fact that the east longitude of 124 degrees coincides with the west boundary of the Korean Peace Line and that the obscure seventh zone was also adjacent to the same, as shown on the map (no. 5). Notwithstanding the justification of the motive behind this, it was speculated that the idea could not have been produced entirely for fishery purposes.

Finally, it can not be denied that the precise legal character of the agreement is highly obscure, since, at least in form, it is purely a

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3. The Chinese delegation included two government officials of no mediocre standing: fisheries management directors of the central and provincial (Kwangchou) governments (Chee, op. cit., p. 119).
private arrangement and neither government would therefore be answerable for its consequences. Under the circumstances in which the Japanese government was unable, and the Chinese government unwilling, to do much if anything towards settling the issue, the private initiative of Japan in seeking to ensure a peaceful context for operations in the East China Sea and the Yellow Sea earned her finally what she least expected or desired, namely, a position of informal acquiescence in the extravagant claims of China over the part of the sea that Japan would much have preferred to regard as open. Additionally disquieting for Japan was the fact that she had been forced into this posture in the midst of her heated controversies with Korea over the Peace Line and with Australia over the Arafuran pearl fisheries. Japan would thenceforth be bound to find it difficult, if not impossible, to dispute the precedent-forming character of the informal arrangements thus made, at any formal negotiations with China in the future.

(ii) The Russo-Japanese Fisheries Agreement

The history of Japanese fishing in the waters of the northern Pacific Ocean, particularly around the Maritime Province of Siberia, dates back to the beginning of the 18th century. From the latter part of the 19th century up to the Second World War, therefore, fishery relations between Japan and Russia became gradually more and more complicated and reached the stage of complete breakdown in 1945 upon Russia’s declaration of war against Japan.

As the San Francisco Peace Treaty of 1951 was to come into force on April 28, 1952, the so-called MacArthur Line was abolished on April 25 of that year by the Allied Command, thereby removing all the restrictions imposed on

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Japanese fishing beyond certain limits. As a result, Japanese fishing vessels made their immediate reappearance in the northern Pacific Ocean for the much-coveted salmon and trout fishery of the area. Their fishing expeditions between 1952 and 1955\(^1\) yielded too impressive a total catch for the Russians not to be aroused by what obviously appeared to be an intolerable degree of overfishing, as may be seen from the report of the Russian delegate at the Rome Conference of 1955.\(^2\)

The fishery relations between the two states began to go from bad to worse for two main reasons. Firstly, Japan had adopted a three-mile limit for her territorial waters in 1870, whereas the Russian limit was twelve miles, claimed since 1909; and this conflict led to the seizure of Japanese fishing vessels by Russia on the ground that they had been operating within her territorial waters. As a matter of fact, up to the end of March 1963, after which conditions began to improve greatly, as many as 1,052 Japanese vessels with the crew of 8,821 were seized,\(^3\) of which 709 vessels with 8,671 fishermen were repatriated; and occasional seizures still continue to take place.\(^4\) These figures dwarfed those of the Korean seizures (320 vessels) over a corresponding period. The total was less than a third of the Russian seizures, and this factor diminished the effect of Japan's constant outcry

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4. A recent seizure of five vessels in the Sea of Japan (near Vladivostok) was reported in The Times (March 6, 1968).
against Korea for the seizures. Secondly, Russia attended the San Francisco Peace Conference of 1951, but did not sign the treaty, so that the 'state of war' continued to exist between them. It became a matter of urgency that Japan restore diplomatic relations with Russia for the settlement of pending problems, of which fishery was one of the most important and urgent.

It was in June 1955 that Japan and Russia began to negotiate a peace treaty in London, only to reach deadlock over the territorial issue on March 20, 1956. Japan requested Russia to return the four northern islands at the southern end of the Kurile Islands, namely, Habomai, Shikotan, Etorofu and Kunashir. 1

To the utter consternation of Japan, Russia proclaimed on March 21, 1956, what came to be called "the Bulganin Line" enclosing the Okhotsk Sea and the western part of the Bering Sea (map no. 6). During the spawning period from May 15 to September 15, operations within the area would be possible only with a permit to be issued by the Russian Ministry of Fisheries, and the total catch of salmon would be limited to 50,000 tons of 25 million fish. 2 This unexpected move by Russia greatly shocked Japan, because preparations had been made to send some 200 vessels to the area on April 28 of that year.

Thus, Japan's persistence on the return of her northern territory at the prolonged London talks was answered by a lightning blow against her fishery prospects, whereupon she was compelled to enter negotiations for a fisheries treaty. Russia insisted from the beginning that the problem of

2. The text of the proclamation by the Soviet Council of Ministers: Chira, op. cit., pp. 11-12.
restricting fishing within the enclosed area would be dealt with only after
the conclusion of a regular fisheries treaty. To Japan this meant that a
fisheries treaty would have to be preceded by the restoration of relations
through a peace treaty, and a peace treaty, in turn, preceded by the
settlement of the territorial issue. At the fishery talks which opened in
Moscow on April 23, Russia strongly opposed the Japanese proposal to treat
the fishery problem separately. Japan had to agree to open negotiations for
a peace treaty before the end of July. The two states eventually signed a
ten-year fisheries treaty which covered "the entire waters (excluding
territorial waters) of the Northwestern Pacific Ocean, including the Japan
Sea, the Sea of Okhotsk, and the Bering Sea," on May 15, 1956. A Joint
Declaration was also signed in place of a peace treaty on October 13 of the
year. The fisheries treaty came into force on December 12, 1956.

As it was foreseen that the fisheries treaty would not come into
force in time for the 1956 season, the parties had to conclude an informal
arrangement for the impending season. This provisional measure specified
that salmon fishing with movable gear would be prohibited within forty miles
of the Russian coasts, that the amount of the Japanese catch would be
increased by 15,000 tons to 65,000 tons from that originally designated for
the Bulganin Line, and that the licenses to be issued by the Japanese
government would have to be endorsed by the Russian authorities in Japan. In
other words, the Bulganin Line measures were not applied to the Japanese

1. The Japanese text: K. Yokoda, Kokusai Joyaku-shu (Collection of International
   Treaties), revised ed., Tokyo, 1962, pp. 771-776; the unofficial English
   JAIL, No. 1 (1957), pp. 119 et seq.
fishing in the area.

The application of the above forty-mile limit and of the Russian endorsement on the Japanese fishing license can not be overlooked because of what it meant in respect to Japan's opposition to the unilateral measures of Australia, China and Korea. Further to this point is another important Russian announcement of July 20, 1957, by which the Peter the Great Bay enclosing Vladivostok was declared to be an historic bay belonging to Russia. Japan could not help being shocked for a second time by the sudden closure of the Bay whose mouth was 108 miles wide (map no. 7), particularly in view of the fact that the announcement was made immediately after Japan's protest over the Russian seizure in early May of twenty Japanese fishing vessels.

To the great annoyance of Japan, therefore, the conclusion of the treaty was not the solution of the issue, but was the beginning of an endless controversy with Russia. The annual meeting of the joint fisheries commission, at which important decisions were made, including the Japanese quota for the impending season, was the occasion for strenuous controversy, as may be imagined from the unusual length of each session. The first meeting in 1957 took 52 days, and 100 in 1958, 122 in 1959, 107 in 1960, 105 in 1961, 76 in 1962, 39 in 1963, 43 in 1964, 32 in 1965, 45 in 1966, 49 in 1967, and 58 in 1968. At Russia's growing insistence, the prohibited and restricted areas for Japanese salmon fishing were also gradually enlarged to such an extent that by 1962 the entire area of the Okhotsk Sea was closed to salmon fishing and, in addition to the original restricted area, there was

designated south of the 45th northern parallel a new one called Area B (map no. 6). The annual quota for this new area was determined separately thereafter. There has been also a steady decrease in the annual quota for Japan.

