A JURIDICAL APPROACH TO THE PROBLEMS OF THE WORLD FISHERIES

by

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THESIS

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C O N T E N T S

Scope of the Thesis

Fisheries Thesis Douglas M. Johnston

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Scope of the Thesis

The purpose of this thesis is to assess the prevailing climate of legal thought on matters relating to fishing on the seas. This will be done by making a preliminary and brief survey of the legal concepts which have clarified or darkened the understanding of international fishery problems; by studying the development of state practices through selected case histories in the field of fishery disputes; and by a more detailed analysis of some international fishery agreements in recent times to determine the likeliest course of action for the future.

Before embarking upon this venture, the writer has thought it useful to take into account several non-legal factors, which are so important as to be considered as "living-law" norms in this particular field of jurisprudence. An attempt will be made to justify this assertion by showing that only by constant reference to the norms established by the humanitarian, the biologist, the social scientist and the statesman, can the legislators and lawyers of international society hope to frame a dependable and comprehensive system of government and law within the field of fisheries.

Accordingly, consideration of the legal factors which form the proper subject-matter of this thesis is preceded by a layman's simplified treatment of the approaches of the universally-minded humanitarian; of the zoologist and marine ecologist; of the social scientist; and of the statesman reflecting national interests.

A. Introduction to the World Fisheries

Chapter 1: The Humanitarian's Approach

("The hungry sheep look up and are not fed" - Lycidas, Milton)

Man lives by grace of the sun, source of all energy and of all natural bounties. To improve his condition on earth he has learned to release the trapped energies around him, to unearth the minerals, to harness the forces of power, and to hunt and cultivate the natural foods. Hitherto these have come mainly from the land, yielding itself gradually to the advances of science but promising less as its limitations were revealed. Now more than ever man's attention has been directed to the sea, to the shallow shores and sounding oceans which cover more than three-fifths of the earth's surface.

The minerals wrought from the land cannot be renewed; the coal seams, the oil fields and natural gas deposits are finite and become less economic to exploit as they are tapped; and, more immediate still, the available natural food supplies are dwindling in proportion to a rapidly expanding world population. Today there are 2,750 million mouths to be fed; at the present rate of increase there will be 3,750 million in twenty years. It is this last problem, the procurance of future food supplies, that presses most urgently.

Sir John Boyd Orr, former head of the Food and Agriculture Organisation of the United Nations, put the matter simply: "The rising tide of population and the falling reservoir of food resources constitute . . . the greatest issue facing mankind today. There will be no peace in the world as long as half of the people suffer from hunger and poverty, knowing that food in abundance is entirely possible."

This sober reflection is borne out by recent scientific inquiries undertaken by the F.A.O. These have shown that the world consumption of meat at 50 million tons per annum is far from enough, on a per capita basis, to secure the minimum protein requirements for the world's populations; with distribution as it is, two-thirds of our fellow beings are underfed. To attain these minimum per capita requirements in 1960 it would be necessary to increase meat production by almost 40 million tons. Yet 90% of the world's potential food material is in the sea. At present only one-tenth of the world's flesh foods is actually obtained from the sea. Out of 20,000 species of seafish no more than fifty contribute to the world catch. Even in the greatest fish-eating countries hundreds of species of sea-life, constituting a highly concentrated protein diet and admirably suited for starving bodies, are being rejected as waste, unacceptable to the dining tables of the world. An understanding of the

implications of this wastage gives a more literal force to the proverb, "all is fish that cometh to net".

In 1949 the United Nations Scientific Conference on the Conservation and Utilization of Resources agreed that the fisheries of the world can be greatly expanded, even to the degree of 22%, by finding new fishing-grounds and exploiting further those grounds already used. At present 98% of the world's commercial fishing is carried on in the Northern Hemisphere, and most of this north of the Tropic of Cancer. Approximately 30% of the world's catch in marine (i.e. salt water) areas is caught in the North East Atlantic region (including the Baltic and North Seas); 28% in the North West Pacific, and 12% in the North West Atlantic. This is due to the heavy concentration of population around the northern waters and the economic need for intense fishing effort, but it is also due to a combination of many hydrographic factors, such as temperature, currents, depths, and plankton distribution, that determine where fish will breed. For all these reasons, the North Sea most noticeably is an area which has been fished close to its limit; except for herring, there was no increase in the North Sea annual catch between 1913 and 1932. On the other hand, many rich fishing-grounds, because of their remoteness or for less obvious reasons, have been almost entirely neglected: north of Norway towards Spitsbergen and in Alaskan waters vast cod grounds await

their proper exploitation, and great shoals of tuna and pilchards off the coasts of West Africa and South America have been left relatively undisturbed so far. The Arctic and Antarctic areas too will soon be ready for harvesting, and the development of profitable fisheries off the Indian sub-continent can be expected in the near future. In the meantime the limiting factors in most of these areas will be economic rather than physical.

The development of fisheries outside the temperate zones can be regarded as part of the New Industrial Revolution, which since the end of the Second World War has sought to redress in some degree the universal balance of resources. The extension of the Old Industrial Revolution, linked as it was with machine progress, depended on the availability of the fossil fuels. Industry became anchored to geological deposits. Where fuel was cheap and readily accessible, factories created wealth, which could pay for education, endow research and provide capital for the new industries springing up out of it. The rapid growth of technological civilisation in the Western world was given added impetus by the fact that nine-tenths of the world's known coal reserves and four-fifths of the world's oil reserves lie north of latitude 20° N, just south of the Tropic of Cancer. But "Temperate Zone Man" was doubly blessed, because his natural foods too were more easily come by, both on land and sea. Until recent times the great bulk

of commercial fishing has been in shallow waters, over the continental shelves or slopes, which lend themselves more easily to exploitation by the accepted fishing methods which fundamentally have changed but little since men first went down to the sea in ships.

Outside the temperate zones of the earth, the so-called "underdeveloped" countries are too remote from the great geological deposits to share in a latter-day, fossil fuel industrial revolution, but, on the other hand, two-thirds of the potential water-power in the world lies in these very regions which were by-passed by the Old Industrial Revolution. It is on this water-power and on the harnessing of nuclear energy that the New Industrial Revolution will depend, for atomic reactors can be independent even of lines of communication, since, once installed, the fuel supplies are negligible. Thus industries are being liberated from geology and geography. It is imperative too that as part of this hemispheric development the under-fished regions outside the temperate zones and beyond the more populous continental slopes should be rationally exploited for the benefit of all.

For the humanitarian, then, fishery problems today are of cosmic significance; we are contending with "the huge army of the world's desires". But the enlightened development and regulation of the world's fisheries can only be attempted after universal consent is obtained. It remains to be considered to what extent such consent is feasible in the near future.

Chapter 2: The Biologist's Approach

(3 Fisherman - 'Master, I marvel how the fishes live in the sea'.
1 Fisherman - "Why, as men do aland; the great ones eat up the little ones'.

Pericles, Shakespeare.)

For commercial purposes there are two broad classifications of fish, demersal and pelagic.[1] Bottom-feeding or demersal species, which include the cod, haddock, hake, whiting, halibut, plaice, sole, flounder, turbot, sea-bream, conger-eel, skate, shark, and dogfish, are caught predominantly by gear operating at or near the sea-bed, such as long lines or trawl nets. These fish live mainly in shallower waters where the sea-food, in the form of animal plankton and small fry of fish, is near the euphotic zone.[2] From this zone the organic remains are only partly decomposed in the short fall to the bottom, so that there is a perpetual and swift sea-cycle of fertilization. Because of this cycle these shallow sea-bed fisheries tend to be more stationary and constant, which allows trawlers to work on a more or less year-round schedule.

The surface-feeding or pelagic species, including herring, sprat, pilchard, sardine, anchovy, menhaden, mackerel, tuna, and salmon, are found in both shallow and deep waters, but for economic reasons most of the commercial fishing, particularly

in the Northern Hemisphere, is done in the relatively shallow grounds, where the shoals are the most dense, by means of drift-net, purse seine net, trolled lines, and other gear adapted for work near the surface. Pelagic fish are generally more mobile and some species undertake lengthy seasonal migrations. Some feed on plankton, others are carnivorous. In deeper waters the sea-cycle of fertilization is more complex and more variable than on the shallower continental slopes. A constant renewal of phosphate, and therefore plankton, from the deep is necessary and this is accomplished by means of great currents, both horizontal and vertical, such as the Gulf Stream and the upwelling of waters off Africa and the western shores of South America. Strong upwellings occur where currents diverge or where, as off the West African shore, the constant off-shore winds push water from the land which has to be replaced from below, bringing with it the rich fertilizer of the deep waters. Upwellings and convection currents appear if the density of the surface water is increased beyond that of the underlying strata, in regions where there are marked seasonal changes in temperature between winter and summer. The surface water cools to a point where the density becomes sufficient to cause it to sink and be replaced by an upward movement of lighter and nutrient-rich water from below. The mysterious shifting of the sea, consequently, makes the movements of pelagic fish more difficult to assess.

Because of their seasonal appearance, the time for catching them in northern, cold, or temperate, waters is rather short and this introduces the economic difficulty of maintaining the proper equipment in the closed season, with complications in the capital and labour markets. The tendency is either to fish over-intensively in season, or to prolong the season, by ranging far and wide in the quest, as the Japanese pelagic fishermen have done in the Pacific Ocean for many years. The latter course involves the development of special techniques and methods, which will become more economically feasible with further improvements in refrigeration.

Nothing, however, either on land or sea, is quite as simple as it sounds; and fish are no exception. The Norwegian haddock, or red-fish, was long assumed to be true to its demersal heritage, but recent research has shown it to be a pelagic species. Sometimes too in certain regions demersal methods are found to be more successful in catching pelagic fish; off the coast of Scotland, for example, herring and mackerel are frequently caught by trawl-nets.

There remains to be mentioned a third class of fish of commercial significance, the molluscs and crustaceans. These include the clam, oyster, mussel, cockle, cuttlefish, squid, winkle, whelk, crab, lobster and shrimp. Most shellfish are demersal and obtained by dredges, trawls, or traps. These methods often involve costly damage to equipment, but high

prices can usually be obtained from canneries and housewives, as this class of fish generally enjoys a special prestige in the hierarchy of sea-foods.

The ratio of demersal species to pelagic, and the relationship of round fish to flat fish and shell-fish, varies considerably in different regions of the world. The shoaling of certain kinds of fish in a particular locality is conditioned by a combination of many hydrographic factors favourable to their feeding and breeding habits. Water temperature plays an important role in the reproduction of fish, determining where and when spawning and feeding takes place; consequently, temperature may be a contributary factor in the migration of shoals from one region to another. A less variable but equally important hydrographic condition is the saline content of the water. According to H. U. SVERDRUP,[3] "salinity influences the character or type of animals that will be present in any region rather than the rate of reproduction or total amount of animal organic material produced."

Over the greater part of the seas these factors, many of which are still undetermined by marine ecologists, are found to be extremely variable, making commercial fishing on a large scale always an economic hazard. In the last hundred years, however, scientific research has been brought to bear more closely on long-run climatic and hydrographic changes. In the 20th Century much attention has been given to the distinct but gradual change in climate in the Arctic and sub-

Arctic regions, which has resulted in a general rise of air and sea temperatures from West Greenland across to North Siberia. For example, during the period between 1931 and 1935 the average winter air temperature in Spitsbergen was 9° Centigrade higher than between 1911 and 1915; in the ten years up to 1933 the surface temperature of the Gulf Stream at its origin increased about half a degree Centigrade, and a similar rise was recorded in the English Channel. Such changes eventually force certain kinds of fish to migrate to regions where the former conditions prevail, and if the migrations are not too lengthy the fishermen have followed the fish. In other cases the fishermen have preferred to change their methods and techniques in order to pursue other kinds of fish.

Accordingly, it was in the shallow coastal waters where hydrographic conditions are relatively stable and fish, particularly of the demersal species, congregate in great quantities near the sea-bed, that the world's oldest fisheries were developed. The development of these fisheries followed the same evolutionary pattern. First, great and profitable catches were made on the shallow banks close to the shore and in sheltered waters. As vessels gradually increased in power and efficiency the volume of fishing grew, until the recessive depletions of the banks first exploited forced fishermen to adopt improved methods and techniques, which in turn led to an outward, off-shore expansion of the fishery. While

this semi-centrifugal process continued, a position would be reached where the total catch was maintained from an area of one thousand square miles which used to be taken from an area of one hundred square miles.[4]

Towards the end of the 19th Century fishery research was put on a scientific footing by pioneers such as Johan Hjort and C.G.J. Petersen, and institutions devoted to the scientific investigation of sea fisheries were established in Norway, Denmark, Scotland, and England. Because of the growing intensity of fishing in the North Sea, most of the early work in this field of scientific research was done in the North European countries, and due to the delicate international ramifications of disputes among fishermen of different nationalities, there was an added incentive to the scientists to conduct their research in a co-operative spirit. In 1902 the International Council for the Exploration of the Sea was founded with the active support of the principal maritime nations of Europe.

As soon as scientific data were forthcoming, the danger of serious over-fishing in the North Sea region became obvious. The depletion of the cod and haddock banks became more drastic as the trawler trade grew in strength, particularly in the 1880's and 1890's when steam trawlers gradually supplanted the old sailing vessels.[5] These modern and powerful ships were able to scour the sea-bed more extensively and more intensively, and during this period not only did the actual volume of demersal fishing mount rapidly, but it was irrespective of

differentials of age, size, and species. Out of these discoveries the theories of overfishing and of conservation evolved together, gill by gill.

In the view of Petersen, rapid production and early cropping were the desiderata in the regulation of fisheries, just as agriculturalists found in crop and animal husbandry. He was principally concerned with maintaining a constant supply of food for the fish to be bred and with finding the most desirable rate of growth for the young fish. He pointed out that measures designed to keep up the supply of mature fish, so that an abundant supply of eggs, larvae, and young fish might be assured, could defeat their own ends and result in vast overcrowded stocks of young fish, which grew slowly and consumed a great deal of food to little purpose, using much of it for maintenance and little for positive body-building. On the other hand, he refrained from advocating indiscriminate thinning out of stocks of young fish for the purpose of increasing growth-rate. A balance must be maintained. It is now the opinion of all modern experts that the wholesale destruction of undersized fish, when they are near commercial size, is prejudicial to the stock and should be prevented.

Nevertheless, as Dr. E.S. Russell points out in "The Overfishing Problem", the effect of Petersen's insistence on the importance of growth-rate, and the desirability of

producing a fast-growing stock, has been all to the good. "It is clear from his work that up to a certain point fishing is good for the stock. It clears out the accumulated stock of old, slow-growing fish, enables the remainder to grow more quickly, and makes room for the oncoming broods, so that they can survive in greater numbers and grow more rapidly. A stock under the influence of fishing utilises the available food more efficiently, through increased rate of growth, and renews itself more rapidly."[6]

Up to a point, then, yield can be increased by increasing fishing, but after the maximum is reached, the more fish caught the less the weight of fish. For every species there must be an optimum rate of fishing. When the rate exceeds the optimum, the yield will fall in spite of the increased effort expended. The rate of fishing which gives the maximum steady yield is of course not necessarily the most economical rate of fishing, for this depends upon many other factors as well. Even the biological factors involved are uncertain and their inter-relations complex, as is borne out by this passage from Dr. D.S. Raitt's paper on "The Rate of Mortality of the Haddock of the North Sea Stock"[7]: "Reduction in numbers means less competition for food, which means greater growth-rate, which means earlier fishing-out, all of which indicates reduction of potential fertility, which in turn would mean still further reduction in numbers, and so on. On the other hand, once a decrease in the rate of depletion was established, greater survival would mean more competition for food, less

growth-rate, later entry into the trawl, greater survival to the spawning age, larger broods, and so on."

In 1905 Dr. W. Garstang suggested that the thinning out of the overcrowded small plaice grounds in the North Sea might be done effectively by transplanting the small fish in great numbers from the coastal waters where they grow slowly to the less populated areas where they grow faster.[8] This method has been adopted in various regions. The 1914-1918 War brought some relief to the overfished waters of the North Sea, but after the optimum catch had been regained, the total yield of demersal fish decreased, in spite of increased intensity of fishing, which is shown in the decreased catch per unit of effort.

It became apparent that the use of the trawl was a destructive and wasteful element in any scheme for regulating fisheries, and eventually it was recognized that in the best fishing grounds mortality by trawl-fishing exceeded that by natural causes. With the size of mesh ordinarily in use great quantities of fish, too small to be of marketable value, were captured and then thrown back with little chance of survival. This discovery aroused the anxiety both of research workers and of the fishing industry and helped considerably to have the danger of overfishing taken seriously. It should not, however, be supposed that the concept of overfishing was a new one, and it may be worthwhile at this stage to digress

briefly in order to show how this concept eventually came into the purview of the modern scientist.

At one time it was assumed by almost everyone that the fish in the sea were limitless; their number was legion and proverbial. It was evident that fish stocks in inland waters were finite and small lakes and streams were in fact commonly exhausted throughout the ages, ever since man became hunter. But before the 19th Century the problem of overfishing on the seas was at most a theoretical possibility. In his "Controversial Illustres" the Spanish jurisconsult Ferdinand Manchaea Vasquez (1509 - 1566) drew a distinction between fishing in the sea and in rivers and lakes, for the purposes of legal theory, holding that while the latter may be exhausted by excessive fishing the sea could not be so exhausted. This argument won the authoritative approval of Hugo Grotius in his "Mare Liberum"[9]: "for everyone admits that if a great many persons hunt on the land or fish in a river, the forest is early exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea." It should be mentioned, however, that this work was written to vindicate the freedom of navigation on the seas, and fisheries were brought in only by way of argument.

The first jurist to stress the risk of fisheries being exhausted by promiscuous use was the Scot, William Welwood, Professor of Civil Law and Mathematics at St. Andrews University

towards the end of the 16th Century. On this account he claimed that inhabitants of a country had the primary and exclusive right to fisheries along their coast-line.[10] To Grotius's contention that it was preferable to suffer promiscuous fishing rather than interfere with the freedom of navigation, Welwood made the apt reply that if the free use of the sea was to be curtailed at all, it ought to be chiefly for the protection of fishings, As it was, he complained that the fisheries on the east coast of Scotland were being exhausted on account of the "neere and dailie approaching of the busse fishers" breaking and scattering the shoals, so that no fish "worthy of any paines and travels" could be found. For the next hundred years all British jurists followed this course in trying to justify the Stuarts' claims to sovereignty over the surrounding seas which were designed to exclude the Dutch fishermen. In his "Mare Clausum", written in the reign of James I, the English jurist, John Selden, specifically denied that the sea was inexhaustible from promiscuous use.[11]

In 1714 the danger of depleting home fisheries was taken so seriously by British legislators that a particularly drastic Act was passed prescribing larger-meshed nets to be used by all British fishing boats under pain of severe penalties.[12] This remarkably premature legislation was never in fact enforced and, along with some fifty other fishery Acts, was

repealed upon the recommendation of the Royal Commission set up in 1868 to investigate the fishing industry. By 1933, however, the wheel had turned full circle again and the Sea-Fishing Industry Act was passed allowing the regulation by Order-in-Council of the mesh of the fishing nets carried by British vessels, and also, by Order, to impose size limits on the fish sold or offered for sale. Thus ended in Britain the period from 1868 of practically complete freedom from legislative restriction of methods of fishing and their landings. In 1934 the International Council for the Exploration of the Sea recommended similar measures for its members.

In summary, it can be seen that in spite of, or perhaps because of, their late entry into the field of fisheries, biologists have accomplished much in a short time. Most important, they have pinpointed two fundamental problems affecting the fisheries of the North-West European waters, which will also apply to other regions if they do not already do so. First there is too much fishing and this results in catches below the optimum; secondly, the incidence of fishing falls too early in the life of the fish and this results in the great destruction of undersized fish which ought to be left in the sea to grow. Mesh regulations can be relied upon, if sufficiently drastic, to solve the second problem, at least as far as round fish are concerned. For the other problem, only a reduction in the volume of fishing can help.

Perhaps the most advanced experimentation in the effects of regulated fishing intensity has been done by Canada and the United States in their most successful joint regulation of the North Pacific halibut fishery since 1924. The lesson to be learned can be put in simple terms. The normal yield or catch in a virgin stock of fish is zero, and it increases with the fishery. At the same time the total mortality increases and the number of fish reaching maturity decreases. If this process goes far enough the lack of eggs and young must bring the increase in normal catch to a stop and cause it to decrease. At some stage intermediate between a virgin stock and one thus reduced by what can only be termed as overfishing, the productivity must be at maximum. Recent evidence indicates that a reversal of this process, a decrease in the amount of fishing, is still bringing an increase in productivity, and the reduction might conceivably be carried further, as technological improvements occur, with a sustained profit if the economic changes can be absorbed. In the case of the North Pacific halibut fishery it is clear that the simple concept of a limit, fluctuating or constant, to the productivity of the stocks, and the direct reduction of the catch until it falls within that limit, have brought definite improvements in the stock of fish.[13]

All organic life is subject to fluctuation in the same way as the environment on which it depends, an environment

which determines the rate at which organisms die. Each species through its mortality rate and accumulated stock is in balance with its environment and its own reproductive process. A regulated fishery disturbs these natural relationships, and these natural factors can only be determined when the effects of the regulated fishery are taken into account. The more study devoted to the effects of a regulated fishery, the closer the scientist will come to predicting the changes in productivity.

The biologist must continue to catch the ear of the world's legislators by pressing the need for the conservation of intensively fished stocks and for the rational development of underfished regions of the world.

Chapter 3: The Social Scientist's Approach

("There is a river in Macedon, and there is also moreover a river at Monmouth; . . . . and there is salmons in both."

Henry V, Shakespeare.)

The social sciences embrace a wide field of human activities; or it can be said that they must cover the whole field in order to study man properly in his social environment. The economist, the political scientist, the sociologist, the anthropologist, the social psychologist, the social historian, and so forth, has each his own particular slant of interest, but for our purpose their similarities of approach rather than their differences in technique are more important. They are all more

concerned with the fishermen and their communities than with the fish themselves. They are more interested in the differences that set them apart, the national or local variations in their social and economic patterns, than in the superficial uniformity of problems arising from the fishing occupation. Their special value lies in reminding would-be regulators of the world fisheries of the complexities involved in over-riding and sweeping changes, of the infinite and intricate ramifications these would have on the daily lives of the people most directly concerned. It will be sufficient for our purpose to illustrate some of the variable factors that might complicate well-intentioned attempts to effect large-scale changes in the interests of efficiency and economy.

In preparation for the International Conference on the Law of the Sea at Geneva (February to April 1958) the Fisheries Division of the Food and Agriculture Organisation issued figures reflecting the approximate contribution made by the sea fisheries to the national income of each of 39 countries.[1] In the majority of these cases the reported income from the sea fisheries is less than one per cent of the total income of the country. Five countries (Tunisia, South Korea, Denmark, Greece and Spain) report about one per cent; four (Hong Kong, Japan, Malaya and Portugal) two per cent; and four (Formosa, the Phillipines, Thailand, and Norway) three per cent. Iceland reports no less than 14 per cent.

Another way of computing the importance of sea fisheries to a country's economy may be found by reference to the quantity of sea fishery landings per head of the population and the unit value of landings, which may be combined as value of landings per head and set against the national income per head. As one would expect on this basis, the fish landings per head in Iceland are exceptionally high (257.7 metric tons landed weight per 100 inhabitants) and, although the unit value of landings is only in the $100 per ton class and the general level of incomes is high, the result is an exceptionally high contribution by the fisheries to the national income.

By this more sophisticated method of calculation one can make an interesting comparison between the four countries whose fisheries yielded approximately three per cent of their national income. Norway's landings per head (48.1 metric tons landed weight per 100 inhabitants) though much less than Iceland's, are still very high by world standards. Again the unit value is comparatively low and average income high. In the case of Formosa, the Phillipines and Thailand, the fish they land per head of population is a mere fraction of the Norwegian per caput production (1.9, 1.7, and 0.8 metric tons landed weight per 100 inhabitants, respectively) but the unit value is high and the level of incomes is characteristically low, so that these comparatively small per

capita landings are relatively as important to their national economies as the far greater landings in Norway are to that country's income.

Accordingly, it may be concluded that countries with highly developed production methods, producing fish cheaply and having high income levels, normally need to land about ten tons of sea fish or more per 100 inhabitants to come into the class with three per cent or more of the national income contributed by the fisheries. Countries of this type are likely to derive substantially more than three per cent of their national income from the sea fisheries, only if they have exceptionally high catch figures of the order of 100 tons per 100 people or more. Countries with comparatively primitive production methods, high fish prices and low average incomes are likely to fall into the two or three per cent classes if their sea fishery landings are well over one ton per 100 inhabitants.

To refine these matters further, the income from processing and perhaps also from transporting and distributing sea fishery products should also be considered. Where most or all of the sea fish is marketed at once in the form in which it is landed, little or no allowance need be made for income from processing, whereas in cases where the bulk of the catch is frozen, canned, dried, or reduced (e.g. for export) the value added in processing is likely to be very considerable. In Iceland, which

is a good example of the latter case, it is estimated that processing adds about 90% to the value of fish as landed.

According to the economic and social factors prevailing in each country, including the national eating habits, the proportion of fish exports to total national exports may vary considerably. The Faroes and Iceland, with 99% and 96% respectively, export very little else. Greenland has 33% and Norway 24%. Eight other countries report over five per cent fishing products in their export totals: Angola, the Bahama Islands, Iran, Japan, Morocco, Panama, Portugal and South West Africa.

It should be realised, however, that the effect on a national economy of changes in its sea fisheries will depend not so much on the importance of the sea fisheries in the national economy as on the sensitiveness or vulnerability of the fishing industry to such changes. Most of all it will depend on the mobility of capital and labour in relation to the fisheries and on the elasticity of demand for fish in the national market. In a highly specialised fishing area where the market is competitive and unprotected, and the industry consequently vulnerable, a scarcity of fish may cause heavy and prolonged loss of incomes since there is no alternative outlet for the local capital and labour. A similar scarcity would be much less severe where there are immediate alternative uses for the fishing men and their equipment and the reduced

production of fish can secure better prices at the expense only of the marginal units in the industry. Even though the importance of the fishery to the national economy in the first case is less important than in the second, the economic effect of a scarcity of fish would be more drastic not only for the industry but for the economy as a whole. On the other hand, a sudden increase in the supply of fish may have no economic effect at all if the demand is not favourable, regardless of the importance of the fishery to the economy.

Unfortunately, it is not easy in practice to determine accurately what would be the economic effect of such changes in supply on any particular economy. As the F.A.O. Report points out:[2] "if economic considerations were to be taken into account objectively in determining legal questions connected with the sea fisheries or in regulating these fisheries, there would be need for much greater knowledge of the relevant economic factors and consequently for a very great deal of economic investigations."

Until the second half of the 19th Century, fishing throughout the world was still a relatively primitive form of hunting and had shown no parallel growth into scientific maturity such as had benefited the arts of agriculture in many lands from the beginning of the 18th Century. The humanitarian's approach, developed in the first chapter, brought out how the fossil-fuel industrial revolution in the

western and northern regions of the world produced extreme inequalities in resources between those that could exploit the great geological deposits and those that could not. The fishing trade too participated in this process and in the last hundred years, while the trade developed in the north and west under the impetus of scientific discovery and technological improvement into a vast modern industry, other fishermen could only persevere in the ways of their forefathers immemorial. The lop-sided development of the fishing trade to-day is such that many fishing communities of the Orient bear a closer relation to those of mediaeval Europe than to those of the present day Western World, and some have changed but little since biblical times.

The heavily capitalised structure of modern fishing fleets in the Western World has brought an increasing emphasis on the need for specialisation in order to reduce overhead costs. But in the fishing units of simpler economies this incentive need not operate to any large extent. In many countries of the Far East, fish, sometimes fresh but more often dried or otherwise cured, is along with rice the staple food of the community, and the principal purpose of fishing is to feed the community. Yet few, if any, communities live exclusively on fish, and no community exclusively devoted to fishing is entirely self-sufficient; the fishing community, unlike the agricultural community, is necessarily participant in an exchange economy. Many communities maintain a dual economy between agriculture and fishing. Either the two occupations are divided among the people, in which case the community

may subsist on some sort of barter economy; or the people share in both occupations, from season to season, in which case the community will be obliged to export certain of its commodities so that cash can be provided to buy or repair equipment for the consecutive seasons.

Even where the persons engaged in the two occupations are not the same, agriculturalists and fishermen are often so closely linked by economic and social processes of exchange, inter-marriage, common residence, and common institutions and values, that they constitute a single unit. Whether the two occupations are conducted within the same community or an exchange economy obtains between two neighbouring communities, the needs and contributions of fishing and agriculture are complementary. Whereas the agricultural harvest is largely seasonal, with long gaps during which no income is received, the yield from fishing is normally one of daily increments. Thus the long-term planning of the farmer will be counterbalanced by the short-term planning of the fisherman, and the cash immediately available from the sale of the daily fish will be needed to maintain the equipment required for both occupations. The differences in investment risk are fundamental, for investment in agricultural land has a permanency not found in fishing enterprises. Fishing-boats and gear, though perhaps just as durable as agricultural implements and cattle, are on the whole more

liable to sudden damage and loss. Hence in a dual or mixed economy the different kinds of risks involved can be held in balance, without resort to professional entrepreneurs.

A different type of development is brought out in a study of the peasant economy of the Malay fishermen, where Professor Raymond Firth, the anthropologist, points out that in the Malay fishing communities the fishing boats are often owned by a wealthier class of Chinese and hired to the Malay fishermen.[3] "The introduction of power boats, with their greater capital outlay, will tend to change the existing pattern of economic relationships in the community. The common practice of lending boats would become less simple because of their greater value, greater liability to damage in unskilled hands, and the less general knowledge of how to handle them. Capital would probably have to be formed in new ways, the increased costs demand a re-arrangement in the established systems of distributed earnings, and there would be more likelihood of the gap being widened between wealthy fishermen and poor. A special group of power boat owners with superior economic status to the ordinary fisherman might even be created. Since in these communities economic relationships are closely bound up with other social relationships, from kinship to recreation, the structure of the peasant economy itself would be affected."

The new economic influences of the last half century have already produced radical modifications in fishing communities

in many parts of the world. For example, the majority of fishermen on the island of Senja in Northern Norway used to operate small farms during the summer, and this combination of winter fishing and summer farming developed into a stable and compact system. However, the introduction of the internal combustion engine to the fishing industry early in the 20th Century greatly increased the need for large-scale capital investment, and thus began a process of specialisation which enabled many to cease farming altogether.[4]

The well-being of a fishing community often depends not merely upon its flexibility in evolving new technical methods and in re-casting its capital structure but also upon its mobility when better prospects are discovered far from home. The mobility of fishermen and their communities turns, it is clear, on a great many variables, economic, social, political, and psychological. In general fishermen tend to cling to their old fishing grounds in much the same way that farmers tend to hold to their homestead. Working with the elements of nature, they cherish the virtues of a conservative and non-acquisitive philosophy. Yet there are instances enough that fishermen are flexible when their own interests demand it. Over the vast expanse of the Pacific Ocean range thousands of Japanese pelagic craft, seeking to fill the needs of the greatest fish-eating people in the world. Nearer home, the Pacific halibut fishery was pioneered by two schooners which sailed round the Horn from Gloucester, Massachussets; and

deep-sea trawling in the North Sea owed its beginning to the movement of fishermen from Brixham on the English Channel to the East Coast ports of Hull and Grimsby.[5] Perhaps when Adam Smith sorrowfully observed that of all baggage human beings are the most difficult to remove, he was thinking of short distances rather than of mass migrations. In recent times in Scotland it was found to be extraordinarily difficult to persuade the coal-miners of Lanarkshire to set up new homes forty miles away in Fife. In his study of the island of Senja, C.R. Molson mentions the unwillingness of the fishing folk of Cyfjordvaer in Northern Norway to leave their old homes and move across the fjord to Husøy, a safer and more sheltered place, despite the construction there of a harbour mole and the provision of electric power.

Changes in the sources of fish may affect a fishing community fundamentally without involving transplantation. In an interesting paper on "Greenland - An Experiment in Human Ecology", Dr. M.J. Dunbar shows how the warming of the Irminger Current, branch of the Atlantic Drift which turns westward at Iceland and converges with the East Greenland Polar Current around Cape Farewell, has contributed to the shift further northward of the saddleback seal and Arctic halibut, once so important to the fishing economy of Greenland. With the strengthening of the Gulf Stream and Atlantic Drift circulation and the retreat of the polar water and ice distribution, great quantities of cod-fish and Atlantic halibut have swum

into the Greenland waters, and to-day the cod fishery is the most important industry in the economy. It is noteworthy that the development of this new fishery is having far-reaching effects on the social, economic, and even political pattern of the world's largest island.

An important factor in the growth of fisheries has been the feeding-habits of different peoples. The demand for fish, and the location of markets where this demand can be made effective, will always determine how far fishermen must sail to supply the fish. It has already been observed that innumerable species of fish caught in supposedly sophisticated parts of the world are being rejected every day as waste, whereas more catholic tastes are found in the "under-developed" parts of the world. Eating habits change but slowly, usually for economic reasons. In Hungary, an inland country, the upper and middle classes have tended to look down upon most species of fish as an inferior food, perhaps because the only fish that it was economically feasible to import in large quantities was of the poorest quality and compared unfavourably with alternative meat and game supplies which were more expensive. In the North European countries many people eat fresh herring only with condescension, because it is plentiful and cheap, but regard most shell-fish as delicacies, though they are often nutritively inferior and just as plentiful in more distant waters. In the Western world generally most

crustaceans and molluscs have been elevated to the level of aristocrats, to the great profit of the canning institutions.[6]

The fact has to be accepted that people are mulishly stubborn and illogical in their eating habits. The writer can remember the official campaign directed by the war-time and post-war British Governments at the rationed and beleagered population, extolling the merits of whale-meat. The campaign was not a success; whales were associated with oil and corsets.