It can be seen from the foregoing that this is in fact one of the few fisheries treaties by which Japanese fishing on the high seas has been systematically restricted despite her objections. In addition to the usual restrictions and prohibitions specified in the other North Pacific fisheries treaties to which Japan is a party, such as the North Pacific Fisheries Convention with Canada and the United States, and the non-governmental agreement with China, this one with Russia excels in features that are not inconspicuous. Firstly, the character of the treaty is dominantly distributive rather than conservatory. Secondly, the measures specified are substantially unilateral rather than bilateral, and the method of their implementation much more thorough-going. Thirdly, the treaty has not settled the issue which gave rise to its necessity, but merely provided the terms of reference for the consideration of the recurrent problems.

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<td>1957</td>
<td>120,000 tons</td>
<td>no restriction</td>
<td>It should be noted that the joint commission does not determine the annual quota for Russia, because most of her salmon fishing is carried on, not on the high seas, but in the rivers of her own territory to which the fish return for spawning. This is a cause for disagreement between the parties on ecological grounds.</td>
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<td>110,000</td>
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(iii) The Joint Regulation by Korea and Japan

The joint regulation of fishing by Korea and Japan within the zone specified in Article II of the treaty is provisional, as indicated in Article III, pending the formulation of regular measures based on scientific findings. The regular measures thus adopted would revise the provisional ones rather than replace them altogether. Their provisional nature may therefore be safely disregarded for the purposes of the present discussion.

The variety of provisions in the complicated documentation converge into a single focus of sharing resources under an apparently equitable arrangement. The actual method adopted is based, however, not necessarily on the amount of catch, but primarily on the number of fishing vessels to be permitted to operate within the joint regulation zone. This is one of the peculiar features of this treaty as far as the method of regulation is concerned.

Annex 1 (a) to (d) stipulates the maximum number of vessels or the units of vessels of both parties that can operate at any given time during specified periods of the year, as follows:

a) drag-net fishing by vessels of less than 50 tons:

    150 vessels......no seasonal limit.

b) "

    50 tons and upward:

    270 vessels......Nov. 1 to Apr. 30

c) seine fishing:

    60 units from Jan. 16 to May 15.

    120 " " May 16 to Jan. 15.

    (7 vessels per unit)

d) mackerel-angling in limited area by vessels of not less than 60 tons:

    15 vessels from June 1 to Dec. 31.
In the rest of the Annex are also provided not only further restrictions on
types of fishing gear, vessels and their markings, but also a range within
which the maximum number of vessels designated above may be adjusted in
favour of Korea by agreements, as long as different operational capabilities
exist between the vessels of the two parties.

It is very important, however, to note that these restrictions are
not supported by any reasonable method of enforcement. Firstly, either
party would only learn of the number of vessels operating within the joint
regulation zone through the quarterly notifications furnished by the other
party, which are to be based on the midday location reports of individual
vessels (Agreed Minutes Item 1, b). Secondly, the standard of the total
catch of both parties within the joint regulation zone is set at 150,000 tons
with a ten-percent marginal fluctuation (Item 2, a). However, no means of
verifying the figure is stipulated, except through the quarterly
notifications furnished by the other party, which are again to be based on
the reports of individual vessels. Thirdly, if it is deemed probable that
the catch by either party is to exceed the above limit of 150,000, its
government is to take "administrative guidance", in order to keep the catch
within the maximum permissible amount (Item 2, a). Undeniably the
determination of catch limit is of the utmost importance in fisheries treaties
of this kind, and no less important is it as well therefore to stipulate the
means for ensuring that such limit is observed by the parties. In this sense,
the adoption of such a vague and meaningless method as "administrative
guidance" can hardly fail to do other than a disservice to the cause for which
the treaty itself had to be concluded.

With regard to the above three ambiguities the following points may
be raised. Firstly, the question would arise in respect of the legal
character, or the binding power, of the Agreed Minutes, which do not
"constitute an integral part of the agreement" as the Annex does. Against
the possible violation of the maximum limit of catch is given no explicit
provision by way of even calling the attention of the other party to the
fact, still less carrying the excess over to the following year for
compensation. In any case, there is no way to ascertain such a violation.
This contrasts with the measures specified in the Russo-Japanese treaty,
which not only regulate the issue of licenses and certificates by a strict
method (Article VII, 2), but also specifies the annual catch on a per-ship
basis (Annex 1, d). Secondly, a similar interpretation can be given to one
of the Verbal Notes by the Japanese Minister of Agriculture and Forestry
which, in the form of a voluntary measure, specifies that within the joint
regulation zone the number of minor-scale coastal fishing vessels engaged in
the types of fishing other than those referred to in the treaty will be
limited so as not to exceed 1,700 vessels at any given time.

Aside from these structural inadequacies of the provisional joint
regulation measures, the treaty can be observed from another aspect. Though
its preamble contains a reminder that "the conservation of said resources and
their rational exploitation and development will serve the interests of both
countries", the character of its operative provisions may be described as
much more distributive than conservatory. Since the advent of this
distributive aspect in fisheries treaty making, three different methods of
sharing resources have been adopted in different regional agreements. The
first type would be one in which the resources are shared by means of what
may be called a free competition system. The Sino-Japanese non-governmental
agreement would belong to this category, because it does not set the limit in
terms of the maximum amount of catch, but simply specifies the number of
fishing vessels in each of the six areas. Though in three (the 1st, 2nd and 5th) of the areas, the number of Chinese vessels by far exceeds that of Japan, the amount of catch would after all depend upon other factors, since there is no ceiling limit. The second would be one in which the resources are shared under a predetermined ratio. To this one would belong the Russo-Japanese treaty, which prescribed the annual maximum limit of catch at the broad ratio of six to four between Japan and Russia respectively. \(^1\) The third would be one in which a fixed rate on a fifty-fifty basis is applied. In form, the Korea-Japan treaty would belong to this category, even though its practical aspect contains factors which would characterise the free competition type. Another example of this category may be the 1950 convention between Canada and the United States relating to the sock-eye salmon fishery in the Fraser River system. \(^2\) It may be appropriately added at this point that the North Pacific Fisheries Convention of 1952 between Canada, Japan and the United States, which is undoubtedly one of the most important to Japan, would fit into none of these categories because of its predominantly conservatory character.

(iv) Enforcement and Jurisdiction

As a rule, ships on the high seas are subject to the exclusive jurisdiction of the state to which they belong in form or in fact. This rule, sometimes called the flag-state principle, has come to be applied to fishing vessels only in a modified form, when they find themselves in a certain part of the high seas in which their operation is to be regulated jointly by a number of states including, but not limited to, their flag-

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2. Reiff, _op. cit._, p. 284.
This is justified by the practical necessity on which such joint regulation by agreements is based.

Joint regulation involves measures whose effectiveness depends, in turn, upon the effectiveness of the measures by which they are enforced. Thus, the above provisional measures for the regulation of fishing within the designated area are supported by the provisions for their enforcement. The only important stipulation in this regard is Article IV (1), which is distinct from the corresponding provisions of almost every other agreement signed between Japan and the other Pacific states whose coasts are visited by her fishermen. In simple terms, it stipulates that "the enforcement including stopping and visiting and jurisdiction in the waters outside the fishery zone shall be carried out and exercised only by the Contracting Party to which the fishing vessel belongs." The other provisions such as the second paragraph of the same article and those in other documents which are not "an integral part of the agreement" can hardly be said to be sufficiently operative or effective from a practical point of view.

The general practice appears to be that the jurisdiction over the vessels operating in violation of the treaty provisions rests ultimately with the state to which they belong. The North Pacific Fisheries Convention (Article X) and the Russo-Japanese Treaty (Article VII) both specify that fishing vessels operating in violation of treaty provisions should be turned over to the authorities to which they belong. Being a non-governmental arrangement, the Sino-Japanese agreement does not contain any provision to such effect.