Just as the appetite of the Japanese people for fish has obliged their fishermen to roam the ocean at large, so their intense fishing close to the Eastern coast of Australia was allowed to proceed uncensored, until recent years, for the Australian people had abundant supplies of cheap, home-killed meat. However, the eating habits of people, though deeply rooted, are not unchangeable, and in the last twenty years the fishing industry has succeeded in having some unfamiliar species accepted in the market-place.

Before taking leave of the social sciences, we might pause and reflect upon the religiosity or superstitiousness of many fishing communities. In some parts it can take the form of a cult; in the small Fife fishing village of St. Monance, on the East coast of Scotland, the visitor is confronted by a bewildering variety of tiny religious sects - non-conformity gone haywire - but each attended by a fanaticism only found in a Presbyterian land. Professor Firth points out

that in Malay fisheries the handling of a large net requires a high degree of co-operation and teamwork, and a man is usually appointed to supervise the proceedings who combines a technical knowledge and ability with some acquaintance with the ritual procedure considered necessary to propitiate spirits and attract fish. In the same part of the world, the use of the names of certain land animals is avoided when at sea. In certain countries the eating habits of the people may be affected by local superstitions and sectarian teachings; specified species, or indeed all species, of fishes may be proscribed altogether. In India, for example, where the prospect of famine is a constant companion to millions of people, such taboos may thrive among starving communities within sight of the sea.

Many fishermen are genuinely and deeply religious, and serious problems can arise thereby. In the Moslem world, the introduction of power boats to induce fishermen to remain at sea for several days in succession, instead of returning each evening or morning, has proved difficult, particularly if it involved missing the Moslem Sabbath, when they normally attend mosque and then repair and dye their nets. In Scotland many local Acts and by-laws, designed to safeguard home fisheries, proscribed fishing on the Sabbath, and attempts were made to extend the prohibition to fishermen of other nationalities as well.

Much sociological work requires to be done in the field of fisheries, but enough has probably been said here to indicate the range and complexity of problems that might arise when a macroscopic view is taken of the world's fisheries. The reports of the social scientist will not make the legislator's efforts any easier; but they will make them more worthwhile.

Chapter 4: The Statesman's Approach

("The use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use permit any possession thereof."

- To the Spanish Ambassador (1580), Elizabeth I of England.)

It has already been said that fishing has only recently emerged from the primitive hunting stage of its evolution. In a similar way, the early fishery disputes were somewhat akin to tribal wanglings. Even as the arts of diplomacy developed the topic of fish was considered to be infra dignitatem for the lofty ambassadors of Europe, or it was used as a dishonest lever to attain other ends. As the theory of state sovereignty evolved, fishing rights became more closely associated with the claims of maritime nations to exclusive dominion over their coastal, and even neighbouring, waters. The plea for the protection of national fisheries was frankly acknowledged as a pawn in the political game, and

could be used to evoke strong patriotic sentiments when a better catch than fish was to be made. Although early diplomatic attitudes adopted by maritime powers over fishing rights were rarely more than half-sincere, the fishing industry was becoming important for many mercantilist economies of Northern Europe, and the growing share of fishery problems in power politics makes a fascinating study. Nowhere is this development better illustrated than in T.W. Fulton's analysis of Anglo-Dutch relations in the 17th Century, in his invaluable book, "The Sovereignty of the Sea".

The credit of being the first sovereign ruler to assert the freedom of the seas belongs to Elizabeth I of England, and her proud dogma, quoted at the head of this chapter, dates from 1580. This was the age of derring-do by the intrepid English sailors, Drake, Hawkins, and Cavendish, and of Jakob van Heemskerk on the part of the Dutch, in open defiance of the Spanish and Portuguese claims to the great western oceans, which were divided between them, with the grant of trade monopoly in those distant regions, by virtue of Pope Alexander VI's "Bullarium Romanium Novissimum" of 1493 and of the confirmatory Treaty of Tordesillas in the following year. Elizabeth's primary motive was to secure liberty of trade and fishery for her subjects, which was threatened then by Spain and Portugal on the one hand and by Denmark on the

other, and until the accession of the Stuarts any pretension on the part of England to a sovereignty in the surrounding sea had but little international importance. When James I came down from Scotland in 1603 to assume the English throne, he brought with him, besides Presbyterian bigotry and a rare fund of learning, a strong bias towards the strict regulation of coastal fisheries, for in Scotland the fishers had never consented to give foreigners the freedom to fish in their waters, as had been so freely accorded by the English. Almost overnight the traditional Elizabethan doctrine safeguarding the freedom of fishing was reversed. The bays inclosed by the headlands of the English coast - the King's Chambers - were defined more clearly and declared to be neutral waters. In 1609 a proclamation was issued, laying claim to the fisheries along the British and Irish coasts and prohibiting all foreigners from fishing there until they had applied for and obtained licences from James or his commissioners. This new policy was directly aimed against the Dutch, whose growing herring fishery round the British coast had become one of the main sources of their wealth and power. Although a departure from traditional ways, James's edict was immediately popular with the British people, for their feeling of jealousy engendered by the development of commercial enterprise by the Dutch was embittered by the suspicion that the Dutch were resorting to unfair means of competition. Relations between the two maritime rivals steadily deteriorated, and under Charles I a powerful fleet was assembled for the avowed purpose of

defending the "King's Chambers" against intrusions of the Dutch herring fishermen.

It is significant that from this time forward, throughout the remainder of the century, the question of fishing rights was frequently relegated to a subsidiary role as against that of the striking of the flag, which was now claimed as a token and acknowledgment of England's sovereignty of the sea and insisted on with the utmost arrogance. "The honour of the flag", in Fulton's phrase, "burned like a fever in the veins of the English naval commanders". The Government of the United Provinces, on the other hand, were more concerned with their commerce and fishing and so long as these substantial interests were not menaced, they were willing to show "respect" to the English flag, though never as an acknowledgment of any supposed sovereignty of the sea. This hectoring attitude continued to be representative of the English government after the fall of Charles, and it ran like a continuous strand of policy through the shifting web of constitutional experiments during the Interregnum. It was in fact the reluctance of Tromp to lower his flag to Blake in the Straits of Dover that precipitated the first Anglo-Dutch War. When the Lord Protector Cromwell entered into peace negotiations with the Dutch in 1653, he suggested that they enjoy the liberty to fish upon British coasts on payment of an annual sum for the privilege, but this was indignantly rejected.

After the Restoration the English pretension to the sovereignty of the sea was continued with almost as much zeal as before, although Charles II did not lay claim to an absolute dominion over the British seas as his father had done before him. On all occasions, however, he alleged his right to levy tribute for the right of fishing in "British" waters, but without the least success. As firmly as ever the opinion was held that the primary source of the great trade and shipping interests of the Dutch lay in their fisheries, which also formed a "nursery" of seamen for their navy. Protective duties were imposed on all catches made by foreigners and monopolies established to safeguard the home interests. In 1660 legislation had been introduced before the House of Commons, directed against fishing by foreigners on the British coasts and the use of destructive methods of fishing. One of its clauses prohibited trawling, whether by subjects or foreigners, within eight miles of certain ports of the coast. However, Parliament was dissolved before this Bill could be passed through the House of Lords.

In 1662 a treaty was signed between the French and the Dutch, in which they agreed to assist one another in protecting their fishermen from those who might molest them. This was the first time in their history that the Dutch had succeeded in formally binding another Power to help them in resisting the English claims to the sovereignty of the sea, so far as concerned the liberty of fishing. The diplomatic

triumph was a barren one, however, and the treaty had no practical effect, for within a few years the Dutch were again at war, first with the English and then with England and France, and other treaties took its place. During the Second Anglo-Dutch War the fisheries of England, and still more those of the United Provinces, suffered severely, but at the conclusion it was the question of the striking of the flag once again that exercised minds most heatedly on both sides.

Still once more, for the third time in twelve years, the two great maritime nations, sharing so many virtues, were at war. This one was most unpopular with the English people, who were tired of battles and of the cost to their pocket. On this occasion the fighting was engineered by the notorious intrigue between Charles II of England and Louis XIV of France, and the weight of Europe's two strongest military powers began to tell upon the fortitude of the heroic Dutch people. Peace proposals were made in 1673, but this time they broke down mainly on account of the clause relating to fisheries. The Dutch still refused to pay an annual tribute for the liberty to fish, and Charles would not agree to a lump sum. The Swedish mediator suggested a compromise solution whereby the Dutch be asked to pay a small annual payment for the privilege of drying their nets on shore, but this too was rejected by Charles. In the end the peace settlement was quite inconclusive with respect to fisheries.

It should be borne in mind that the English fisheries were a national, as well as an international, bone of contention. Throughout the reigns of both Charles I and II, many attempts were made, with the support of the king, to create a great national fishery society, but each proved to be abortive.

By the end of these protracted wars with England and France, the small Dutch nation had virtually spent its strength. Never again would its sailors roam the seas with such challenging spirit. Its great herring fisheries round the British coast went into a decline from which they never recovered. In any event, by the end of the 17th Century it was becoming clear that the era of claims to exclusive sovereignty over extensive regions of the sea was passing away. Henceforth, the policy of fixing exact boundaries for special purposes, either by international treaties or national laws, would take its place. In the following century, the Age of Enlightenment, anarchy would give way gradually to an awakening sense of international order. The evolution of fishery regulation would be a slow uphill battle yet, but the pre-conditions were already in the making.

So far in this chapter fishing rights have been represented as a king's gambit, the passive victim of political engineering. In other times and places, however, fisheries came to exercise a more positive and active influence, in shaping the political

structure of regions dependent on the fishing trade. In "The Cod Fisheries" Prof. H.A. Innis makes a penetrating study of the compelling forces exerted by the exigencies of the fisheries in Newfoundland, Nova Scotia, and New England upon the political creeds and practices of these governments.

Throughout most of the 17th and 18th Centuries the two foremost imperialist powers of Europe, England and France, were locked in constant struggle to establish a great commercial empire in the West. Since the voyages of Cartier and Cabot men had been settling on the north-east seaboard of North America, and most of the communities which had sprung up between the St. Lawrence basin and the Gulf of Maine were devoted largely to fishing. The earliest settlements of all were established on Newfoundland, and it was in the fisheries between that island and the mainland coasts of New England and Nova Scotia that the bitter conflicts originated, focus of the clash between the mercantile systems of France and England. It was in these troubled waters that the great experiment in empire-building by charter and monopoly was to come to ruin, for the fishing industry by its divisive and competitive nature could not be put under large-scale organization, such as the fur trade, and competing interests inevitably developed between the fishing communities, making the forces for political severance, and then national union, irresistible.

First, the struggle for colonial supremacy had to be won and lost. During the English Civil War the French had taken advantage of the diversion to expand their fishery, which was previously confined to the summer season, and Colbert adopted an aggressive policy in New France and the French West Indies. However, the recovery of Newfoundland and the development of commercialism in New England combined to restrict the production and limit the markets of the French fishermen. The weakness of the French fishery lay in its lack of a focal point; fishing craft plied back and forth between the scattered parts of France and even more widely scattered communities in the Atlantic maritimes, but it proved to be impossible to establish a colonial base on the mainland coast. New France was remote and unable to supply provisions for the French fishery or for the French West Indies, and was forced to depend on the British colonies. Without support from New France, the French fishing industry in the New World was compelled to rely on the ships coming out from France in the Spring. Soon the defence aspect in the development of the fisheries came to play a dominant role. Ship-building in New England became firmly established on a commercial basis; differences between the British colonies were temporarily shelved; and military defeat for the French became assured.

With the elimination of the French colonial system, the constitutional contradictions within the British system became

more apparent. The right of free fishing in the New World was assumed to be under the control of the Crown in 1621, but the fishing industry came to be affected by imperial parliamentary legislation, through the Navigation Acts and, after the 1688 Revolution, by an Act of 1699 relating to Newfoundland, and subsequent enactments. After New France had been absorbed in the British Empire, the New World was divided into three types of regimes; the territories of the Hudson's Bay Company under the Crown, the old province of Quebec and Newfoundland under the King and Parliament, and the diverse constitutions of the colonies which shared resentment against the increasing powers of Parliament. Britain could not and did not succeed in combining these elements. Monopolist grants under the Crown were suited in continental regions such as India and the Hudson Bay area, but they were inadequate for the maritime colonies and could not be combined with the fishing interests dominated by private enterprise. Government support was enlisted in the cause of free fishery by such devices as bounties and regulations ostensibly designed to strengthen the navy, but inter-colonial jealousies added fuel to the highly combustible issues which soon reached a flagrant conclusion in the American Revolution. Just as France was driven from Nova Scotia, Cape Breton and the Gulf of St. Lawrence and its hinterland, so too New England in turn was driven from Nova Scotia, the Gulf of St. Lawrence, and Newfoundland.

The geographical isolation of Nova Scotia, her position as a bulwark against the French, and the limitations of her sailing vessels favoured the growth of strong commercial interests concentrated at Halifax. After the Treaty of Versailles in 1783 the aggressive commercialism on the part of Nova Scotia, based on the fishing and carrying trades and rooted in New England traditions, came into evidence through her influence on imperial policy. The importation of manufactured products from the United States was excluded by tariffs; the rights of New England sailing vessels were restricted in order to prevent smuggling and limit the production of fish in the United States; direct trade between the United States and the West Indies was discouraged, and direct trade between the latter and herself was encouraged. With the increasing importance of Nova Scotia in the Empire there came a relative decline in the influence of the West Indies on the other maritime colonies, and this coincided further with the westward expansion of the United States and the decreasing influence of New England in American policy, which was shown by the restrictions imposed on her fishery in the 1818 Convention.

The characteristics common to all fishing communities were epitomised in Newfoundland; development was exogenous, with settlements spreading laterally along the coast-line, looking to the sea. The expansion of the Newfoundland fishery first had the support of New England, then advantage

was taken of the difficulties arising between Britain, France, and the United States, which terminated with the hostilities in 1815. The rise of an assertive, lesser merchant class, especially at St. John's, led to a struggle for responsible government and the readjustment of the political structure to meet the demands of the more settled areas. Fiscal arrangements were required to provide capital for the construction of roads and the development of agriculture, and the burden of long-term debt became more and more severe. In order to maintain her international markets for the fishing industry, Newfoundland became increasingly dependent upon Britain, and in times of depression her vulnerable economy took a further step into the mire. When Canadian Confederation was mooted she could not face the risk of exposing her overseas interests to the surge for continental expansion westwards, and her independence led to isolation. Isolated but intact, her assertiveness was never in doubt, as evident in her protests against United States encroachments and the termination of a modus vivendi agreement in 1905; in negotiations which ended with the important award by the North Atlantic Fisheries Arbitration; in the resistance to Canadian encroachments in Labrador and the decision of the Privy Council in the boundary dispute; and ultimately in the acceptance of her stringent conditions for entering Confederation.

The economic consequences of capitalism were less severe in Nova Scotia where resources were more diverse and where

the purposes of Confederation were more attuned to her immediate interests. The sanctification of free trade in Britain and the removal of commercial preferences led to the feeling that Nova Scotia must seek protection through her own efforts. By the 1854 Reciprocity Treaty with the United States fish was admitted from Nova Scotia free of duty and American vessels were permitted to fish in Canadian waters. The abrogation of this treaty hastened the progress of Confederation which took place in 1867. The assertiveness of the Nova Scotia fishing interests made itself felt in the British North America Act, whereby in Section 91 fisheries were placed under the exclusive jurisdiction of the federal government, so that the industry's position would be strengthened in international negotiations. In the main, however, Nova Scotia turned to face the interior; her sea-front economy with many ports changed into one centred upon one central port with railway connections to the heart of the mainland.

Thus the ancient dreams of a vast and active commercial system based on the North Atlantic fisheries were not fulfilled. We have seen that the fisheries lay at the heart of events which contributed to the defeat of the French, the breakdown of the colonial system and the disappearance of the Navigation Acts. On one side these events culminated in the American Revolution; on the other, in the rise of responsible government and the establishment of Confederation.

This brief glimpse at the political content of fishing rights and fishery problems will perhaps suffice to point the moral, to adorn this thesis. Our world is constantly changing and ever shrinking; local problems become general and require a cosmopolitan breadth of vision, a sophisticated understanding, and an ear for the "still, sad music of humanity".

SECTION B.

THE GROWTH OF LEGAL DOCTRINE

We have completed a short, speculative survey of some fishery problems in an extra-juridical context. The purpose of this survey was to show how such problems have assumed formidable and expanding proportions in modern international society. Thus the problem of fishery control has been revealed in several dimentions. It may be assumed that the solution sought after will have to be equally diverse and many-sided. For when the living-law norms have been conceived as a unit by the statesmen, the birth and survival of the infant - as it were - will depend upon the "pre-natal" and "post-natal" research devoted to its physical welfare by the biological scientists; limits to its capacity have already been set by the historical gènes of its predecessors; its psychological development must be regulated by the social scientists with a view to the environments in which it must thrive; and its spiritual maturity can be attained only through the enlightened moral principles of the humanitarians.