Therefore, the problem lies in the process of verifying the act of violation, that is, in deciding whether the right should be recognised for the authorities of a party to stop and visit the vessels of the other, if they are
suspected of such a violation. The above two treaties recognise the right to the extent of employing such strong terms as "seizure or arrest" of person and vessels. In contrast, the flag-state principle is absolute in the case of the Korea-Japan treaty, in the sense that the only immediate action which may be taken by the authorities of a party against the vessels of the other in case of suspected violation is limited to notifying the authorities of the other state of such suspicion (Agreed Minutes Item 3, a). Only against such vessels as are found operating within the drag-net and trawling prohibition zones of either party can a direct warning be given by the authorities of the other party (Item 8, c). It should be noted that these zones had been established unilaterally long before the conclusion of the treaty, and therefore do not come within its immediate scope.

This rigid adherence to the flag-state principle was prompted by Japan's determined efforts to prevent the recurrence of what had been taking place against her fishing vessels within the Peace Line area. Thus, apart from the above provision that the act of violation is simply to be notified, the only other means of regulation is through joint patrol, as specified in the Agreed Minutes (Item 3, b, c, d). As has been mentioned above, this can not be an effective means. Efforts to mend these inadequacies were made subsequently, and resulted in the conclusion of further arrangements between Korea and Japan on October 18, 1966. These new arrangements have by no means affected the flag-state principle, but have simply enumerated the details relating to the method of communication between the patrol boats of both parties (Annex I), the joint patrol by ships of both parties (Annex II),

1. The treaty between Japan and New Zealand concluded in 1967 has a similar article (IV), but it is not in the case of joint regulation.
and the joint patrol by a ship of either party with the personnel of the other aboard (Annex III).

In connection with what is rather fondly called the flag-state principle, however, mention should be made that it is not an established practice in a fisheries treaty. As a matter of fact, the context in which it was so often used in the non-legal publications of Korea and Japan - the former to refute it and the latter to welcome it - is undeserving of the term "principle", because the practice is not so much a matter of principle as it is a matter of policy to be agreed upon between the parties concerned. Thus, in the case of fishing vessels, the exception for which provision is made in Article 5 (1) of the High Seas Convention would be more strongly operative:

Paragraph 1: Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.......

(v) The Joint Resources Survey Zone

It is stipulated in Article V of the treaty that another zone will be established immediately outside the joint regulation zone for the purpose of conducting the survey of resources under joint sponsorship. Its outer limits and the types of surveys to be conducted therein are not specified in the treaty or in any other documents accompanying it. Article VII (b) makes a brief reference to the effect that the demarcation of this zone will be based on the recommendation of the joint fisheries commission. As has been mentioned earlier, the ambiguity of the provisions regarding this third zone had partly to do with Korea's intention to avoid what might be called a 'sentimental vacuum' between the Peace Line and the outer margin of the joint regulation zone, thereby ensuring at least in form that the Peace Line would...
appear to have left its shadow, however faint.

On April 28, 1968, however, two agreements were made in the form of Exchanges of Notes between Korea and Japan, one defining the extent of the zone, and the other outlining the types of surveys to be conducted within it. The extent as defined in the first of these agreements is fairly vague, as is shown on the map (no. 5), particularly in the sense that it partly overlaps with the treaty area of the Sino-Japanese non-governmental agreement as well as with that of the treaty signed between China, North Korea, North Vietnam and Russia in 1956. It would have to be admitted on the other hand that the ecological factors relating to the species to be surveyed would make it difficult to determine such zones otherwise. With regard to the types of survey, the other agreement specifies ecosystemic and environmental investigations of the nine major species of the zone.

The investigation plan in the above arrangements gives only the general frame of activities to be carried on by the parties in coordination. Though such investigation of resources is carried on under joint sponsorship also among the signatories of other fisheries treaties covering the North Pacific areas, the case of the Korea-Japan treaty is clearly different from that of other examples in that the idea was originally conceived rather accidentally, but has led to a general and permanent arrangement. In contrast, the corresponding provisions in the North Pacific Fisheries

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1. This treaty is simply intended to cover cooperation among the signatories in fishery, oceanographical and limnological research (Art. I, 1).
Convention (Article III, c, 1) and the Russo-Japanese Treaty (Article IV, d) simply specify the circumstances under which ad hoc investigations may be conducted for some specific and immediate purposes of the treaty. In this latter case, therefore, it is not necessary to maintain such an explicit boundary of the zone as is specified in the Korea-Japan treaty. The agreement, which was signed between Japan and Russia on July 24, 1967, entitled the Agreement for the Scientific and Technological Cooperation in the Field of Fishery, also specifies no area of activity, but merely outlines a broad scope of cooperation for joint research as well as for the exchange of knowledge and experts. The Sino-Japanese case (Article V and Annex IV) is also similar to the Russo-Japanese treaty.

One of the immediate and great advantages of such a joint survey of resources should be to preclude discord arising from discrepancies in individual or unilateral findings as well as from the danger of exaggeration. The arguments between Korea and Japan and between Japan and Russia at the Rome Conference of 1955 in connection with the ecology of the species in their respective waters represented good examples of how different the conclusion of one investigation could be from that of another. Of more interest than this are the scientific findings ascribed to Moiseev of Russia, which were published immediately before the proclamation of the so-called Bulganin Line and on which the measures were based: an aerial reconnaissance in 1955 revealed that the spawning of salmon and trout off the southwestern coasts of the Kamtchatkan Peninsula was forty percent less than usual. Obviously, it

2. Rome Conference Papers, A/CONF. 10/7 (presented by the three delegations).
3. Chee, on cit., KJTL, pp. 123 and 130.
was intended to exaggerate the overfishing of the species by Japan. Even in the absence of any findings to the contrary, it would be unscientific to assert or to accept such an allegation at its face value.

A third example is the controversy between Japan and the United States, both being parties to the North Pacific Fisheries Convention. By the Convention, Japan is to abstain from fishing the 'American' salmon in the waters east of the 175th western longitude. Since 1958, the United States began to insist on moving the prohibition line to the west by ten degrees of longitude on the ground that her investigation had shown that the stocks swam beyond the line. Japan objected to the proposal on the ground that, though the 'American' and the 'Asian' salmon in fact intermix in the waters west of the line as confirmed by the United States, the east-west intermixing of other stocks took place east of the line.

Because of such differences of opinion and the series of financial and technological problems that prevent the majority of states from undertaking individual investigations, it is entirely desirable that the heavy burden be shared by the parties for their mutual benefit.

(vi) The Joint Fisheries Commission

It has become customary for a fisheries treaty to include provisions relating to the establishment of a joint commission. In the case of the Korea-Japan treaty, it is Articles VI and VII that stipulate the composition of the body and its function. In its formal and procedural aspects, it is fairly similar to that of most other treaties such as the North Pacific Fisheries Convention, the Northwest Pacific Fisheries Treaty, and the North Atlantic Fisheries Convention. The distinction between one joint commission and another can best be assessed and indicated on the basis of the extent to
which the governments of the parties are to be bound by its decisions.

On a broad basis of this authority, a joint commission can be classified either as one that retains the power to make decisions or as one whose decisions are purely recommendatory in their effect. The Korea-Japan Fisheries Commission belongs to the latter category, as do those of the first and the last of the above three treaties. As the North Atlantic Fisheries Convention is a multilateral treaty to which eleven states are parties, it is understandable that its joint commission can hardly have a stronger authority than that delegated to it. The case of the North Pacific Fisheries Commission between Canada, Japan and the United States is different from that of this multilateral agreement and from that serving Korea and Japan. Its major points were framed in a series of highly restrictive provisions based on the so-called abstention principle, so that one of the major functions of its joint commission is to ensure the faithful observation of its terms by the parties, rather than to engage itself in making decisions of such standing and binding character as may be seen in the case of the Northwest Pacific Fisheries Commission between Japan and Russia.

In contrast, the authority of the Russo-Japanese Fisheries Commission is much more substantial than that of the other three examples. It has the power to amend the Annex to the treaty (Article IV, Paragraph a) and to determine the amount of annual catch for certain stocks (Paragraph b). In view of the fact that, from the Russian point of view, the treaty itself had been prompted by the necessity to conserve the very stock of fish - salmon and trout - the annual catch of which had to be thus determined, the executive power of the Commission could hardly be too strong. In other words, the treaty was formulated in such a way as would require the constant
attention of a directing and supervising body.

From the foregoing comparison, it can be said that the Korea-Japan Fisheries Commission was not invested with any distinct authority, but was rather intended to serve as a forum at which both parties could discuss matters of peripheral significance. Its status was made more obscure by the peculiar addendum (Article VII, 3) to the effect that the governments of both parties should "respect to the extent possible the recommendations made by the Commission". This is no more than an entirely ceremonial formulation, platitudinous, old-fashioned and wholly void of legal effect.
MAPS

These maps are based on, or enlarged from, the source materials identified under each.

No. 1 ..... Fisheries Regulation between Korea and Japan
No. 2 ..... The Straight Baselines
No. 3 ..... The Demarcation around the Cheju Island
No. 4 ..... The Major Fishing Grounds around Korea
No. 5 ..... The Korea-Japan Joint Resources Survey Zone and the Prohibitive Zones Established by China
No. 6 ..... The Russo-Japanese Arrangements by the Northwest Fisheries Treaty
No. 7 ..... The Peter the Great Bay
No. 8 ..... The Clark Line
No. 9 ..... The MacArthur Line
Fisheries Regulation between Korea and Japan

(Korea Annual, 1966, p. 118)
The Straight Baselines

Map No. 2

(based on the Initialled Korea-Japan Agreements.)
The Demarcation around the Cheju Island

Map No. 3

(based on the Initialled Korea-Japan Agreements,)
(Government of Korea, May 15, 1965.)
The Major Fishing Grounds around Korea

Map No. 4

1. shrimp, halibut, sole (Dec.-Apr.)
2. mackerel(Apr.-Oct.)
3. corvenia, croaker, eel, hairtail(around the year)
4. mackerel(Jun.-Nov.)
5. mackerel(around the year)
6. corvenia, sole, red fish, gurnard(Sept.-Apr.)
7. mackerel(around the year)

(Won, p. 185, op. cit.)
The Korea-Japan Joint Resources Survey Zone and The Prohibitive Zones Established by China

(I) Korea-Japan Joint Resources Survey Zone.
(II) Chinese Military Warning Zone.
(IV) Chinese Military Operation Zone.

(partly based on Okuno, p. 58, op. cit.)
The Russo-Japanese Arrangements by the Northwest Pacific Fisheries Treaty

Map No. 6

(I) ——— The Bulganin Line
(II) ——— The salmon fishing regulation area
(III) ——— The salmon fishing prohibition area since 1962

(Oda, International Control of Sea Resources, p. 73)
Peter the Great Bay

Map No. 7

(Ohira, p. 16, op. cit.)
The Clark Line

proclaimed: Sept. 27, 1952
abolished: Aug. 27, 1953

(p. 446, Collection of International Treaties)
(edited by H. K Lee et al., Seoul, 1958)
The MacArthur Line

Map No. 9

/The MacArthur Line

(Okuno, p. 26, op. cit.)
APPENDIX I

5 AGREEMENT ON FISHERIES BETWEEN JAPAN AND THE REPUBLIC OF KOREA

Japan and the Republic of Korea,

Desiring that the maximum sustained productivity of the fishery resources in waters of their common interest be maintained,

Being convinced that the conservation of the said resources and their rational exploitation and development will serve the interests of both countries,

Confirming that the principle of the freedom of the high seas shall be respected unless otherwise specifically provided in the present Agreement,

Recognizing the desirability of eliminating causes of disputes which may arise from their geographical proximity and the intermingling of their fisheries, and

Desiring to cooperate mutually for the development of their fisheries,

Have agreed as follows:

ARTICLE I

1. The Contracting Parties mutually recognize that each Contracting Party has the right to establish within twelve nautical miles measured from its coastal baseline a sea zone in which it will have exclusive jurisdiction with respect to fisheries (hereinafter referred to as "fishery zone"). However, in case where either Contracting Party uses a straight baseline in establishing its fishery zone, such straight baseline will be determined upon consultation with the other Contracting Party.

2. The Contracting Parties will not raise against each other any objection to the exclusion by either Contracting Party of the fishing vessels of the other Contracting Party from engaging in fishing operation in the fishery zone of either Contracting Party.

3. The overlapping part of the fishery zones of the Contracting Parties shall be divided into two by the straight lines joining the ends of the part with the midpoint of the straight line drawn across that area at its widest point.

ARTICLE II

The Contracting Parties establish a joint regulation zone enclosed by the
lines described below (excluding any territorial seas and the Republic of Korea's fishery zone).

(a) Meridian 124° East Longitude north of 37°30' North Latitude.

(b) Lines connecting the following points in order:

(I) Intersection of 37°30' North Latitude and 124° East Longitude

(II) Intersection of 36°45' North Latitude and 124°30' East Longitude

(III) Intersection of 33°30' North Latitude and 124°30' East Longitude

(IV) Intersection of 32°30' North Latitude and 126° East Longitude

(V) Intersection of 32°30' North Latitude and 127° East Longitude

(VI) Intersection of 34°34'30" North Latitude and 129°2'50" East Longitude

(VII) Intersection of 34°44'10" North Latitude and 129°8' East Longitude

(VIII) Intersection of 34°50' North Latitude and 129°14' East Longitude

(IX) Intersection of 35°30' North Latitude and 130° East Longitude

(X) Intersection of 37°30' North Latitude and 131°10' East Longitude

(XI) High peak of Uannyong

ARTICLE III

The Contracting Parties shall implement in the joint regulation zone, until such time as conservation measures necessary for the maintenance of the maximum sustained productivity of fishery resources are implemented on the basis of sufficient scientific surveys, the provisional regulation measures for fisheries described in the Annex, which constitutes an integral part of the present Agreement with respect to drag-net fishing and seine fishing and to mackerel-angling fishing by fishing vessels of not less than 60 tons. (Tonnage is in gross tonnage and is indicated by deducting the tonnage allowed for improving living quarters of the vessel.)
ARTICLE IV

1. Enforcement (including halting and boarding of vessel) and jurisdiction in the waters outside the fishery zone shall be carried out and exercised only by the Contracting Party to which the fishing vessel belongs.

2. Either Contracting Party shall give and exercise pertinent guidance and supervision in order to ensure that its nationals and fishing vessels will faithfully observe the provisional regulation measures for fisheries, and shall carry out domestic measures, including appropriate penalties against violations thereof.

ARTICLE V

Joint resource survey zones shall be established outside the joint regulation zone. The extent of the said survey zones and the survey to be conducted within these zones shall be determined upon consultation between the two Contracting Parties on the basis of recommendations to be made by the Joint Fisheries Commission provided for in Article VI of the present Agreement.

ARTICLE VI

1. In order to realize the objectives of the present Agreement, the Contracting Parties shall establish and maintain the Japan-Republic of Korea Joint Fisheries Commission (hereinafter referred to as "the Commission").

2. The Commission shall be composed of two national sections, each consisting of three members appointed by the Governments of the respective Contracting Parties.

3. All resolutions, recommendations, and other decisions of the Commission shall be made only by agreement between the national sections.

4. The Commission may decide upon and amend, as occasion may require, rules for the conduct of its meetings.

5. The Commission shall meet at least once each year and such other times as may be requested by either of the national sections. The date and place of the first meeting shall be determined by agreement between the Contracting Parties.

6. At its first meeting, the Commission shall select a chairman and a vice-chairman from different national sections. The chairman and the vice-chairman shall hold office for a period of one year. Selection of the chairman and the vice-chairman from the national sections shall be made in such a manner as will provide in turn each Contracting Party with representation in these offices.