The role of the lawyer in this fanciful metaphor is less than clear, unless it be that of educator; pedagogue by virtue of learning, disciplinarian by consent of society, and civil servant for the public welfare. The lawyer's approach will be through the text-writers and by reference to selected case histories.

Chapter 5: The Antecedents of Modern International Law

("The Law hath not been dead, though it hath slept".

- Measure for Measure, Shakespeare.)

The subject of fisheries and their legal status has rarely been accorded individual treatment by text-writers. But traditionally it has been closely associated with the law of territorial waters and the principle of the freedom of the seas, and within this wide field fisheries have always been a focal point. Successive qualifications to the principle of the freedom of the seas have developed as fishing interests grew in scope and value, until eventually those doctrinal qualifications themselves solidified into an independent and apparently conflicting doctrine, that of the territorial sea. Traditional international law itself grew out of this dual development. Accordingly, it is necessary to trace the evolution of those concepts that are germane to this study within a wider ambit than would otherwise be necessary.

It is in some ways a misfortune for the juridical doctrine of sea fisheries that the source is Roman law, for the Roman civilians were not greatly interested in maritime law, or indeed in fisheries, except in its private law aspects. At the flowering of the Roman civil law, the Mediterranean was

firmly in the hands of Rome; no rival dared to challenge her sea-power and so there was no conflict of state rights. When enemy pressure did eventually bear upon the Empire it was from the interior of the continent, and the vast barbarian races that descended to destroy the glories of Rome had no acquaintance with the sea or of the legal order that worked the Empire. In the curious mixing of Gothic and Roman law, as revealed in the Germanic codes, it was the latter that proved its staying power, though vague and diffuse in its sources. The Roman heritage was not to be shaken off.

Before Rome lit the Mediterranean like a lonely beacon, the sea had been used for centuries as a trade route, and merchant-sailors ventured far to buy and sell. But fishermen rarely lost sight of their shores, for to do so was to expose themselves to the notorious wrath of the gods. Even the state was restrained in its claims, for fear of offending the deities of the sea, with no doubt a nice regard for where its commercial advantages lay. It is recorded by Polybius, the historian, that a treaty was concluded between Rome and Carthage in 509 or 508 B.C.: "The Romans and their allies not to sail with long ships beyond the Fair Promontory unless forced by storm, or by enemies: it is forbidden to anyone carried beyond it by force to buy or carry away anything beyond what is required for the repair of his ship or for sacrifice and he must depart within five days."[1] The effect of this, as Sir Graham Bower points out, was to make the western half

of the Mediterranean to the west of Cape Bar a closed sea, but there was no question of assuming exclusive rights in that portion of the sea. It was merely a gentlemen's agreement between the two principal commercial powers trading in that region, and the exclusion of Rome was voluntarily accepted by that state.

Roman jurisprudence with respect to the sea can be traced principally through the works of Justinian, Marcianus, Celsus, Ulpian, and Paulus. It was agreed that the sea is common to all men, both as to use and ownership. It is owned by no one and indeed, like the air, is incapable of appropriation. It can be used openly and freely by all mankind, in the sameway as the sea-shore. No one, then, could be forbidden to fish in the sea, for the right to fish in the sea was derived from the status of the sea and of the sea-shore. Jurisdiction could be exercised over the sea-shore, which was <u>res communis</u> and "subject to the guardianship of the Roman people". This jurisdiction, exercised in the interests of public welfare, appears to have been founded on the legal fiction that the coast was guarded by the Roman people as a sacred trust of civilisation, in much the way that President Theodore Roosevelt regarded the Panama Canal! ("If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded by the interests of mankind, the United States holds that position with regard to the inter-oceanic world".)

Harbours and rivers are differentiated from the sea, being treated as of the class, res publicae. The use of the river or harbour is public, but the state (res publica) has jurisdiction over its use. Virtually all commentators concur that this state jurisdiction did not entail ownership. Gaius, the great authority on private law, took no judicial notice at all of the sea, but treated of fish in the law of things, as a res nullius. Unfortunately, due to the imprecision of the terminology used by the classical jurists, it is not clear whether this means that fish are not in fact owned by anyone or cannot by their nature be appropriated.

Most appeals in later centuries to the authority of Roman law for promulgating the doctrine of the freedom of the seas were based on either the ius naturale or the ius gentium. Here again terminological confusion permitted divergent interpretations: some claimed that the right of fishing, under the ius gentium, applied to all mankind; others that it pertained only to citizens of Rome. The exact distinction between the ius naturale and the ius gentium was never generally agreed upon, though for most jurists in the 3rd Century A.D. the former was credited with being the foundation of the latter, performing the dual function of ultimate source and final sanction. The ius gentium was an outgrowth of private law, claimed to be of universal validity, guaranteeing the fundamental or natural rights of mankind against states or individuals; the ius naturale was that part of the moral law,

distinguished from divine law, which could be applied through the medium of the ius gentium.

Despite the early depredations of Gothic law on the surface of the new society, which was built on the ruins of the Roman Empire, the Corpus Iuris Civilis proved to be the lasting bedrock upon which the feudal and modern systems would rest. Despite its lacunae and tenuous distinctions, it was the inherent completeness of Roman law as a system that assured its survival and it came to make increasing inroads on the conqueror's law. By the Codex of Euricus (circa 470), for instance, where Gothic and Roman law clashed in litigation, parties who were Romans had recourse to Roman law. The next codification under Alaric II, promulgated in 506 contained more Roman than Gothic law, and the former continued to weigh more and more heavily in the balance. Any reference to sea or fishing depended almost entirely on Roman law and altogether relatively little contribution was made to legal theory in this field during pre-feudal times. But there was a growing and significant practice on the part of great landowners to regard the waters washing their lands as coming exclusively within their control. Often they possessed private fisheries in these waters by royal or imperial grant, and other privileges and immunities from jurisdiction, such as the right to levy taxes and customs on foreigners.

The Roman jurisprudence was catholic but inflexible and development of its doctrine was slow and uneven. In the Eastern

Roman Empire jurists advanced such conflicting opinions on the proper interpretation to be applied to the legislation of Justinian that it became necessary to codify the entire law then known in the East. This work was undertaken in the reigns of Emperor Basil and his son, Leo the Philosopher, and the code, the Basilica, was promulgated around 910. Although of eastern growth and use, it derived directly from Roman sources, and in its relation to the sea and the maritime fisheries it is in complete accord with the Institutes and Digest of Justinian. In the west by 1100 the process of interpretation of the Corpus Iuris Civilis was so rigid as to threaten the system with ossification, but in the 12th and most of the 13th Centuries the Glossators returned to the original texts, adding valuable commentaries to the civil and canon law, which helped to bring these systems into line with mediaeval society.

Feudalism was based upon ownership of the land and the sea was not included in the term, land. Within the complicated system of property rights which were governed by feudal law, including property rights in jurisdiction, there is no mention of property rights in the sea. For feudal law, rationale of the feudal system, was territorial law, catering for a territorial system. There had of course always been a special kind of jurisdiction, independent of territorial jurisdiction and resting on the ius naturale, for the purpose of policing the sea and suppressing pirates, as hostes humani generis,

but this co-operative spirit in combatting pirates would go under to the modern urge for national exclusiveness. If a proprietary right in the sea was to be legally recognized, it could only be one rooted in the land. The king or the emperor was the ultimate landowner in the state. If he was to have proprietary rights in the sea it could only be as owner of all proprietary rights in the land. This would have required an assimilation of the sea to the land and this was something that feudal law, by its own terms, could not accomplish. Consequently, feudal law proved to be inhospitable soil for the growth of the theory of territorial waters. Faced with irresistable historical forces that would culminate in the idea of state sovereignty, it shrank from drawing logical conclusions, eschewed the Roman dogma, and maintained a rigorous silence.

It is unlikely that the mediaeval mind could have conceived the modern notion of sovereignty for the personality of the state had not yet been properly developed. The power and authority of the princeps was recognized by all, including himself, to be subject to the divine law, made actual by ecclesiastic law, and perhaps subject also to the ius naturale or ius gentium. This was the law a priori and there was no concept of sovereignty to overrule it. Both under the feudal and Germanic system law was essentially custom. Legislation in the sense of law-making, was a concept alien to the mediaeval spirit; law was declared, interpreted, or modified

to a degree, but not made. In the 13th century the idea of law in the making appears; the old idea of law by custom does not disappear but henceforth it must compete with the new for recognition. Part of this growth was due no doubt to the need in modern society for making legal provisions to meet new conditions or for modifying old laws, part to the resuscitation of Roman jurisprudence - allowing law-making in the classical spirit - and to the systematic development of the canon law, which was based upon it. Gradually, almost imperceptibly, there emerged the modern concept of sovereignty, that there exists in every autonomous state the power of making and unmaking laws, a final authority which is subservient in law to no one. In time, the unities of holiness, Romanism, and imperialism would lose their historic meaning, feudal institutions would disintegrate, and national self-consciousness would set its stamp on the pattern of European society. The growth of state self-confidence would be accelerated by all these trends, resulting in the absolutist, monarchical forms of government.

Although the sea itself could not be owned within the purview of feudal doctrine, the products of the sea came under the feudal law of things, which dealt only with those capable of becoming the objects of private property. Fish in Roman law - or at least fish of the sea - were regarded as <u>ferae naturae</u>, in the sense that, like bees and deer,

they ran wild in their natural state, but could be brought under ownership by any man according to the law of possession. Once possession or effective control is lost, then the animalis resumes its naturally wild state and is fair game for any man. Due to the supposedly inexhaustible supply of fish in the sea, the civilians no doubt could not have conceived of this doctrine being applied, but to-day in this age of fish-hatcheries and regulated breeding-grounds of anadromous fish, like the salmon, this facet of doctrine has a specially interesting lustre.

After the end of the Glossators - usually equated with the death of Accursius in 1260 - theoreticians can be categorized roughly by their attitude to the classical doctrines. On the one hand, there were those who believed Roman law to be inadequate in many respects, where modern practice had outstripped theory or where the old dogma was an actual impediment to clear thinking for the future. This, the so-called practical school, produced many outstanding scholars who contributed much to the development of international law touching the sea and sea-fisheries, and they will command special attention in this chapter. On the other hand, the majority of scholars adhered rigidly to Roman doctrine on all points, which they adopted by faith, and used their considerable talents to clarify the old law. Professor Fenn described their prowess in these words:[2] "The almost complete

unanimity with which the jurisconsults of the historical school ignore their opponents is impressive. Man after man devotes his profound scholarship to monumental works of erudition, and ignores the presence of contradictory teaching, engulfing his opponents in a silence the cumulative effect of which is powerful in the extreme. The explanation of this attitude may perhaps be found in an unquestioning faith in the sufficiency of the Roman law, in its power to achieve supremacy by its own inherent greatness." For this thesis the main contribution of the historical school was that it conjured the illustrious name of Grotius, whose doctrine will be studied in the following chapter.

The most distinguished member of the practical school was Bartolus of Sassofrato (1314-1357), Italian jurist and teacher of law, at Pisa and Perugia. For Bartolus and his followers, custom was a potential source of law in itself and could be used to correct the Roman law when that law was incapable of a just and beneficial application to a given set of facts. Accordingly, the idea of law-making, based on usage and custom and subject to the "pragmatic test", was enthusiastically embraced by these jurists. Bartolus himself accepted that a state could exert exclusive rights of jurisdiction within its adjacent waters (mare adiacens), without involving any claim to a right of sovereignty over these waters. When pressed as to how far from land such jurisdiction

might be exercised, he suggested 100 miles as being a "moderate distance". This was, from the classicist point of view, a subversive and progressive doctrine, for it allowed to a state the sole right of jurisdiction over something in which all men have equal rights.

In practice many states had claimed exclusive jurisdiction over the adjacent sea but no one had attempted to define the limits of this jurisdiction, either as to its character or its scope. The further from land, the less confident the claim, until after a haze of blurred distinctions one passed beyond the realm of uncertainty into the high seas, still free and sacrosanct. The question to what extent the littoral state was allowed to exercise this jurisdiction hinged upon its relative naval strength, rather than upon any commonly accepted notion of law. The most notorious transgressor of early times in this respect was the state of the city of Venice, which claimed "Dominion" over the northern part of the Adriatic, a time-honoured relationship which was given picturesque expression periodically in the ceremony of the "marriage with the sea", conducted at the sea's edge by the Doge of Venice. Similar claims were being put forward at this time also by Genoa in the Ligurian Sea and by the Tuscans and Pisans in the Tyrrhenian Sea. The Venetians went so far as to claim not merely an exclusive jurisdiction (jurisdictio) in, but actual ownership (potestas) of, the

gulf and sea of the Adriatic and also of the islands contained therein. The claims of Venice had long been uncontested by other states on account of the predominance of that city-state as a maritime power in that region. Bartolus' doctrine was in effect a limitation upon her sweeping claims to ownership, but he granted that she might have a property right in the islands, on the grounds of immemorial usage.

For Baldus of the Ubaldi, the most eminent pupil of Bartolus, the sea and the seashore are common to all, but he made an important three-fold distinction between property in the sea, use of the sea, and jurisdiction and protection in relation to the sea. This was an ingenious attempt to reconcile the freedom of the seas with certain practical needs, such as that for policing the seas against pirates, and this doctrine was to have a considerable influence on Grotius. Bartolus, on the other hand, had blurred these distinctions and with his theory of mare adiacens came closer to the theory of territorial waters in the classical sense.

Baldus held another distinction between things which are res communes and those which are nullius in bonis; the latter may be appropriated, the former may not. Consequently, the sea may not be appropriated by anyone; but there may be jurisdiction, without ownership, over it. Baldus conceived the mare adiacens as a judicial district in which the ius civile is operative; the part of the sea over which the state has

jurisdiction is likened to a district which has been annexed and subjoined to its territory. Thus, the juridical process of assimilating the sea to the land, which could not be accomplished under pure feudal law, was now under way. Baldus was also responsible for conceiving the doctrine that under certain conditions a state may occupy the bed of the sea. The shore, instead of attaching to the sea, was regarded as part of the land. In time this new orientation would destroy the classic doctrine of the shore by sinking it in the territory of the littoral state.

Simultaneous with this evolving doctrine of mare adiacens and cognate theories, there were conflicting opinions as to the legal status of public fisheries. The pure classicist maintained that the use of fisheries was entirely free since the sea is common to all and incapable of appropriation in any sense. Even in an age when "sovereignty" resided in the king, as representative of the state and the common weal, the classicist still held that the ius piscandi was iure gentium or iure naturalis and accordingly even the "sovereign" could not control the fisheries. This was, however, gradually becoming an extreme view. Feudal law attributed to the king certain exclusive rights and privileges, known as the regalia, or royal prerogative. Not only was jurisdiction over coastal waters included in the regalia, but also the power to grant both fishery and fishing rights (reditus piscationum and ius

piscandi). These rights applied equally to coastal waters and public rivers, but on the high seas, of course, the Crown had no rights of fishery save those which all men had. As the king was the vertex of the feudal pyramid, there developed a practice of prerogative grants, such as rights of fishing, percolating down to landowners in fief. When these rights, granted by a former king, became accepted by long-standing custom, the source of authority tended to be overlooked and the notion of prescription prevailed.

Accordingly, another school of jurists based its doctrine on prescription, asserting that by this means a private person may acquire exclusive rights, either of use or quasi-possession, in public fisheries,that is in fisheries located in public waters. In the view of Balbus authority on mediaeval prescriptions, things under the ius gentium may not be prescribed, but the exceptions to this rule that he states are most significant. In the first place, this rule applies to prescription only and not to the acquisition of the same rights by custom. Exclusive rights based on prescription and custom are not in law the same, though their immediate effect may be, because in the former case the person acquiring the right has taken it from someone else, whereas if he has acquired it by custom he has not. Thus the ius piscandi may be acquired by custom, the burden of proof resting with the person alleging exclusive rights, and it would be required to prove that the ius piscandi

had in fact been exercised for at least ten clear years "with the knowledge and sanction of the people". It appears too that for a prescriptive right of fishing to be valid under the ius gentium the period must be one cuius initii memoria non extat in contrarium. This limita was the factual basis of Venetian rights in the Adriatic and was acknowledged by classical and practical jurists alike to be good law. As we have seen, however, what was originally a right of fishing developed into exclusive jurisdiction and ownership in relation to the sea surrounding. Even Balbus believed that the Venetians had jurisdiction in eorum mari, ex longa consuetudine and had acquired a ius maris.

For both of the groups that allowed limitations to the doctrine of the freedom of the seas, through the regalia or prescription, the community of the sea remained inviolate. Those who held the theory of mare adiacens advanced by Bartolus may for this purpose be classed with those who repudiated it, for the theory of the adjacent sea is fundamentally concerned with rights of jurisdiction, not with rights of property, in the sea. There were, however, those who held that the sea, or part of it, may be owned as property, just as land is owned, and fishery rights were regarded as property rights, vested in the proprietor of the waters. This theory developed along two lines, arising out of the theory of mare adiacens on the one hand, and of the ancient law of custom and

the feudal doctrine of the regalia, on the other. These two strands of juridical doctrine were separate and independent but they were later to merge in the theory of dominium maris, as soon as it was settled that the mare adiacens could be owned as property.

The development of the original theory of the freedom of the seas into that of dominium maris can now be briefly summarised. The first derogation from the classical dogma was the doctrine of Paulus, that a private person may possess proprium ius in a definite part of the sea. The Glossators conceded that this right may be acquired per privilegium vel per longam consuetudinem, and then it became established that the princeps may impose a servitude on the sea. By a broad interpretation of the rights of the king included in the regalia and by a wide application of the laws of prescription to the sea and maritime fisheries, later jurists broke down the original doctrine forbidding private appropriation of what is common to all. Under Bartolus the theory of mare adiacens emerged, and Baldus followed with the theory that the adjacent sea is a district of that state over which the state's law is extended. The last point in the development is made by Gentilis, who applied the word territorium both to land and sea. After Gentilis, it is literally correct to speak of territorial waters in international law.

The theory of territorial waters (dominium maris) is

latent, if not implicit, in the theory of mare adiacens, for the former demands the extension of municipal law over the adjacent sea, and it became virtually inevitable after the work of Bartolus and Baldus. The assimilation of the adjacent sea to the land adjoining, though primarily accomplished to justify the claims of jurisdiction over the adjacent sea, is favourable to the theory that the state exercising this jurisdiction has a certain proprietary right in the coastal waters. With the relationship, both political and legal, between the state and its adjacent waters becoming generally accepted, the rights of property recognized on land could, mutatis mutandis, be extended to the coastal sea, in much the same way that criminal jurisdiction had already been extended there. In the sovereign only lay the right to exercise jurisdiction, for he was the ultimate owner of all the lands. In practice he also exercised by now exclusive jurisdiction in the sea. So he must have right of ownership in the sea, just as he had ownership over the lands.

This analysis brings us up to modern times, to the notions of state sovereignty and territorial waters. But the great and decisive battle has still to be waged, and for this account we must turn to a new chapter.

Chapter 6: The Emerging Theory of the Territorial Sea

("'What's the good of Mercator's North Poles and Equators, Tropics, Zones, and Meridian Lines?'
So the Bellman would cry: and the crew would reply 'They are merely conventional signs!'"

Hunting of the Snark - Carroll.)

It has been observed that as the state system hardened and engendered national aspirations, involving repeated incursions on the principle of the freedom of the seas, the historical school of jurisconsults turned from the need to adapt the Roman law to changing conditions and devoted itself instead to scholarly works in classical research. It can be assumed that the field would have been left entirely to the practical jurisconsults but for the appearance of an exceptional classical scholar. The genius of Hugo Grotius had such an abundance that it not only revitalized the well-ploughed field of civil law but overflowed into virgin soil, planting seeds of legal thought and moral wisdom that would take root and flower in the shape of modern international law.

The doctrine of mare adiacens was well entrenched in Europe by the 16th century, allowing certain exclusive rights of jurisdiction to the littoral state or its sovereign

head. Bartolus and Baldus had gone so far as to prescribe 100 and 60 mile limits respectively to this jurisdiction, but these limits had not been sanctioned by the general usage of states, though sometimes quoted with approval by the Mediterranean states. The more closely any part of the sea resembled native or inland waters, the more tenaciously states clung to the analogy with bays and gulfs, and public rivers. Passage through the Sound into the Baltic Sea was subject to heavy dues by Denmark, a prominent maritime power which also claimed sovereignty over much of the North Sea. This claim did not give rise to much controversy at the time, for her main rival England, particularly in the Icelandic and Norwegian fisheries, was soon to make equally sweeping claims to her own "home waters". The Venetian claim to the Adriatic had the positive approval of the Christian states as a bulwark against the further encroachments of the Turkish Empire in Europe and a means for suppressing both Saracens and pirates, then equated as hostes humani generis. But real and lasting antagonism erupted over the extraordinary papal bifurcation of the oceans between Spain and Portugal, a dual sovereignty which could no more be enforced by arms than justified by law or ethics. A Spanish monk, Francis Alphonso de Castro, writing in the mid-16th century, protested valiantly that the pretensions of Spain, Portugal, Venice and Genoa were contrary to imperial law, to the primary right of mankind, and to

the law of nature. The dominium maris is not lawful, for the sea "ab origine mundi ad hodiernum usque diem (has been) semper in communi nulla exparte immutatum".[1] More cautiously, his great compatriot, Ferdinand Vasquez, argued that the law of prescription, basis of the Italian cities' claims, was purely civil and that only the ius gentium and the ius naturae could be applied to issues between sovereign states.

In 1609 the youthful Grotius threw his weight into the attack with the publication of the "Mare Liberum", ostensibly designed to vindicate the right of the Dutch to compete with the Spanish and Portuguese in the East Indian trade. All property, he asserted, is based on possession (occupatio).[2] What cannot be seized or enclosed - for example, the open sea - cannot become property and therefore remains common to all mankind.[3] The sea can neither be bought nor sold, nor otherwise legally acquired.[4] It is under God's dominion alone.[5] Property rights by prescription or custom cannot relate to the sea, for no one has the power to grant a privilege to the prejudice of mankind in general,[6] and mankind in general cannot be assumed to have granted a concession in the sea.[7] The shore partakes of the character of the sea.[8] The air, the sea, and the sea-shore are all res nullius in the widest sense but not in the narrow sense by which things become the property of those that seize

and possess them.[9] Agreements between maritime states to apportion certain areas of the sea to facilitate suppression of pirates bind only those who are parties to them and give no right of ownership.[10] Navigation and fishing are on the same footing but the latter is deserving even more of protection.[11]

Such tributes as are included in the regalia are imposed not on the thing, that is the sea or sea-fisheries, but on the person;[12] therefore, they can be levied on subjects of the sovereign, but not on foreigners. A maritime fishery is free to all men, since the sea is free to all. But the sovereign may tax his subjects for exercising their right of fishing there, since the right of taxation in respect of fisheries is vested in him by virtue of the regalia doctrine. The effect of this was to give the sovereign virtual control over the fishery, as far as his subjects were concerned, although in law the fishery itself was not subject to control. In practice, if a subject could not afford to pay the tax he could not exercise his right to fish there, and Grotius was forced to hold that the tax was levied not on the fishery but on the subject's right to fish, so as to avoid granting to the sovereign any sort of proprietary right in the fishery. In fact, however, the ius piscandi was included

in the regalia as a logical extension of the doctrine that the Crown has a proprietary right in the fishery, and this doctrine itself flowed from the larger concept of ownership in the territorial waters. It would have been fatal, of course, to Grotius' doctrine to allow any proprietas to the king but the result was that he could never have an entirely consistent theory that would permit a clear distinction between coastal waters and the open sea; and this involved a blurring of the legal status of public fisheries. He is careful to distinguish between the sea and a public river, for the latter is the property of the people; it is public and the right of fishing in it can be granted by the people or by their king.[13]

Grotius then was necessarily vague in his definition of these parts of the sea which were excluded from his rule of mare liberum. It is clear that rivers, inner seas and narrow outlets were excepted as being bounded round by land, but he proceeds to name other bodies of water which are not to be deemed part of the sea - bays, gulfs and straits: "in hoc autem Oceano non de sinu aut freto". Moreover he goes on to suggest what appears to be a limit to the adjacent sea: "nec de omni quidem eo quod e litore conspici potest",[14] the range of vision, reminiscent of the Scottish rule-of-thumb of "a land kenning" (approximately 14 miles from the point of view of the crow's nest). By impli-

cation Grotius seems to have admitted at least that the mare adiacens is not necessarily liberum, and his adversaries were to seize upon this looseness to justify their own contention that it could in fact be clausum. Nevertheless, although he appears to have conceded the possibility of territorial waters, he never expressly granted a special status to these parts of the sea.

In "De iure belli ac pacis, libri tres" (1625) Grotius returned to the subject briefly and modified his position slightly, but significantly, in relation to the inviolable character of the adjacent sea. No one can have property in the sea, whole or part, and this refers to states as well as private persons. In the first place, the sea cannot be exhausted by promiscuous use, and where there is abundance for all there can be no moral justification for appropiration. Moreover, the sea cannot be occupied or possessed because of its liquidity, since liquids having no bounds of their own cannot be possessed unless enclosed, and as the sea exceeds the earth in area, it cannot be enclosed by it. In a significant sentence, however, Grotius seems to anticipate Bynkershoek in suggesting that the adjacent sea extends as far as can be protected by armed force from the land.[15]

Grotius' position was defended by another Dutch scholar, J.I. Pontanus, against the attacks of Selden and other British writers. Pontanus became historiographer to the King of

Denmark and the Danish asserted their sovereignty over extensive territorial waters. Accordingly, Pontanus found that his official position required him to adopt a less liberal view, like Grotius when he was appointed Swedish Ambassador to the French Court. Eventually Pontanus was obliged to acknowledge a sharp distinction between the high seas and the mare proximum. Grotius himself never made this concession but his theory of mare liberum was now compromised. Even so, Grotius and Pontanus were left free to attack the exorbitant pretensions of Spain and Portugal and at the same time to renounce Selden's doctrine that the nature of the sea did not preclude its appropriation and that physical strength alone sufficed to enforce a state's claim to sovereignty. Like Grotius, Pontanus differentiated between the oceanum vastum and the mare proximum, but unlike Grotius he agreed with Selden's theory of dominium maris adiacentis; he was the eponymous bridge between the doctrine of mare liberum and that of the territorial sea.

We have now outlined the views of Grotius, Pontanus, Vasquez, and de Castro, who shared the common purpose of upholding the broad principle of the freedom of the seas, subject to certain reservations. The opposing theory, that of mare clausum, found its most vigorous expression in the British school of jurists, at the end of the 16th and in the early 17th century. Early in Elizabeth I's reign the

Englishman, Thomas Digges, vindicated the claim of the Crown to the foreshore in the right of prerogative. The shore is considered as part of the kingdom over which the Crown has general ownership and as such has never been de facto granted out to subjects of the Crown. The evidence of user and longa possessio on the part of a private subject does not avail to prove a title to it unless the grant can be shown. Henceforth, in most writings on the side of mare liberum the shore takes its character from the land instead of the sea. The Scottish jurist, Sir Thomas Craig, who specialised in the ius feudale, followed Balbus in applying the rule of prescription, bolstered by custom, to the seas. He held the theory dominium maris and was one of the first British lawyers to declare that the sovereign is the proprietor of the fisheries found in the coastal waters round his land. He was also one of the first to object to the pressure of Dutch competition on British fisheries.

In practice there had always been a noticeable difference in attitude between the English and Scottish fishermen regarding the activities of Dutch fishermen in British waters. A comparison of English and Scottish fishery regulations up to the Union of the Crowns shows that the former were invariably framed in a more liberal and tolerant spirit.[16] For centuries Scottish fishermen had been traditionally inhospitable to any visiting craft off their coast and many a

time blood had flowed when Dutch fishers were found casting their nets within sight of shore. The fishing industry had always played a more important role in the Scottish economy than south of the border and fish exports grew steadily in volume from the east coast fisheries of Scotland. All firths and inlets were held to be "reserved waters" and exclusive rights of fishery were maintained at least 14 miles out to sea, sometimes twice that distance. Occasional reference was even made, as by Welwood, to an understanding with the Dutch that Scottish rights within 80 miles of the coast would not be infringed. It has already been mentioned that the first to take cudgels against Grotius was William Welwood who was particularly concerned over the possibility of overfishing off the Scottish coast. He did not seek to overthrow Grotius' doctrine of mare liberum as a whole but he emphasized such limitations to it as were necessary to establish the right of the sovereign to restrict the use of the coastal waters. Both the land and the adjacent sea were under the common jurisdiction of the sovereign who had exclusive right of navigation and fishing in these waters. His argument for territorial waters is based on local law and precedent. Chapter 4 has related how James VI of Scotland assumed the crown of England with a rooted Scottish prejudice against sharing ancestral waters with foreigners and how political and economic conditions combined to favour the aggressive maritime policy of the Stuarts.

There was no lack of doctrinal support for this stand, but until the advent of Selden the quality of scholarship declined with the rise in the emotional temperature. In the works of Serjeant Robert Callis two faults appeared which were to be characteristic of the British school advocating mare clausum: a confusion between jurisdiction and sovereignty, and the assumption that sovereignty is derived from, or depends upon, ownership of the thing in question. The Continental civilians, better drilled in the concepts of Roman law, were more careful in making distinctions, such as that between dominium (full legal ownership having the essence of potestas or proprietas) and imperium (sovereignty in relation to territory). It was feasible for an advocate of mare liberum to allow the theory of mare adiacens without proprietas; but once proprietas was allowed in the mare adiacens, the theory of dominium maris was involved and that of mare clausum more difficult to refute. Lord Coke followed Digges and Collis in presenting arguments based upon the common law and upon the statutes of the realm, and after much valuable historical research by Sir John Borough, the time was ripe for John Selden to fuse these elements into his prodigious work "Mare Clausum" (1635), the final statement of the British school.

The substance of Selden's argument, supported by a mass of historical evidence, may be summarised.[17] The sea is capable of appropriation. The ancient law relating to the

community of things had been considerably diluted down the ages and the claim to dominion over parts of the sea was not contrary to the law of nature or the law of nations. In practice many modern states exercised real sovereignty in certain waters - the Venetians, Genoans, Tuscans, Pisans, Turks, Poles, Germans, Russians, Swedes, and Danes, as well as the British; on the other hand, Spain and Portugal had no title to the oceans purported to be theirs under the famous papal bull of Alexander VI in 1493. The permission of innocent passage through territorial waters does not derogate from the sovereign state's dominion of the sea. It is not true that the sea has no limits, nor that it is inexhaustible from promiscuous use.

Selden showed that maritime sovereignty had been continuously exercised within the British seas (as he defined them) since the days of the early Britons and that the kings of England had perpetually enjoyed exclusive dominion and jurisdiction in the surrounding seas as part of their territory. They had always preserved the right to forbid foreigners from fishing and navigation or to exact tribute for that liberty. The Crown's rightsin the seas, asserted both by the kings and Parliaments of England, were in conformity with the common law of England and had been in several instances acknowledged by other nations.

The doctrine of Grotius, with which the claims of Spain and Portugal were met, had gone further than was necessary to destroy these pretensions and further than any state except the United Provinces, which was closetted in the British seas, cared to go. The world was anxious to secure the right of navigation, but it was willing that states should enjoy the minor rights of property and the general rights of sovereignty which accompany national ownership. Most of the remaining jurists of the 18th century agreed with Selden that the right of appropiration in the sea existed in law but that no state could forbid the peaceful navigation of its seas without violating the laws of humanity. On the other hand, they rejected the exaggerated sweep of his generalisations which permitted rights of sovereignty over wide expanses of the ocean in the case of the strongest maritime powers. While the morally impeccable premises of Grotius' argument, appealing to universal conscience, equity, and humility, were accepted as the only possible foundation for international commerce, it was the less extreme views of Selden that approximate more nearly to those of modern international law relating to the territorial sea. It was left to the Age of Enlightenment to resolve the paradox and to fix the limits of this sea, once if not for all.

In his famous work, "De iure naturae et gentium" (1672), Pufendorf dealt with the subject of the sea's status, somewhat

sketchily, maintaining that fluidity is no bar to appropriation, since rivers can be owned; that though the sea itself is inexhaustible for many purposes, its products are not and "there is no reason why the borderers should not rather challenge to themselves the happiness of a wealthy shore or sea than those who are seated at a distance from it." The paramount exigencies of national security and defence, and established rights of exclusive fishery justify the claims of a maritime state to dominion over the adjacent sea. The extent of that dominion in any particular case is determined by the physical facts of effective possession or to be spelled out of treaties; and where the question is still in doubt after these tests have been applied, it should be presumed that the sea belongs to the states bordering on it, so far as may be necessary for their defence.

As the 17th and 18th centuries advanced the zeal of maritime states to maintain proprietary rights in the open sea waned considerably, despite the partial acceptance of Selden's doctrine, and by the end of the 18th century those parts of the sea "spoken for" by the principal trading nations had been reduced to relatively narrow territorial belts. It was a curious irony of history that Britain, defender of the closed sea, was to have most reason for championing the freedom of the seas. After a series of naval victories over the Dutch and French, she was to

emerge as mistress of the seas, presiding imperially over scores of trade routes circling the globe. Despite constant embarassment by the shadow of her past Britain made little serious attempt after Trafalgar to preserve the substance of her former claims and under the aegis of her navy freedom of navigation and commerce became an actuality.

In the course of legal doctrine the tendency to narrow the range of maritime occupation is still more strongly marked. Virtually every text-writer who touched upon the subject accepted Grotius' basic premises: the sea cannot be occupied; it is indivisible, inexhaustible, and productive without the increment of man's labour; it cannot be allotted or appropriated, and there is no moral excuse for abandoning the original community of goods. Logically, if these tenets were valid, they applied equally to all portions of the sea, yet enclosed seas, straits, bays, gulfs, and littoral seas were still regarded as susceptible of occupation, and this was clearly necessary and desirable on the call of national security. Accordingly, while no one was prepared to abandon utterly Selden's view that the sea can be subjected to proprietary rights, still less was anyone prepared to accept Grotius' liberal doctrine with all its consequences. So there was a growing willingness to declare the ocean to be truly free and at the same time, to recognize states as holding certain waters by right as in the nature of territory,

subject to the right of navigation on the part of other states.