7. A standing secretariat shall be established under the Commission to carry out the business of the Commission.
8. The official languages of the Commission shall be Japanese and Korean. Proposals and data may be submitted in either official language, or, if necessary, in English.

9. In the event that the Commission concludes that joint expenses are necessary, such expenses shall be paid by the Commission through contributions made by the Contracting Parties in the form and proportion recommended by the Commission and approved by the Contracting Parties.

10. The Commission may delegate the disbursement of funds for the joint expenses.

ARTICLE VII

1. The Commission shall perform the following functions:

(a) Recommend to the Contracting Parties with respect to scientific survey to be conducted for the purpose of study of the fishery resources in waters of their common interest and to the regulation measures to be taken within the joint regulation zone on the basis of the results of such survey and study;

(b) Recommend to the Contracting Parties with respect to the extent of the joint resource survey zones;

(c) Deliberate, when necessary, on matters concerning the provisional regulation measures for fisheries and recommend to the Contracting Parties with respect to measures, including the revision of the provisional regulation measures, to be taken on the basis of the results of such deliberation;

(d) Deliberate on necessary matters concerning the safety and order of operation among the fishing vessels of the Contracting Parties and on general principles of measures for handling accidents at sea between the fishing vessels of the Contracting Parties, and recommend to the Contracting Parties with respect to measures to be taken on the basis of the results of such deliberation;

(e) Compile and study data, statistics and records to be provided by the Contracting Parties at the request of the Commission;

(f) Consider and recommend to the Contracting Parties with respect to the enactment of schedules of equivalent penalties for violations of the present Agreement;

(g) Submit annually to the Contracting Parties a report on the operations of the Commission;

(h) In addition to the foregoing, deliberate on various technical questions arising from the implementation of the present Agreement, and recommend, when deemed necessary, to the Contracting Parties with respect to measures to be taken.
2. The Commission, in order to perform its functions, may, when necessary, establish subordinate organs composed of experts.

3. The Governments of the Contracting Parties shall respect to the extent possible the recommendations made by the Commission under the provisions of paragraph 1 above.

ARTICLE VIII

1. The Contracting Parties shall take measures deemed pertinent toward their respective nationals and fishing vessels in order to have them observe international practices concerning navigation, to ensure safety and maintain proper order in operation among the fishing vessels of the Contracting Parties and to seek smooth and speedy settlements of accidents at sea between the fishing vessels of the Contracting Parties.

2. For the purposes set forth in paragraph 1, the authorities concerned of the Contracting Parties shall, to the extent possible, maintain close contact and cooperate with each other.

ARTICLE IX

1. Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled primarily through diplomatic channels.

2. Any dispute which fails to be settled by the provisions of paragraph 1 above shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third arbitrator to be agreed upon by the two arbitrators so chosen within a further period of thirty days or the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that such third arbitrator shall not be a national of either Contracting Party.

3. If, within the periods respectively referred to, the Government of either Contracting Party fails to appoint an arbitrator, or the third arbitrator or a third country is not agreed upon, the arbitration board shall be composed of the two arbitrators to be designated by each of the governments of the two countries respectively chosen by the Governments of the Contracting Parties within a period of thirty days and the third arbitrator to be nominated by the government of a third country to be determined upon consultation between the governments so chosen.

4. The Governments of the Contracting Parties shall abide by any award made by the arbitration board under the provisions of the present Article.
ARTICLE X

1. The present Agreement shall be ratified. The instruments of ratification shall be exchanged at Seoul as soon as possible. The present Agreement shall enter into force on the date of the exchange of the instruments of ratification.

2. The present Agreement shall continue in force for a period of five years and thereafter until one year from the day on which either Contracting Party shall give notice to the other of an intention of terminating the present Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE in duplicate at Tokyo, in the Japanese and Korean languages, both equally authentic, this twenty-second day of June, 1965.

For Japan:

(Signed) Ktsusaburo Shiina
(Signed) Shinichi Takasugi

For the Republic of Korea:

(Signed) Tong Won Lee
(Signed) Dong Jo Kim

ANNEX

The provisional regulation measures for fisheries provided for in Article 3 of the present Agreement shall apply to each of the two Contracting Parties and shall be as follows:

1. The maximum number of fishing vessels or fishing units in operation (that is, the maximum number of fishing vessels or units operating at a given time within the joint regulation zone, holding licences and bearing identification markings for fishing operation within the said zone):

   (a) For drag-net fishing by fishing vessels of less than 50 tons, 115 vessels.

   (b) For drag-net fishing by fishing vessels of not less than 50 tons

       (i) 270 vessels during the period November 1 to April 30 of the following year,

       (ii) 100 vessels during the period May 1 to October 31.

   (c) For seine fishing

       (i) 60 fishing units during the period January 16 to May 15,
(ii) 120 fishing units during the period May 16 to January 15 of the following year.

(a) For mackerel-angling fishing by fishing vessels of not less than 60 tons, 15 vessels; provided that the period for fishing operation shall be from June 1 to December 31, and that the fishing operation zone shall be the waters south of the straight line connecting the point where the borderline between Kyongsang-pukto and Kyongsang-namdo of the Republic of Korea intersects the coastal line and the intersection of 35°30' North Latitude and 130° East Longitude (however, on the western side of Chejudo, south of 33°30' North Latitude).

(e) While there exists a difference in fish-catching capability between fishing vessels of Japan and of the Republic of Korea, the number of fishing vessels or units in operation of the Republic of Korea shall be adjusted through consultations between the Governments of the two Contracting Parties, on the basis of the maximum number of fishing vessels or units in operation provided for in the present Agreement and taking into consideration such difference.

2. Size of fishing vessels:

(a) For drag-net fishing

(i) not less than 30 tons and not more than 170 tons except for trawl fishing,

(ii) not less than 100 tons and not more than 550 tons for trawl fishing.

However, drag-net fishing by vessels of not less than 50 tons (except drag-net fishing for prawn in the Japan Sea by vessels of less than 60 tons, which has been permitted by the Republic of Korea) shall not be conducted in waters east of 128° East Longitude.

(b) For seine fishing, not less than 40 tons and not more than 100 tons for seine vessels.

However, the one seine fishing vessel of not less than 100 tons which exists in Japan on the date of the signing of the present Agreement shall be permitted as an exception for the time being.

(c) For mackerel-angling fishing by fishing vessels of not less than 60 tons, not more than 100 tons.

3. Mesh size (inner diameter when in sea water):

(a) For drag-net fishing by fishing vessels of less than 50 tons, not less than 33 millimeters.

(b) For drag-net fishing by fishing vessels of not less than 50 tons, not less then 54 millimeters.

(c) For the main net for horse mackerel or mackerel of seine fishing, not less than 30 millimeters at its main part.
4. Power of fish-luring lights (total installation capacity of generators):

(a) For seine fishing, two light-ships of not more than 10 kilowatts each and one light-ship of not more than 7.5 kilowatts, totalling not more than 27.5 kilowatts, per fishing unit.

(b) For mackerel-angling fishing by fishing vessels of not less than 60 tons, not more than 10 kilowatts.

5. Licences and identification markings:

(a) Fishing vessels operating in the joint regulation zone shall hold licences and shall bear identification markings, issued by the respective Governments. However, with respect to fishing vessels engaging in seine fishing, fishing vessels other than seine vessels are not required to hold licences, and seine vessels shall display principal markings while vessels other than seine vessels shall bear sub-markings which correspond with principal markings.

(b) The total number of licences and of identification markings (with respect to fishing vessels engaging in drag-net fishing and mackerel-angling fishing, two markings borne by each fishing vessel shall be counted as one, and with respect to fishing vessels engaging in seine fishing, two principal markings borne by each seine vessel shall be counted as one) shall be, for each fishery subject to the provisional regulation measures for fisheries, the same as the maximum number of fishing vessels and units in operation for such fishery. However, in view of the realities of fisheries, the number of issuance may be increased over the maximum number of fishing vessels in operation by 15 percent with respect to drag-net fishing by fishing vessels of not less than 50 tons and by 20 percent with respect to drag-net fishing by fishing vessels of less than 50 tons.

(c) The form of identification markings and the place where they shall be borne shall be determined through consultations between the Governments of the two Contracting Parties.

(Exchange of Notes Concerning the Straight Baselines for the Fishery Zone of the Republic of Korea)

(Korean Note)

Tokyo, June 22, 1965

Excellency,

I have the honour to refer to the Agreement on Fisheries between the Republic of Korea and Japan signed today and to state that the Government of the Republic of Korea intends to determine the following straight baselines in connection with the establishment of the fishery zone of the Republic of Korea:
(1) Closing line of the mouth of bay by a straight line connecting the tips of Changgigap and Talmangap.

(2) Closing line of the mouth of bay by a straight line connecting the tips of Hwaamchu and Pungwolgap.

(3) Straight lines connecting in order the respective southern extremities of 1.5-Meter Am, Sangdo, Hongdo, Uyoam, Sangbekdo and Komundo.

(4) Straight lines connecting in order the respective western extremities of Soryongdo, the Sogangnyolpido, Ochongdo, Jikdo, Sangwangdungdo and Hoengdo (the Anma Islands).

I have the honour to state that, if Your Excellency would confirm, on behalf of the Government of Japan, that the Government of Japan has no objection with respect to the determination of the aforementioned straight baselines, the Government of the Republic of Korea will consider that the consultations with the Government of Japan on this matter have been completed.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Tong Won Lee
Minister of Foreign Affairs

His Excellency
Etsusaburo Shiina
Minister for Foreign Affairs of Japan

(Japanese Note)

Tokyo, June 22, 1965

Excellency,

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

"(Korean Note)"

I have the honour to state that the Government of Japan has no objection with respect to the determination by the Government of the Republic of Korea of the aforementioned straight baselines for the establishment of the fishery zone of the Republic of Korea.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Etsusaburo Shiina
Minister for Foreign Affairs of Japan
His Excellency
Tong Won Lee
Minister of Foreign Affairs of the Republic of Korea

(EXCHANGE OF NOTES CONCERNING THE FISHERY ZONE OF
THE REPUBLIC OF KOREA)

(Korean Note)

Tokyo, June 22, 1965

Excellency,

I have the honour to refer to the Agreement on Fisheries between the Republic of Korea and Japan signed today and to confirm the following understandings reached between the representatives of the two Governments:

As a provisional measure, the waters enclosed by the lines delimiting the fishery zone to be established by the Republic of Korea and the following lines shall for the time being be treated as part of the fishery zone of the Republic of Korea:

(1) Straight lines connecting in order the intersection of 33°48'15" North Latitude and 127°21' East Longitude, the intersection of 33°47'30" North Latitude and 127°13' East Longitude and the point 12 nautical miles due east of Udo.

(2) Straight line connecting the intersection of 33°56'25" North Latitude and 125°55'30" East Longitude and the intersection of 33°24'20" North Latitude and 125°56'20" East Longitude.

On receipt of Your Excellency's reply confirming, on behalf of the Government of Japan, the aforementioned understandings, the Government of the Republic of Korea will consider that this Note and Your Excellency's reply shall constitute an agreement between the two Governments which shall enter into force on the date of the entry into force of the aforementioned Agreement.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Tong Won Lee
Minister of Foreign Affairs

His Excellency
Etsusaburo Shiina
Minister for Foreign Affairs
of Japan
Tokyo, June 22, 1965

Excellency,

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

"(Korean Note)"

I have the honour to confirm that the aforementioned understandings are also the understandings of the Government of Japan and that the Government of Japan will consider that Your Excellency's Note and this reply shall constitute an agreement between the two Governments which shall enter into force on the date of the entry into force of the aforementioned Agreement.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration

(Signed) Etsusaburo Shiina
Minister for Foreign Affairs
of Japan

His Excellency
Tong Won Lee
Minister of Foreign Affairs
of the Republic of Korea

AGREED MINUTES REGARDING THE AGREEMENT ON FISHERIES BETWEEN JAPAN AND THE REPUBLIC OF KOREA

The representatives of the Governments of Japan and the Republic of Korea have reached the following understandings concerning the Agreement on Fisheries between Japan and the Republic of Korea signed today:

1. Re licences and identification markings:

   (a) The two Governments will give administrative guidance so that licences and identification markings will not be transferred from one fishing vessel to another on the sea except at a port.

   (b) Either Government will tabulate by month the state of fishing operation by each fishery on the basis of reports of the fishing vessels in operation of its country on their positions at noon, and communicate to the other at least four times a year.

2. Re standard amount of the total annual fish catch:

   (a) The standard amount of the total annual fish catch within the joint regulation zone by drag-net fishing, by seine fishing and by
mackerel-angling fishing by fishing vessels of not less than 60 tons will be 150,000 tons (with allowance of 10 percent upwards or downwards); for Japan, the breakdown of this amount of 150,000 tons is as follows: 10,000 tons for drag-net fishing by fishing vessels of less than 50 tons, 30,000 tons for drag-net fishing by fishing vessels of not less than 50 tons and 110,000 tons for seine fishing and for mackerel-angling fishing by fishing vessels of not less than 60 tons. The standard amount of the total annual fish catch is an amount to be used as a guidance in regulating fishing operations by the maximum number of fishing vessels or units in operation. Either Government will, if it recognizes that the amount of the total annual fish catch by drag-net fishing, seine fishing and by mackerel-angling fishing by fishing vessels of not less than 60 tons within the joint regulation zone is to exceed 150,000 tons, give administrative guidance even during fishing seasons so that the number of fishing vessels or units in operation will be so adjusted as to keep the amount of the total annual fish catch within 165,000 tons.

(b) Either Government will designate the ports for landing the fish caught within the joint regulation zone by fishing vessels of its country engaging in fisheries subject to the application of the provisional regulation measures for fisheries.

(c) Either Government will tabulate by month the fish catch on the basis of reports of the fishing vessels in operation of its country on the amount of their fish catch within the joint regulation zone and on the basis of survey at the ports of landing, and communicate the results to the other at least four times a year.

(d) Either Government will, at the time of the observation by an official of the other referred to in 3 (c), if requested by that other, provide further to that official as much convenience as possible for the observation of landing of the fish caught by fishing vessels of its country subject to the application of the provisional regulation measures for fisheries, and make arrangements so that an explanation of the reporting and tabulation of fish catch will be given to him to the extent possible.

3. Re enforcement and violation concerning the provisional regulation measures for fisheries:

(a) A duly authorized official on a patrol vessel of either country may immediately communicate, when he discovers a fact which makes him believe with sufficient reason that a fishing vessel of the other country is actually and obviously violating the provisional regulation measures for fisheries, the fact to a duly authorized official on a patrol vessel of the other country to which such fishing vessel belongs. The Government of that other country will pay due regard to the communication in carrying out enforcement and exercising its jurisdiction over such fishing vessel, and will communicate measures taken consequently to the Government of that other country.

(b) The patrol vessels of the two countries may, in carrying out
enforcement over the fishing vessels of the respective countries with respect to the provisional regulation measures for fisheries, patrol jointly and maintain close contacts, as necessary, in accordance with prior consultations between the authorities concerned of the two countries, in order to make their enforcement smooth and effective.

(c) Either Government will, if requested by the other, provide as much convenience as possible for the observation of the state of enforcement within its country concerning the provisional regulation measures for fisheries to an official of the other who has been specially authorized for this purpose.