The mare liberum V. mare clausum controversy was closed, as far as the Dutch were concerned, by the publication in 1702 of Cornelius van Bynkershoek's "De dominio maris dissertatio", in which Selden's theory is rejected by suggesting a definite and realistic limit for the breadth of the territorial belt. Here, the adjacent sea is assimilated to the land territory and the distinction between imperium and dominium disappears completely. In a later work, "Quaestiones iuris publici" (1737), Bynkershoek held that while the open ocean could not be under dominion, large parts of it could be appropriated (fluidity being no bar) and various nations had at different times enjoyed such dominion. Since the invincible agreement for territorial waters was related to the needs for state security, the measure of effective defence was put forward as a reasonable criterion in the measurement of territorial waters. This criterion found expression in Bynkershoek's famous maxim, imperium terrae finiri ubi finitur armorum potestas, which, as we have seen, was hinted at by Grotius and was formulated by other writers prior to Bynkershoek. In fact the cannon-shot rule was familiar in most countries at that time; it was accepted as established law in France and was probably equally well-known in Dutch diplomatic practice. However that may be, Bynkershoek was responsible for generalising and popularising the rule.

In "Le Droit des Gens" (1758) Emmerich de Vattel asserted that a state might acquire exclusive rights in navigation and fishery in the open sea by treaties, but not by prescription, unless in virtue of the consent or tacit agreement of other states. "When a nation that is in possession of the navigation and fishery in certain tracts of the sea claims an exclusive right of them and forbids all participation on the part of other nations, if the others obey that prohibition with sufficient marks of acquiescence, they tacitly renounce their own right in favour of that nation, and establish for her a new right, which she may afterwards lawfully maintain against them, especially when it is confirmed by long use[18]. . . Between nation and nation all that can reasonably be said is that in general the dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it."[19] Thus it is clear that Vattel approves of the reason for the cannon-shot rule, but it appears from other parts of his texts that in the case of coastal fisheries - certainly in the case of sedentary fisheries - natural and economic conditions would prevail, on the basis of custom, to determine the extent of territorial waters.

Soon after this attempts were made to formulate a definite measurement of the territorial belt in terms of miles or leagues. In 1782 the Italian author Ferdinando Galiani proposed

a three-mile rule, particularly as a neutrality zone, but this was not accepted at once by other writers. In 1795 another eminent Italian jurist, Domenico Azuri, helped to graft the three-mile rule on to the young and supple body of international law. "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 further than three miles from the land which is without dispute the greatest distance to which the force of gunpowder can carry a ball or bomb."[20]

In the "Protection of Coastal Fisheries under International Law" Professor Stefan A. Riesenfeld cites passages from 227 text-writers of the 19th and 20th centuries. This summary shows that "during the first half of the 19th century the cannon-shot rule prevailed, but later the three-mile rule gained ground, giving way still more recently to the conviction that neither rule conforms to actual international practice, but that the adjustment of conflicting interests must be found in a different and less mechanically rigid formula."[21] Of the 113 writers between 1800 and 1899, 52 favoured the cannon-shot rule, 15 the cannon-shot or three-mile rule, 27 the three mile rule, one a different fixed measure, while 18 took the view that the question should be answered on different grounds, taking into account the interests involved. Of the 114 writers since 1900, 14

favoured the cannon-shot rule, six the cannon-shot or three-mile rule, 41 the three-mile rule, one a different measure, while 52 took the view either that there was no international agreement on the question and that states were free to make any reasonable claim, or that the question should be solved. according to international law on a basis which varies according to the interests and circumstances involved.

The reason for the gradual abandonment of the cannon-shot rule by states in favour of three marine miles was described with lucidity by Professor P.C. Jessup in the "Law of Territorial Waters and Maritime Jurisdiction", in these words[22]: "The truth seems to be that the value of Bynkershoek's maxim 'imperium terrae finiri ubi finitur armorum potestas' lay in the fact that it denied the ancient theory that the sea is incapable of appropriation without countenancing the excessively wide claims which had led to the famous Grotius-Selden controversy. The nations were unwilling to say that the free and common seas touched their very shores, and on the other hand they found it impracticable to claim dominion over vast oceans. Bynkershoek supplied the happy medium on a theoretical basis which appealed to the spirit of the times. His norm of cannon range was adopted and accepted for nearly a century before Jefferson started the fashion of using three miles, or a marine league, as the alternative. It was then approximately an exact equivalent,

and to this its introduction was no doubt due, but once introduced it remained because the nations found it a convenient compromise between conflicting interests. When it ceases to be generally convenient it will probably be changed by general convention". In recent years it has been suggested (*) that the two rules are not only distinct in nature but may be equally distinct in origin and development. It is related by Fulton that the first mention of a three-mile maritime belt for exclusive fishing rights was contained in a diplomatic document for use by the English ambassadors to the Cologne Peace Conference in 1673: "In which fishing ye said States shall oblidge themselves that their subjects shall not come with in one league of ye shores of England and Scotland."[23] It might well be that the historical identification of the one rule with the other is no more than a fiction of the 18th century jurists striving to reconcile and represent divergent state practices and to secure for the future a practical and generally acceptable rule.

The most ardent and consistent supporters of the three-mile rule have always been Britain and United States, with the acquiescence, in varying degrees of enthusiasm, of many states, including France, Germany, Belgium, Holland, Greece, Turkey, and Japan, subject to reservations in many cases with regard to fishing and other rights. Russia, Italy, Portugal, and Spain have been traditionally dissatisfied

* W.L. WALKER, "Territorial Waters: The Cannon Shot Rule". B.Y.I.L. 1945, pp. 210.

with the three-mile rule which they have frequently criticized as being inadequate for the protection of their national interests, and diverse claims to wider dominion have been asserted from time to time. Scandinavian claims to a four-mile zone have come to be regarded separately and are virtually approved in international law by long-standing custom, an inheritance of the ancient Danish claims to wide dominion of the surrounding sea. Norway in particular has been favoured in view of the specially marked indentation of her coast line, as will be seen later in a review of the recent Anglo-Norwegian Fisheries case (I.C.J. 1951). Several Latin American states have laid claim to exclusive jurisdiction over exorbitant distances at sea. While these have not been supported by the rest of the world, they indicate the need for some kind of standard to be followed. The Codification Conference held in The Hague in 1930 under the auspices of the League of Nations failed to agree on a uniform breadth of the territorial sea, vigorous arguments being heard for three, four, six and twelve miles, and the delegates failed indeed to agree on the need for a uniform standard. Similar difficulties were encountered when the International Law Commission of the United Nations attempted to codify international law relating to the regime of the territorial sea, and it remains to be seen what measure of success can be achieved by this attempt.

In recent years a distinction has come to be made between the exercise of jurisdiction and that of control by the littoral state. Jurisdiction may be said to connote the power of the state's courts to adjudicate, whereas control connotes the power of administrative and executive officers to govern the actions of persons and things. For example, diplomatic officials are immune from the jurisdiction of the courts in the state to which they are accredited but are subject to many regulations imposed by the executive organs of that state's government. Again, a foreign ship pursuing innocent passage through territorial waters is in general immune from the normal court processes of the littoral state, while remaining subject to its navigation regulations. As international law stands at present, in the view of most states, jurisdiction may be exercised within three (or, exceptionally, four, six, or twelve) miles of the shore and any act may be committed therein which is lawful on the land adjoining. This is subject to the right of innocent passage and to the contingency of the "force majeure" (such as the right to seek shelter in extremity). The exercise by certain states of special rights beyond this territorial zone is acquiesced in by most of the world, particularly if the state's security or public health is involved. For example, the United States Customs Department has long assumed a 12-mile zone of jurisdiction over incoming

ships. If the possession of territorial waters constituted nothing more than a 'bundle of servitudes' or certain rights of control or jurisdiction, then in such a case it would be difficult to see a difference in kind between the three-mile zone and the 12-mile zone. But if the territorial waters are assimilated to the land adjoining, then the distinction becomes clear, involving "full jurisdiction" on the one hand and "limited control" on the other.

At The Hague Codification Conference it was proposed inter alia that various exceptions be allowed to the general rule of a three-mile limit, and the principle was put forward of a zone on the high seas contiguous to the territorial sea in which the littoral state could exercise such control as was necessary to satisfy it s customs, public health, and security regulations. Twelve miles from the coast were suggested as the extent of such a contiguous zone, that is nine outside the traditional three-mile zone of the territorial sea. United States, Britain, Canada, Australia, South Africa, Japan, Brazil, India and Sweden were opposed to the whole conception of a contiguous zone, and the proposal was dropped. Sufficient agreement was, however, reached to enable the Conference to prepare a draft Resolution on the legal status of the territorial sea. Every delegate concurred that a littoral state possesses sovereignty over its territorial zone of the sea, but the word "sovereignty" is

used, almost apologetically, in a relative, not absolute, sense to imply that "the power exercised by the state over this belt is in its nature in no way different from the power which the state exercises over its domain on land."[24] But the specific rights of a littoral state actually exercised in its territorial waters, far from being unlimited as on land, can usually be reduced to one of five heads: jurisdiction over foreign vessels, police functions, customs and revenue regulations, fishery rights, and maritime ceremonial (such as showing of the flag). Moreover, the limitations imposed by international law on a state's power in respect of its sovereignty over the territorial sea are greater and more numerous than those in respect of its domain on land. The littoral state may not impede, or levy a charge upon, the innocent passage of foreign vessels (other than warships) in the territorial sea; on the other hand, the latter are obliged to comply with "the laws and regulations enacted in conformity with international usage by the Coastal State, and in particular as regards:

(a) the safety of traffic and the protection of channels and buoys;

(b) the protection of the waters of the Coastal State against pollution of any kind caused by vessels;

(c) the protection of the products of the territorial sea;

(d) the rights of fishing, shooting and analogous rights belonging to the Coastal State."[25]

Approval was also given to the right of "hot pursuit" of a foreign vessel into the high seas, when a regulation (such as a fisheries regulation) is infringed by it within the territorial sea, provided the pursuit follows immediately on the escape of the foreign vessel and is continuous. The right of pursuit ceases as soon as the vessel pursued enters the territorial sea of its own country or of a third state.

In 1953 at Geneva the International Law Commission of the United Nations recommended: "On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the base-line from which the width of the territorial sea is measured." The British Government, for long one of the most ardent opponents to the doctrine of the contiguous zone accepted this position subject to the provisions that

(a) jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations, only;

(b) such jurisdiction is not exercised more than twelve miles from the coast;

(c) the territorial waters of a state shall not extend more than three miles from the coast unless in a particular case a state has an existing title, sanctioned by long-standing custom, to a wider belt.[26]

As far as fisheries are concerned, the present development of maritime jurisdiction seems to be somewhat as follows. All states accept the existence of a territorial zone of the sea up to at least three miles; within these waters the littoral state is assured of exclusive rights of fishery. Outside the three-mile zone up to 12 miles various rights are claimed ranging from full jurisdiction, involving territorial sovereignty and full legal ownership of the fisheries, to the minimum of rights of control to safeguard the most vital interests of the littoral state. The views of different states upon the legal status of the fisheries within the nine "marginal" miles depends upon the character of the coastal sea, the coast-line, and the fisheries involved, upon analogous rights that have been exercised in the past within these waters, and upon many other factors besides. Outside the twelve-mile zone few states will make so bold as to claim full legal control of the fisheries, unless they can point to exceptional circumstances in fact and in law. Law is made by marginal cases, and international law is no exception. We may expect then that the law relating to the jurisdiction over fisheries will take shape from the settlement of disputes arising in these nine "marginal" miles of the coastal sea. Accordingly, attention will have to be given to some of these disputes, through the medium of selected case histories, but before this is done we must devote a further chapter to current developments in the theory of maritime jurisdiction.

Chapter 7: Doctrinal Developments in Maritime Jurisdiction

("Between two girls, which hath the merriest
eye; I have perhaps some shallow spirit of
judgment;
But in these nice sharp quillets of the law,
good faith, I am no wiser than a daw."

Henry VI, Shakespeare.)

Considerable attention has been paid to the gradual evolution of the territorial sea. It has been observed that the extent of the territorial belt has never been the subject of general agreement among states and jurists, but the exclusive nature of the littoral state's rights in its territorial waters has been accepted by all. If it is true that certain state practices of recent times have been subversive of the most cherished traditions of the law relating to the sea, it is even more true and more relevant that the law of the sea cannot pretend to have a universal application until it follows the plain trends of international society. Now as never before the sea holds glittering promise of mineral wealth for states that can bring modern technology to bear upon it; and among the fisheries the age-old problems are magnified by the facts of depletion and the needs for conservation and exploitation. Both sets of problems, involving the most intimate hopes and fears of coastal states, are every day at play in

inducing states to justify the extension of their jurisdiction, control, or sovereignty at sea.

Despite the lack of total agreement on the width of the territorial belt, states have until recently been satisfied that only two dimensions could be related to its measurement; the sovereignty claimed was always co-extensive with the coast-line, and extending seawards from it. The question of a third dimension, that of depth or height, did not arise as a practical possibility, until the advent of the aeroplane and the oil drill. In the 20th century the growth of international aviation has thrust upon lawyers a host of new problems relating to the legal status of air-space, which required fresh thinking about the limits to a state's territory and to its jurisdictional rights. At the same time lawyers began to ponder on the status of the sea-bed. In 1923 Sir Cecil Hurst posed the startling question: "Whose is the Bed of the Sea?" (*) Due to the conclusive character of rights to the territorial sea, the answer might be supposed easy in relation to the territorial belt; but what of the sea-bed outside these limits?

The question first posed itself in relation to sedentary fisheries, which are very often situated outside the range of territorial waters, strictly defined. Sedentary fisheries comprise various classes of marine products, such as edible oysters (e.g. off the coasts of England, Ireland, France,

* B.Y.I.L. Vol. IV, 1923/24 pp. 34.

Australia, Florida), pearl oysters (Ceylon, Persian Gulf, Venezuela, Panama, New Guinea, Australia, French Somaliland), amber (Baltic Sea, Scandinavia), coral (Australia, Algeria, Sardinia, Sicily), sponges (Tunisia, Morocco, Florida, Mexico, the Levant), chanks (Ceylon), trepangs (Malaya, China) and beche-de-mer (China). With the exception of amber and coral these are live animals which can usually detach themselves from their moorings, but since they are almost invariably caught when attached to the bed of the sea, they have come to be regarded, separately from floating fish, as belonging to the soil or the sea-bed, rather than the sea itself. But biologically the facts are different, for these animals live in the water and derive their food from it, not from the soil; accordingly, there is no need to accept Hurst's analogy with "produce of the soil". Can a valid distinction in law be drawn between an oyster or sponge and a floating fish on the ground that the former can be subject to ownership by reason of its incidental attachment to a bankwhereas the latter can only be owned when caught? The ius soli principle of nationality cannot be applied by analogy to a sponge any more than to a salmon; nor can an oyster, once it finds attachment, derive its "domicile" from a supposed "animus manendi"!

There were long-standing claims to the ownership of the pearl and chank beds in the Gulf of Manaas, between India and Ceylon, by successive Portuguese, Dutch and British

colonialists, and none disputed that a good title obtained on the basis of long-continued and uncontested occupation. From this position Hurst argued that "the exclusive right to the pearls to be obtained from the banks flowed from the ownership of the bed of the sea where the banks were situated, and not from any claim to maritime jurisdiction over the waters. Wherever it can be shown that particular oyster beds, pearl banks, chank fisheries, sponge fisheries, or whatever may be the particular form of sedentary fishery in question outside the three-mile limit, have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on, their being a produce of the soil." The sea, according to Hurst was res communis, but the sea-bed and subsoil were res nullius. Accordingly the sea-bed and its resources were amenable to occupation, while the sea remained inviolate.

We have already suggested that sedentary fisheries cannot be regarded as the produce of the soil except by a legal fiction. Nor, it may be added, can ownership of the sea-bed under the high seas become vested in the coastal state by reference to uncontested occupation. It is one thing to argue that exclusive legal rights to sedentary fisheries can be acquired by a state through immemorial usage and acquiescence, but an entirely different matter to go further

and argue that long and undisputed use of the fishery perfects the state's title to the soil. No analogy should be made from the principle of effective occupation of land territory. In literal terms effective occupation of the sea bed is impossible, for it cannot be inhabited, administered or fortified. Even for land territory, the degree of effective occupation required to vest a title may test the nicest judgment (cf. The Legal Status of Eastern Greenland P.C.I.J.). Not only is occupation not a sufficient condition of title, it may not even be a necessary one. The legal basis of occupation of the sea-bed is even less secure, particularly as recourse must be had to a sort of "notional" occupation.

Hurst also mentions long-standing custom as a criterion, and many jurists have preferred to look for positive prescription to support claims to long-established sedentary fisheries. The distinction in international law between occupation on the one hand and immemorial usage and control on the other is not an easy one; in matters of the sea it may be an impossible one. Clearly where sedentary fisheries in the high seas have been exploited exclusively by the natives of the adjacent state for a very long time, their rights to this fishery may be regarded as settled in law. The history of the Ceylon chank fisheries, for example, can be traced from the 6th century B.C. They have passed through various owners, but as owners they were recognized.