(d) Either Government will, in carrying out enforcement over the fishing vessels of its country with respect to the provisional regulation measures for fisheries, if requested by the other and if it deems such a request as proper, provide reciprocally as much convenience as possible to officials of the other for boarding its patrol vessels engaging solely in enforcement over fisheries, for the purpose of observation of the actual state of enforcement.

4. Re Japan-Republic of Korea Joint Fisheries Commission:

The Japan-Republic of Korea Joint Fisheries Commission will select annually the chief of the standing secretariat from among members of the national section of the Contracting Party in which the annual meeting of following year will be held, before the closing of each annual meeting. The chief will hold office for a period of one year. The chief will carry out the business of the secretariat including preparations for holding Commission meetings, with the assistance of the authorities concerned of his country and, when necessary, with the assistance of the duly authorized officials of the other Contracting Party stationed in his country.

5. Re arbitration board:

The countries to be chosen respectively by the two Governments and the third country to be determined upon consultation between the governments of the countries so chosen, which are mentioned in paragraph 3 of Article IX of the Agreement, will be selected from among the countries having diplomatic relations with both Japan and the Republic of Korea.

6. Re exchange of information between patrol vessels concerning the state of fishing operation:

A patrol vessel of either country may, when it deems necessary, request a patrol vessel of the other to furnish necessary information concerning the state of fishing operation in the joint regulation zone, and the patrol vessel of the other will comply with such request as much as possible.

7. Re coastal fishing:

The two Governments will exchange information concerning the state of coastal fishing operation (excluding drag-net fishing and seine fishing and mackerel-angling fishing by fishing vessels of not less than 60 tons) and, if
necessary for the maintenance of order in fishing grounds, will hold consultations with each other.

8. Re mutual respect for domestic fishing ban areas, etc:

(a) With respect to the fishing ban areas concerning drag-net fishing and concerning seine fishing, and the waters enclosed by the lines of 128° East Longitude, 128°30′ East Longitude, 33°9′15″ North Latitude and 25° North Latitude concerning drag-net fishing, presently established by the Government of Japan, and with respect to the fishing ban areas concerning drag-net fishing and concerning trawl fishing presently established by the Government of the Republic of Korea, either Government will respectively take necessary measures to prevent fishing vessels of its country from engaging in fishing operations in these waters of the other.

(b) The systems being applied by the Government of the Republic of Korea with respect to drag-net fishing by the fishing vessels of the Republic of Korea of less than 50 tons in that part of the Yellow Sea which is within the aforementioned fishing ban areas of the Republic of Korea and with respect to drag-net fishing for prawn of the Republic of Korea in that part of the Japan Sea which is within the said fishing ban areas will be recognized as exceptions.

(c) A duly authorized official on a patrol vessel of either country may, when he discovers the fact that a fishing vessel of the other is operating in its areas referred to in (a), call attention of such fishing vessel to the fact and, at the same time, promptly communicate the fact to a duly authorized official on a patrol vessel of the other. The Government of that other will respect the communication in carrying out enforcement and exercising its jurisdiction over such fishing vessel and will communicate to the Government of that either country the measures taken consequently.

9. Re innocent passage:

It is confirmed that innocent passage (in the case of fishing vessels, it is restricted to cases where their fishing gear has been put away) through territorial seas and fishery zones will be in accordance with the rules of international law.

10. Re rescue at sea and emergency refuge:

The two Governments will conclude arrangements as soon as possible with respect to rescue at sea and emergency refuge for fishing vessels of the two countries. Even prior to the conclusion of such arrangements, the two Governments will provide proper rescue and protection as much as possible in accordance with international practice with respect to rescue at sea and emergency refuge for fishing vessels of the two countries.

Tokyo, June 22, 1965

(Initialled) E. S.
(Initialled) T. W. L.
Tokyo, June 22, 1965

Excellency,

I have the honour to confirm that the following understandings have been reached between the representatives of the Governments of Japan and the Republic of Korea on the form of identification markings and the place where they shall be borne, which are provided for in the Annex to the Agreement on Fisheries between Japan and the Republic of Korea.

1. Identification markings shall bear an abbreviation to indicate the nationality of the fishing vessel and a number to enable the identification of the type of fishing and the home port. The form of identification markings shall be as set forth in the sheet attached hereto.

2. Identification markings shall be so painted that the said abbreviation and number can be identified at night.

3. All identification markings shall have the seal issued by the respective Governments.

4. Identification markings shall be borne at prominent places on the upper part of both sides of the bridge of the fishing vessel.

(a) Form for the Japanese Side

(Principal Marking)

(Note) The oblique lined parts shall be yellowish orange and the other parts shall be black.
On receipt of Your Excellency's reply confirming, on behalf of the Government of the Republic of Korea, the aforementioned understandings, the Government of Japan will consider that this Note and Your Excellency's reply shall constitute an agreement between the two Governments which shall enter into force on the date of the entry into force of the aforementioned Agreement.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(b) Form for the Korean Side

(Principal Marking)

\[
\begin{array}{c}
\text{K250} \\
150\text{cm} \\
\text{6cm} \quad \text{6cm} \quad \text{7cm}
\end{array}
\]

(Sub-Marking)

\[
\begin{array}{c}
\text{K250.7} \\
100\text{cm} \\
\text{25cm} \quad \text{35cm} \quad \text{4cm} \quad \text{4cm} \quad \text{4cm} \quad \text{4cm} \quad \text{4cm}
\end{array}
\]

(Note) The oblique lined parts shall be black and the other parts shall be yellowish orange.
His Excellency
Tong Won Lee
Minister of Foreign Affairs
of the Republic of Korea

(Korean Note)

Tokyo, June 22, 1965

Excellency,

I have the honour to acknowledge the receipt of Your Excellency’s Note of today’s date, which reads as follows:

"(Japanese Note)"

I have the honour to confirm that the aforementioned understandings are also the understandings of the Government of the Republic of Korea and that the Government of the Republic of Korea will consider Your Excellency’s Note and this reply shall constitute an agreement between the two Governments which shall enter into force on the date of the entry into force of the aforementioned Agreement.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Tong Won Lee
Minister of Foreign Affairs

His Excellency
Etsusaburo Shiina
Minister for Foreign Affairs
of Japan

(Exchange of Notes Concerning Co-operation on Fisheries)

(Korean Note)

Tokyo, June 22, 1965

Excellency,

I have the honour to refer to the Agreement on Fisheries between the Republic of Korea and Japan signed today and to confirm the following understandings reached between the representatives of the two Governments:

With a view to developing and improving the fisheries of the two countries,
the two Governments will co-operate with each other as closely as possible in the technical and economic fields.

This co-operation will include the following:

(1) Exchange of information and technics concerning fisheries.
(2) Exchange of fishery experts and technicians.

On receipt of Your Excellency's reply confirming, on behalf of the Government of Japan, the aforementioned understandings, the Government of the Republic of Korea will consider that this Note and Your Excellency's reply shall constitute an agreement between the two Governments which shall enter into force on the date of the entry into force of the aforementioned Agreement.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Tong Won Lee
Minister of Foreign Affairs

His Excellency
Etsusaburo Shiina
Minister for Foreign Affairs
of Japan

(Japanese Note)
Tokyo, June 22, 1965

Excellency,

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

"(Korean Note)"

I have the honour to confirm that the aforementioned understandings are also the understandings of the Government of Japan and that the Government of Japan will consider that Your Excellency's Note and this reply shall constitute an agreement between the two Governments which shall enter into force on the date of the entry into force of the aforementioned Agreement.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Etsusaburo Shiina
Minister for Foreign Affairs
of Japan
His Excellency
Tong Won Lee
Minister of Foreign Affairs
of the Republic of Korea

LETTERS EXCHANGED CONCERNING SAFE OPERATION

Tokyo, June 22, 1965

Sincerely yours,
(Signed) Torao Ushiroku
Director, Asian Affairs Bureau
Ministry of Foreign Affairs

Mr. Yon Ha Gu
Director, Asian Affairs Bureau
Ministry of Foreign Affairs

Items concerning safe operation and the maintenance of order

1. Signs and signals

   (1) Sign indicating that a fishing vessel is engaging in fishing operation

   (2) Sign indicating an accident which occurred during fishing operation of a fishing vessel

   (3) Sign indicating anchoring and mooring of a fishing vessel at night

   (4) Recognition signal of a fishing vessel at night and whistling signal indicating its course
2. Matters to be observed during operation

(1) Principle of respecting operation of a fishing vessel ahead engaging in fishing operation
(2) Principle of respecting the area of gear set during fishing operation
(3) Principle concerning the case of parallel operation of fishing units
(4) Principle concerning operation in congested fishing grounds (including the distance between light-ships engaging in seine fishing operation)

3. Matters concerning clearing out of the course

(1) Principle of priority of a fishing vessel engaging in fishing operation
(2) Principle concerning mutual clearing out of the course of a fishing vessel engaging in fishing operation
(3) Principle of priority of a fishing vessel which met an accident (such as the losing of gear and severing of rope) during fishing operation

4. Matters to be attended to in anchoring and mooring

5. Matters concerning rescue at sea

6. Matters concerning compensation for damage to a fishing vessel and gear.

(Letter from the Director of the Asian Affairs Bureau of the Ministry of Foreign Affairs of the Republic of Korea to the Director of the Asian Affairs Bureau of the Ministry of Foreign Affairs of Japan)

Tokyo, June 22, 1965

Sir,

On the occasion of the signing today of the Agreement Concerning Fisheries between the Republic of Korea and Japan, I take pleasure in stating that the fisheries authorities of the Republic of Korea intend to guide Korean private organizations concerned so that an arrangement containing the items set forth in the sheet attached hereto will be made between the private organizations concerned of the two countries as soon as possible in order to seek safe operation and maintain proper order of operation and to serve the purpose of seeking smooth and speedy settlements of accidents at sea between the fishing vessels of the two countries.

(Signed) Yon Ha Gu
Director, Asian Affairs Bureau
Ministry of Foreign Affairs

Mr. Torao Ushiroku
Director, Asian Affairs Bureau
Ministry of Foreign Affairs
Items concerning safe operation and the maintenance of order

1. Signs and signals
   (1) Sign indicating that a fishing vessel is engaging in fishing operation
   (2) Sign indicating an accident which occurred during fishing operation of a fishing vessel
   (3) Sign indicating anchoring and mooring of a fishing vessel at night
   (4) Recognition signal of a fishing vessel at night and whistling signal indicating its course

2. Matters to be observed during operation
   (1) Principle of respecting operation of a fishing vessel ahead engaging in fishing operation
   (2) Principle of respecting the area of gear set during fishing operation
   (3) Principle concerning the case of parallel operation of fishing units
   (4) Principle concerning operation in congested fishing grounds (including the distance between light-ships engaging in seine fishing operation)

3. Matters concerning clearing out of the course
   (1) Principle of priority of a fishing vessel engaging in fishing operation
   (2) Principle concerning mutual clearing out of the course of a fishing vessel engaging in fishing operation
   (3) Principle of priority of a fishing vessel which met an accident (such as the losing of gear and severing of rope) during fishing operation

4. Matters to be attended to in anchoring and mooring

5. Matters concerning rescue at sea

6. Matters concerning compensation for damage to a fishing vessel and gear

RECORD OF DISCUSSIONS

In the course of negotiations for conclusion of the Agreement on Fisheries between Japan and the Republic of Korea, the following statements were made respectively by the Japanese and Korean sides:
Japanese Representative:

(a) Administrative guidance in "give administrative guidance so that the number of fishing vessels or fishing units in operation will be so controlled" in paragraph 2 (a) of the Agreed Minutes regarding the Agreement includes guidance for the adjustment of the number of issuance of licences and identification markings.

(b) The observation of the state of enforcement within its country in paragraph 3 (c) of the Agreed Minutes regarding the Agreement includes receiving an explanation of the state of issuance of licences and identification markings.

(c) Most of the Japanese fishing vessels engaging in coastal fishing which is not subject to the provisional regulation measures for fisheries and operating in the joint regulation zone are of small scale management and their areas of operation are, because of their actual operational capability, mainly from north of Tsushima to northwest of Chejudo in the joint regulation zone, and, in view of the state of that fishing, it is considered that there would be no major change in this situation.

Korean Representative:

(a) Administrative guidance in "give administrative guidance so that the number of fishing vessels or fishing units in operation will be so controlled" in paragraph 2 (a) of the Agreed Minutes regarding the Agreement includes guidance for the adjustment of the number of issuance of licences and identification markings.

(b) The observation of the state of enforcement within its country in paragraph 3 (c) of the Agreed Minutes regarding the Agreement includes receiving an explanation of the state of issuance of licences certificates and identification markings.

(Initialled) T.H.

(Initialled) K.S.L.
KOREA

PRESIDENTIAL PROCLAMATION OF SOVEREIGNTY OVER THE ADJACENT SEAS

18 January 1952

U.N. Docs. ST/LEG/SER.B/6 (1957) and ST/LEG/SER.B/8 (1959)

Supported by well-established international precedents and urged by the impelling need of safeguarding, once and for all, the interests of national welfare and defence, the President of the Republic of Korea hereby proclaims:

1. The Government of the Republic of Korea holds and exercises the national sovereignty over the shelf adjacent to the peninsular and insular coasts of the national territory, no matter how deep it may be, protecting, preserving and utilizing, therefore, to the best advantage of national interests, all the natural resources, mineral and marine, that exist over the said shelf, on it and beneath it, known, or which may be discovered in the future.

2. The Government of the Republic of Korea holds and exercises the national sovereignty over the seas adjacent to the coasts of the peninsula and islands of the national territory, no matter what their depths may be, throughout the extension, as here below delineated, deemed necessary to reserve, protect, conserve and utilize the resources and natural wealth of all kinds that may be found on, in, or under the said seas, placing under the Government supervisions particularly the fishing and marine hunting industries in order to prevent this exhaustible type of resources and natural wealth from being exploited to the disadvantage of the inhabitants of Korea, or decreased or destroyed to the detriment of the country.

3. The Government of the Republic of Korea hereby declares and maintains the lines of demarcation, as given below, which shall define and delineate the zone of control and protection of the national resources and wealth on, in, or beneath the said seas placed under the jurisdiction and control of the Republic of Korea and which shall be liable to modification, in accordance with the circumstances arising from new discoveries, studies or interests that may come to light in future. The zone to be placed under the sovereignty and protection of the Republic of Korea shall consist of seas lying between the coasts of the peninsular and insular territories of Korea and the line of demarcation made from the continuity of the following lines:

1. Text of Proclamation provided by the Permanent Observer of Korea to the United Nations.
a. From the highest peak of U-Am-Ryung, Kyung-Hung-Kun, Ham-Kyong-Pukdo to the point (42°15'N - 130°45'E);
b. From the point (42°15'N - 130°45'E) to the point (38°00'N - 132°50'E);
c. From the point (38°00'N - 132°50'E) to the point (35°00'N - 130°00'E);
d. From the point (35°00'N - 130°00'E) to the point (34°00'N - 129°10'E);
e. From the point (34°00'N - 129°10'E) to the point (32°00'N - 127°00'E);
f. From the point (32°00'N - 127°00'E) to the point (30°00'N - 124°00'E);
g. From the point (30°00'N - 124°00'E) to the point (39°45'N - 124°00'E);
h. From the point (39°45'N - 124°00'E) to the western point of Ma-An-Do, Sin-Do-Yuldo, Yong-Chun-Kun, Pyungan-Pukdo;
i. From the western point of Ma-An-Do to the point where a straight line drawn north meets with the western end of the Korean-Manchurian borderline.

This declaration of sovereignty over the adjacent seas does not interfere with the rights of free navigation on the high seas.
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