No branch of international law rests more squarely on customary law than the law relating to the sea, unless it be that of diplomatic immunities. But many of the most valuable sedentary fisheries to-day on the high seas have been exploited only recently, either because they were newly discovered or as an extension of traditional sedentary fisheries in territorial waters, strictly defined. In determining a legitimate prescriptive period for international law there is no settled framework of reference to guide the judicial process, and coastal states have not been willing to wait for one. Unilateral action by states in claiming certain rights to large chunks of the high seas has become almost sanctified by its very universality. With the codification of the law of the sea in the hands of the International Law Commission, suggestions have been made that the status quo in relation to sedentary fisheries should be preserved.[1] This would mean that newly-discovered banks, in which no rights had been acquired by prescription, would be subject to the general regime of floating fisheries and prescriptive rights could not be regarded as precedents to justify the new occupation of any part of the sea-bed outside territorial waters. In future, presumably, the rights of coastal and other states to sedentary fisheries would be both limited and guaranteed by the sanction of bilateral or multilateral treaties and international conventions.[2]

Hurst's main argument was that "the recognition of special property rights in particular areas of the bed of the sea outside the marginal belt for the purpose of sedentary fisheries does not conflict in any way with the common enjoyment by all mankind of the rights of navigation of waters lying over these beds. Nor does it entail the recognition of any special or exclusive right to the capture of swimming fish over or around these beds." Gidel on the other hand insists that the ownership of sedentary fisheries and the freedom of the high seas are essentially incompatible.[3] This view is obviously predicated on the original belief in the absolute freedom of the high seas. In "La Plataforma continental ante del derecho", he concedes that "the concept of the freedom of the high seas has now lost the absolute and tyrranical character imposed upon it by its origin as a reaction against claims to territorial sovereignty over the high seas."[4] This concept has served its purpose in an age when the paramount urgency was to maintain and safeguard the free navigation of the seas. This need to-day is none the less desirable, but it can be presumed to be sufficiently rooted in the universal codes of ethics to co-exist with apparently derogatory practices on the high seas, which themselves must safeguard other, newer vital needs.

When a coastal state actually assumes exclusive supervision over a sedentary fishery outside its territorial waters, however, it need not claim more than the measure

of jurisdiction required to achieve its purpose of regulating the fishery. Once this jurisdiction has been conceded, an element of exclusiveness is introduced which relates the sea-bed, the subsoil and the superjacent waters more closely to the territorial sea than to the high seas, because to some extent in having exclusive right to exploit, or to regulate the exploitation of, the sedentary fisheries in that region, a system of priorities is involved, even though unimpeded navigation through the superjacent waters is assured.[5] In some measure the freedom of navigation has to concede to the priority established in that region, because the exploitation of the sedentary fishery inevitably impinges upon the general right of navigation. This argument is even more cogent in the case of mineral resources exploited in the high seas, where derricks and other installations must be erected which constitute both a physical and legal impediment to shipping in a certain degree. Disclaimers as to encroachment upon the freedom of navigation are more closely analogous to the assurance of the right of innocent passage in territorial waters. The vesting of property or other exclusive rights to sedentary fisheries in the high seas is but another example of the multiplication of shades of grey between the freedom of the high seas and sovereignty over the territorial sea. The blurring of distinctions is a necessary concomitant with the increasing uses of the sea, but the point to be made here is that all

legal claims to more extensive control over the sea by a state must be whittled down by "Occam's Razor" (entia non sunt multiplicanda praeter necessitatem), so that the purpose of the claim, submitted to the test of reasonableness, is the only relevant factor.[6]

At this stage we may discern two kinds of fishery rights: the right of a state to claim fisheries exclusively for its nationals in a certain area, and the right of a state to enact and enforce regulations for the protection and conservation of the fish in a certain area. In territorial waters this distinction does not apply, but outside the area of sovereign rights the limited claims of the latter kind are more acceptable under international law and closer to the general interest which the law should promote. If a state wishes to claim exclusive fishery rights outside the territorial sea, strictly defined, it has two alternative courses of action. The bolder way is to claim a wider territorial belt than is normally allowed by the generality of nations. This course, if sanctioned by the law and practice of nations, puts beyond dispute the right of the coastal state to exercise sovereign jurisdiction almost entirely regardless of the interests of other states. Since it is exclusive of all other states and impinges upon more than fishery interests, this course encounters the sternest opposition, but Norway found in 1951 that it is

possible to substantiate such a claim in law by virtue of special circumstances (Anglo-Norwegian Fisheries Case I.C.J.). The alternative course is to claim jurisdiction for certain purposes outside the territorial sea by reference to a "contiguous zone". Such a claim may be incorporated in national legislation or in bilateral or multilateral treaties, but this course too has provoked strong protests as being an unnecessary encroachment upon the freedom of the seas.[7] In 1950 the Preparatory Committee of the Codification Conference concluded in its First Report that it would not be possible to arrive at any general agreement establishing a uniform contiguous zone for fishing, and it merely proposed the establishment of such a zone exclusively for customs, sanitation, and security purposes.

One of the most compelling reasons for a state to seek extension of its territorial waters, or of the area within which it may exercise jurisdiction for certain purposes, is to enable it to lay down rules for the protection of the coastal fisheries over a wider area. In so far as a coastal state makes provisions for the regulation of its fisheries, it has long been felt that a maritime belt of three miles is inadequate,[8] but it has always been difficult to see how a state could enforce such provisions against the nationals of another state. In the Bering Sea Fur Seal Arbitration of 1892 between Britain and America, and in the subsequent arbitration between Russia and America, the tribunal denied

the coastal state the right to exercise protective jurisdiction over fisheries on the high seas contiguous to its territory.[9] More recently various states have come together to guarantee such rights, on a mutual understanding of the needs for conservation and of the primary interest of the coastal state. Treaties and conventions of this kind have laid down provisions governing such matters as: the size of meshes; closed seasons or closed waters to allow fish to spawn; the outlawry of certain destructive methods of fishing such as dynamiting; the prohibition of the sale of undersized fish on the market; the banning of trawlers from certain areas, particularly those frequented by small fry; and so forth.

On September 28th, 1945, the President of the United States issued a Proclamation enunciating a national policy which included the establishment of conservation zones in areas of the high seas contiguous to the coasts of the United States. If fishing in the past in these areas had been carried out only by nationals of the United States, control was to be exercised by the United States alone. If fishing had been shared with nationals of other states, control would be established by agreement between the United States and all other interested states. Similar rights were conceded to all states with respect to their own coastal waters. This policy was virtually a declaration

of the intention to preserve the status quo, in the sense that exclusive rights were claimed to the "national" extra-territorial fisheries, so that they would remain in the national "domain", and non-exclusive but special conservatory rights to the "international" fisheries outside the territorial sea. It is not clear how this policy would affect fishermen of states other than those already engaged in the international fisheries. It is at least probable that states representing the intruding fishermen might be invited to share in the fisheries on some basis provided they agreed to abide by the provisions laid down by the regulator (i.e. coastal) state.[10] It would be more difficult to guess at the intentions towards non-party states that refused to conform to these provisions, but it is hard to escape the conclusion that reference could only be made to some independent, possibly international, body provided with the necessary judicial and administrative machinery to meet such a problem. Certain it is that the existing judicial authorities would be sorely afflicted, when confronted with litigation in such a matter, by the lack of a clear, positive statement in law which could be applied. No doubt that the establishment of a conservation zone is a trespass upon the classical freedom of the high seas, but no court could afford to ignore the changing needs and conditions of the highly developed technological, industrial, commercial and social life of modern states.

This latter consideration is particularly important for coastal states in a position to exploit the mineral resources which lie in the submarine areas contiguous to their territorial waters. The question of fishery conservation has become closely related in recent years to that of mineral exploitation, for the two sets of interests combined form a powerful inducement for many states to claim extensive jurisdiction, if not sovereignty, over contiguous parts of the high seas. The dual problem has been focussed - though, unfortunately, not clarified - in the theory of the continental shelf, and to this development we must now turn.

The term "continental shelf" was first used by the English geographer H.R. Mill in his "Realm of Nature" (1897). Continental land-masses do not terminate abruptly at the sea-shore, and sometimes not even at a reasonable distance therefrom. Frequently the sea-bed tapers off gradually and represents a continuation of the continent under water. The geological nature of the sea-bed may indicate that before submersion it formed a continuous part of the land-mass that is left, and it has even been envisaged in a law-court that large parts of the sea-bed in shallow waters will some day be reclaimed and revert to the land-mass, as conventionally regarded (U.S. v. Texas 1950 339 U.S.707). This continuation under water extends to a depth of approximately 100 fathoms (or 200 metres), at which level the continental land-mass

tends to fall away more or less abruptly to unplumbable depths. The term "continental shelf", in its strict geological sense, refers to the end of this underwater landmass only, but as lawyers are interested in the whole area of contiguous shallow waters, covering exploitable parts of the sea-bed and subsoil, and not just in the farthest parts of them, the term "continental shelf" in legal theory bears a broader connotation, to include those parts of the sea-bed less than 100 fathoms in depth. Indeed it is those parts of shallow waters closest to the territorial sea that provoke most controversy in practice, for it is there that mineral resources can be exploited most easily by the coastal state and that sedentary and other fisheries can be subjected to supervision. It may be, however, that when the notion of the continental shelf is introduced in courts of law, it will require to be interpreted strictly, like "Greenland", as a technical term (cf. The Legal Status of Eastern Greenland, 1933 P.C.I.J.).

At the National Fishery Congress at Madrid in 1916 Senor de Buren, later Director General of Fisheries in Spain, urged the necessity of extending their territorial waters, for the purpose of conserving coastal fisheries, to include "the whole of the continental shelf". Although Portugal, much plagued by the repeated incursions of foreign fishermen in her coastal fisheries, received the idea enthusiastically,

nothing came of it as a concept in law for a considerable time. In 1947 the State of Texas passed a statute making similar claims, but in the case of U.S. v. Texas (supra) this enactment was held to infringe the federal rights of the United States.

The first reference to the shelf in a state document was in a diplomatic note issued by the Russian Imperial government in 1916, and this note was re-issued by the Soviet Union in 1925. Juridically, however, it is felt that this policy was based not so much on the concept of the shelf (in relation to depth) as on the "theory of sectors" or that of "spheres of influence" (in relation to longitude and latitude). On the other hand, in 1925 Ceylon issued a Pearl Fisheries Ordinance which, although it made no actual reference to the continental shelf, took notice of the depth dimension in defining "pearl bank" as a "determinate area between the three-, and, in some places five-fathom line, and the 100-fathom line." Accordingly, this ordinance approximated quite closely, both in spirit and in measurement, to the modern concept of the continental shelf.

Though references to the shelf are modern, the underlying theory is not, for it is merely a convenient way in modern dress, of determining juridically how geographical limits may be applied to the sea-bed and its subsoil. It may be

that the problem of how to classify the latter, as res communis like the sea, or res nullius like Antarctica, will resolve itself in favour of res nullius, if it can be shown that states consider the sea-bed and subsoil are amenable to jurisdiction and can be subject to control and sovereignty. In 1950 the International Law Commission in its 2nd Session, rejected the idea that the sea-bed and subsoil of the continental shelf were either res nullius or res communis and therefore not amenable to acquisition by occupation; but it did assert that a littoral state was entitled ipso iure to exploit and control the resources of the bed of the marginal sea without relation to the existence of the continental shelf. This position it has maintained consistently.[11] It may be mentioned in passing that this view involved acceptance of the doctrine of occupation, or the analogous criterion of exploitability; otherwise there would be no legal limit to the claim.

Between the practices of states in respect of sedentary fisheries and the enunciation of the full-blown theory of the continental shelf there was an important link in the treaty between Britain and Venezuela in February, 1942, which related to the shallow waters, sea-bed, and subsoil of the Gulf of Paria between Venezuela and Trinidad. In this treaty both states acknowledged each other's right to exploit mineral and other resources in the shallow waters

outside the territorial zones of the parties; respect was to be accorded to islands, islets, rocks and the territorial waters surrounding them; and the instrument expressly preserves the status of the waters themselves, disclaiming any intention to appropriate them or to interfere with the right of navigation therein. Professor Borchard suggests[12] that this sort of claim on the part of a coastal state may be supported on one of several grounds:

1) the theory that territorial sovereignty may be extended over shallow waters, sea-bed and subsoil, viewed as an uninterrupted continuation of the land;
2) the theory of terra nullius, implying that proprietorship may be acquired by effective occupation, and leaving foreign fishing and navigation rights unimpaired;
3) the theory that all or part of the Gulf of Paria is so shallow that the two states are justified in claiming it for themselves as national waters, including the subsoil underneath, subject to the surface rights of third persons;
4) the argument that mineral resources frequently are found in pools or deposits which extend beyond territorial limits and that the protection of these resources as a whole justify the exercise of extra-territorial rights by the littoral state.

In September, 1945, the President of the United States issued a Proclamation[13] to the effect that in view of the fact that rich and accessible oil deposits lie close to the coast-line, but outside the conventional three-mile limits and that "self-protection compels the nation to keep a close watch over activities off its shores", so the Government of the United States "regards the natural resources and the sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." The possibility of overlapping jurisdictions is recognized but it is suggested that difficulties of this kind may be settled bilaterally in accordance with "equitable principles". Particular care was taken to stress that this in no way involved an invasion of the high seas in any matter that affected the traditional freedom of navigation. This American proclamation was followed by similar ones on behalf of: several Arab sheikdoms in the Persian Gulf under British protection (e.g. Bahrein, Kuwait, Abu Dhabi, and Qatur - all in 1949), a number of British colonies such as the Bahamas (1945), Trinidad (1945), Jamaica (1948), and British Honduras (1949), and many independent states, including Mexico (1945), Argentina (1946), Panama (1946), Chile (1947), Peru (1947), Costa Rica (1948), Iceland (1948), Guatemala (1949), the Phillipines (1949),

Saudi Arabia (1949), Honduras (1950), Brazil (1950), Pakistan (1950), El Salvador (1950), Yugoslavia (1950), Israel (1953), and Australia (1953). Some of these claims were limited to fisheries, and made no mention of mineral resources.

The drafters of the American instrument seem to have studiously avoided use of the term "sovereignty", preferring the phrase "jurisdiction and control". When some of the proclamations that followed asserted rights of national sovereignty over the continental shelf, and the seas adjacent, the United States government voiced its protest and pointed out that there was no claim to sovereignty, in its own proclamation, over the shelf, and no claim of any kind to the waters above the shelf. Many of the proclamations significantly omitted to accord appropriate and adequate recognition to the fishery rights of other states in the high seas adjacent to the coast, though some sort of guarantee was expressed or implied in favour of free navigation. Moreover, in some of the more blatant claims, such as that of 200 miles by Chile, much of the area in question lies far beyond the continental shelf, and the sheikhdoms along the Trucial coast lie in the Persian Gulf which does not flow over the shelf, strictly defined, but is merely a basin of less than 100 fathoms on the Asian continental land-mass.

Many of these additions can find no precedent in President

Truman's Proclamation, which was carefully worded, and they represent innovations without any legal foundation. However, the influence of the American instrument cannot be underestimated. We must accept Hurst's argument[14] that the difference between "jurisdiction and control", which is clearly intended by the United States to be exclusive, and sovereignty is so small as to be little more than a question of name. Substance is of more importance than form, and the areas of water under the purview of the American proclamation must be regarded as intended to be subject to the sovereignty of the United States. Hurst argues further that "if the right of jurisdiction and exclusive control which is claimed is less in measure than a right of sovereignty and the area in consequence lies outside the area of the state's sovereignty, the area must, unless it lies within an area where some other state is sovereign, constitute a res nullius. That seems to be difficult to reconcile with the claims to jurisdiction and exclusive control asserted in the Proclamation " . . . . [15]. "The result would be that the land mass of the continental shelf, though itself subject to state control and jurisdiction so complete as to be equivalent to sovereignty, would be covered by a mass of water of which the status would be that of the high seas and therefore technically res nullius, the airspace above the sea being in the same way outside the limits of the state's exclusive control or sovereignty."[16] Whether this jurisdiction and control be claimed as a public

property under the state's sovereign right over its marginal sea by virtue of international law or the common law or because the continental shelf is a continuation of the state's territory, or as a property right in controllable soil and subsoil without any claim to surface waters, or because foreign rights in the subsoil just beyond the territorial limits would be an intolerable threat to the littoral state's economic interests, the fact is that claims of this kind, more or less have been asserted by many littoral states, and have been acquiesced in by others, especially where a specific resource was in question. Property by prescription alone might have sustained the right to a resource already exploited, but it is possible that in the case of unexploited resources in the continental shelf the unilateral assertion of jurisdiction and general acquiescence therein over a period of time - without entering upon the abstruse question of title - will substantiate the coastal state's claim.[17]

Professor Lauterpacht gives three probable reasons to suggest that the nuance between 'jurisdiction and control' and 'sovereignty', on the part of the United States government, may have been deliberate. In the first place, the formal annexation of territory under American constitutional law cannot be effected by Presidential proclamation, but requires the full legislative approval of Congress. Secondly, in view of the United States' persistent attitude regarding the acquisition of sovereignty over arctic and antarctic

regions - based on a rigid insistence upon effective occupation as a necessary condition to a valid title - it may have been deemed more desirable to give a different and somewhat less emphatic formulation to a claim based on the fact of contiguity. Thirdly, some importance may have been attached to the theory that "sovereignty and ownership go together", and that it was better to take the line of least resistance when the question of appropriating the subsoil of the continental shelf was still a moot point in law.

Lauterpacht goes on to maintain that sovereignty over adjacent submarine areas, like sovereignty over territory in general, is not incompatible with restrictions imposed by customary international law or undertaken by treaty. Thus though rights acquired or claimed by states over submarine areas are rights of sovereignty, it does not mean they are not subject to such limitations as follow from international law, guaranteeing the freedom of the seas. In particular, the normal extent of territorial sovereignty as expressed in the principle usque ad coelum does not apply to the continental shelf, either in relation to the superincumbent sea or to the air above it. Similarly, the general rule of the freedom of navigation in relation to the bed of the sea may be fully applicable, as in the case of the right to lay cables and probably pipe lines. There would be little point, then, in limiting the right of states over submarine areas to control and jurisdiction for the purpose of exploration

only.[18] There are no other uses for the bed of the sea! Thus it may be argued that if the generally accepted principle of innocent passage is not inconsistent with the sovereignty of a state over its territorial waters, neither is "sovereignty" or "jurisdiction and exclusive control" in relation to the sea-bed inconsistent with the universally accepted fundamental freedoms of the high seas. The limitation of sovereignty is a common phenomenon in international law. The truth is that the notion of the freedom of the seas, as implying absolutely unimpeded navigation, is, when rigidly applied, as obnoxious as the uncompromising doctrine of absolute sovereignty. The synthesis between the two can only be crystallised by the test of reasonableness, between legitimate particular interests on the one hand and the common welfare of the sea on the other.

Whatever may be the demerits of the 100-fathom limit propounded by the theory of the continental shelf, it does have the advantage of setting some limit to the legitimate claims upon the bed of the sea. That limit, conceived as a rebuttable presumption of the practicability of exploitation, is not unreasonable, if a measure of this is to be sought at all. It may be taken as a reasonable starting-point in negotiations for future regulation of exploitation, but where exploitation is possible in shallow waters the right of littoral states to jurisdiction and control should not,

of course, rest on the notion of the continental shelf, strictly defined. In this sense of the term, the relatively shallow North Sea has little contact with the shelf and the Persian Gulf none at all, and exploitation in these areas would probably have to rest on the argument that coastal submarine areas constitute a natural seaward extension of the littoral state's territory. The width of the shelf in various areas of the globe is very uneven, but the law can not be expected to atone for geographical inequalities. It may be relevant, however, that where the shelf is very narrow the coastal state's demersal fisheries tend to be most dense and there seems to be no moral justification for limiting exclusive rights of exploitation to mineral resources. This sentiment would be particularly appealing to a country such as Portugal that is in the difficult position of having a very narrow continental shelf and highly condensed fisheries, which induce foreign fishermen to fish there. So it may be argued on moral grounds that Portugal has a just claim to a monopoly of fishing within a belt of at least six miles, particularly when it is considered that more than 50,000 men, which represents a high proportion of the Portuguese population, are engaged in fishing.

It is true that the shelf, in its wide sense including all waters of less than 100 fathoms, houses an abundance of fish, particularly of the demersal species, but it is not the only natural habitat and clearly cannot be made into

a criterion for the delimitation of rights concerning fisheries. A Report on a Survey of the Fishery Resources of the United States and its Possessions stated that "unlike conditions on the North Atlantic coast, food-rich water in the Pacific is not confined to the continental shelf, extends many miles to sea over deep water, supports large populations of many kinds of pelagic fishes". Japan's tuna fisheries, for example, extend over vast distances of the Pacific and her production is in the region of 500 million pounds a year. Some of these fish are caught in depths as great as 500 fathoms. One and a half million of the Japanese population fish for a livelihood. On the Pacific coast of America halibut live on banks as deep as 250 fathoms. Whiting are found on sandy or pebbly bottoms from the shore line to a depth of about 300 fathoms, and 86% of total landings at Hawaii, where the shelf is only a few ~~inches~~ miles wide, is found as far as 100 miles offshore. The idea of de Buren to extend the territorial sea to include the whole of the continental shelf would clearly lead to discrimination against those countries which have no shelf (in the wide sense) - that is, those that rely heavily on pelagic fishing - since the most important fisheries are not limited to coasts where the shelf exists. Such an extension of territorial waters for fishery purposes is based on the wish to exclude fishermen from other countries, or on the wish to apply measures of conservation to a wider area, or on both. If such wishes were

to be fulfilled, why should countries which have perfectly good reasons for these demands be excluded for the irrelevant reason that they do not possess a continental shelf? With the unanswerability of this question, it is concluded that the right of conserving coastal fisheries can have no juridical basis in the theory of the continental shelf.

The right of conservation has been well described, though perhaps too easily vindicated, by Paul Fauchille in his "Traité de Droit International Public"[19]: "Le système", he says, "que nous adoptons est celui du droit de conservation. Que faut-il entendre exactement par cette formule? La conservation de soi-meme constitue un droit fondamental des Etats: elle est même pour eux un devoir. Un Etat est dès lors autorisé à prendre toutes les mesures destinées à assurer son existence, à se défendre contre tous les actes pouvant porter atteinte aux éléments de celle-ci, c'est-à-dire à son territoire, à sa population, à sa richesse matérielle . . Il lui appartiendra enfin de protéger ses propres intérêts économiques et ceux de ses ressortissants. Et tout cela, non seulement sur son sol même, mais encore sur les eaux environnantes, qui, nous l'avons dit, sont une partie du vaste océan, comme lui libres de toute souveraineté . . . C'est aussi le droit de conservation de l'Etat qui explique pourquoi il doit avoir certains droits sur la patrie de la mer contigue à son sol; c'est lui qui, en fin de compte, justifie et légitime l'existence de ce qu'on appelle la

"mer territoriale". Telle étant la raison d'être des droits de l'Etat# sur la mer littorale, il va de soi qu'il doit y posséder tous les droits nécessaires à la sauve-garde des éléments de son existence, mais qu'il ne doit pouvoir y exercer que les seules droits indispensables à cette suave-garde et seulement dans les limites réclamées par elles: en-dehors de là, la mer cotière doit, comme la haute mer, demeurer plânement ouverte a l'usage de tous." Although there may be considerable sympathy with the arguments put forward in that passage, the central thesis contained therein must, it is submitted, be rejected as unacceptable, as it would virtually allow each state to decide for itself the extent of its right of conservation, driven by its own egotistic motives. This course would lead with unfailing certainty to conflicts with other states. It seems clear that unilateral rights of this kind can only be exercised, and recognized in law, by the consent of all other interested states, and agreement on the extent of these rights must somehow be arrived at by treaty or convention.

A fishery right cannot be thought of apart from the place. It is difficult to imagine a right to sedentary or other bottom fisheries without some sort of right to the banks. Even if no exclusive rights are claimed but only conservation rights, the coastal state must be able

to enforce its regulations, for instance to prevent fishermen from dredging or using trawl on the banks before the season for oysters is open. With such difficulties in mind the International Law Commission in its 3rd Session made a number of interesting proposals in the 3rd draft article: "The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have been long maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishingactivities on an equal footing with nationals. Such regulation will however not affect the general status of the areas as high seas.

1. The Commission considers that the sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the universal resources of the subsoil, whereas in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g. stakes embedded in the sea-floor. This distinction justifies a division of the two problems.[20]
2. Sedentary fisheries can give rise to legal difficulties only where such fisheries are situated beyond the outer limit of territorial waters.

3. Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, have been regarded by some coastal states as under their occupation and as formerly part of their territory. Yet this has rarely given rise to complications. The Commission has avoided referring to such areas as "occupied" or "constituting property". It considers, however, that the special position of such areas justifies special rights being recognized as pertaining to coastal states whose nationals have been carrying on fishing there over a long period.[21]

4. The special rights which the coastal state may exercise in such areas must be strictly limited to such rights as are essential to achieve the ends in respect of which they are recognized. Except for the regulation of sedentary fisheries, the waters covering the sea-bed where the fishing grounds are located remain subject to the régime of the high seas. The existing rule of customary law by which nationals of other states are at liberty to engage in such fishing on the same footing as nationals of the coastal state should continue to apply."

This can be taken to mean that exclusive rights are to be ruled out. Only conservation rights are to be exercised by coastal states, in order to prohibit trawling where there is serious danger of over-fishing. Sedentary fisheries remain as one of the few restrictions on the freedom of the seas recognized in international law.

At this stage of the analysis we shall turn to a review of important fishery disputes and some of the settlements that have been attempted. This survey will be done on a regional basis, divided between the North East Atlantic, the North West Atlantic and the North Pacific.

SECTION C

THE ORGANIZATION OF PROCEDURES

So far our attention has been devoted to the problems of the world's fisheries as a universal concern, first by sketching some of the non-juridical aspects, and then by tracing in more detail the growth of legal doctrine round fish and fisheries. The opportunity has been taken to explore the doctrine and to high-light those aspects by reference to certain specific disputes as they have erupted in different parts of the world. Now it will be necessary to examine how those techniques and theories have been applied within the last 150 years. Let us submit them to the "pragmatic test".

By the end of the Napoleonic Wars, Western civilization had reached one of its most important turning points. The theory of revolutionary democracy had been put into practice in both the Old World and the New; its inherent contrariety had been demonstrated in one case, its inherent tenacity in the other. But weak or strong, its virtues rested on faith in the universal rights of man. As the 19th century advanced this faith was increasingly expressed in political terms, reflecting an expansion of

ethical horizons, the evolution of a universal conscience. Correspondingly, scientific discoveries cut the world down to a size that could be comprehended by all. The existence of world-size problems became apparent and the application of world-size remedies became feasible.

In that era of international trade and navigation giant steps were taken towards a world legal order that lay ahead. Political disruptions failed to halt these steps and in some ways served to hasten them on. In recent times such organisations as the League of Nations and United Nations, conceived on the highest and broadest plane, have striven to accomplish that end with the minimum of friction and failure.

Experience has suggested, however, that the best means of reaching that goal is to conserve and use the best of the past to shape the future, rather than to start afresh with radical innovations. Accordingly, the best future for fishery regulation, considered as a world-wide problem, may lie in the works of regional conventions and agencies. Assuming this to be a practical and useful method of approach, we shall now consider the results achieved in three important regions - the Northeast Atlantic, the Northwest Atlantic, and the North Pacific - by means of convention and judicial arbitration.

Chapter 8: The Northeast Atlantic Region

("Man marks the earth with ruin, - his control
Stops with the shore."

Childe Harold's Pilgrimage, Byron)

We have seen in a previous chapter that the development of modern maritime states round the North Sea basin in the 17th and 18th centuries produced nationalistic policies jealously intent on preserving the status quo in respect of home fisheries, even to the total exclusion in many cases of foreign fishermen who seemed to threaten the existing stocks. National rights of exclusion were brought into clearer definition with the emerging theory of the territorial sea, and conversely the chief questions affecting the width of the territorial belt were still concerned with sea fisheries. The nebulous nature of the international law relating to fishery rights made it necessary in the 19th century for the European states to convene and settle specific disputes as they arose.

In the 18th century fishing disputes between British and foreign fishermen round the British coast had been a perennially running sore in international relations and only the sterner realities of the Napoleonic War brought a brief respite in those regions. As soon as peace was restored, encroachments and mutual recriminations were

resumed. The Dutch were no longer a formidable maritime power, but they were still the most efficient drift-net fishermen in the world, although the British and French had long since learned the arts of commercial fishing from them. Objections against Dutch incursions were again raised at the highest diplomatic levels and in 1824 the King of the Netherlands issued a decree prohibiting Dutch fishermen from fishing within six miles of the Scottish coast.

I The English Channel Fisheries

In the English Channel disputes were even more acrimonious between British and French fishermen. After the war the latter began to fish intensively along the English coast, at a time when the British fisheries in that region had suffered a serious decline. A Select Committee of the House of Commons[1] found that the depression in the British fishing industry had begun with the peace in 1815 and such were the feelings of resentment aroused between the two countries during the war that the French predatory raids were blamed for this decline, although it was clearly due to a variety of economic factors. The disputes between the French and British fishermen arose from a basic conflict between two modes of fishing: the trawler, dragging the sea-bed for demersal fish, often dragged the drift nets carefully laid for pelagic herring which lay in its path.

On the part of French fishermen too there were numerous complaints, the most bitter referring to the dredging for oysters off the French coast.

In 1839 a convention was concluded at Paris "to define and regulate the limits within which the general right of fishery on all parts of the coasts of the two countries shall be exclusively reserved to the subjects of Great Britain and of France respectively".[2] Under this convention the exclusivity of the three-mile zone, measured from the low-water mark, was to be respected on both sides, and it was equally agreed that "the distance of three miles fixed as the general limit for the exclusive right of fishery along the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland." Also, a host of fishery regulations were to be observed alike by British and French fishermen in extra-territorial waters. Agreement was reached on the numbering and lettering of fishing-boats, and the types of fishing apparatus to be employed were defined.

The regulations laid down were comprehensive, complex and inflexible; in the light of to-day they seem unscientific and clumsy. Moreover, they were difficult to enforce and it was the means of enforcement that proved to be the fatal

cancer in the body of the treaty. All fishing vessels in the Channel came under "the exclusive superintendence of the cruisers and agents of their own nation" but the cruisers of one nation were expected to "acquaint" the other of infractions by its nationals. Further, cruisers were entitled to examine a ship's papers and virtually to arbitrate disputes on the high seas. By an exchange of diplomatic notes this was interpreted to apply only when there was justifiable suspicion of a violation of the regulations. In practice the enforcement machinery broke down. The French complained of laxity on the part of the British in enforcing the regulations against their own nationals, and threatened to abrogate the convention. The Belgians, not bound by the bilateral agreement, persisted in fishing within the three-mile zone, and the Irish demanded the right to exercise protective jurisdiction over their oyster beds outside the three-mile limit.

Moreover, although it was desirable that a limit of exclusive fishing should be precisely fixed, it was unfortunate in some respects that the zone selected should be so narrow. There can be little doubt that it was chosen to conform with the limit already recognized in Britain and America as bounding the territorial sea for purposes of neutrality, and because it was deemed sufficient, but no more, than sufficient, to afford protection to the breeding of fish and fish-spawn, which was mistakenly

assumed to be confined to coastal waters.

Although it failed, the 1839 Convention deserves an honourable mention in the history of fishery regulation, for it gave expression to some of the underlying and unspoken concessions made during the Anglo-Dutch controversies of the 17th century. It represents an early and praiseworthy attempt to regulate the activities of fishermen on the high seas through bilateral agreement, whereby each nation was to exercise some control over the nationals of the other. Two great powers had recognized the three-mile limit as the exclusive fishery zone of the littoral state. The importance of some form of fishery regulation had been acknowledged, even though it was designed only for preventing disputes among fishermen of different nationalities outside that zone. A means for enforcing the regulations had been conceived, though found unworkable. Finally attention had been focussed on the need for conservation even though the scientific basis for such measures was lacking. In 1867 a new convention was concluded between the same two countries, boundaries were re-affirmed and police provisions refined and extended, but differences of interpretation developed and the French Government failed to pass the necessary legislation to enforce the new regulations.

II The North Sea Fisheries

By the 1870's fishing disputes in the coastal regions of the North Sea basin had reached an extremely serious pitch and it was apparent that international regulations must be established to keep the peace among the fishermen of many nationalities who vied for catches there. In 1881 a conference of the North Sea powers - Britain, France, Germany, Belgium, Holland, Denmark, Norway and Sweden - was convened at The Hague. Once again, as in the English Channel, attention was primarily devoted to the prevention of disputes rather than to the conservation of the fishery in question, but the dangers of overfishing were not entirely ignored. A German proposal for a mutual policy of conservation in respect of fry of fish and small fish was dropped on the call of France, as the convention had not been called for that purpose. Britain and Belgium cited with apparent approval a report drawn up by Messrs. Buckland and Walpole to the effect that "nothing that man has done, and nothing that man can do, can affect the supply of herrings in the sea."[3] Fulton comments upon this: "Even if this were approved for the herring in the absolute form in which it is expressed - and it is clearly illogical and unwarrantable to pledge the future in this loose way - it obviously might not, and in point of fact does not, apply to the great bulk of the fishes that

would have been affected by the German suggestion". As it happened, the delegates were content to "call the attention of the Governments to the need of a profound examination of the question".

The positive results of the 1882 Convention were, however, noteworthy. Uniformity was agreed upon in the marking and registration of all fishing vessels. Steps were taken to minimize conflicts between trawlers and drift-net fishermen, by placing the onus squarely on the trawlers to avoid drift-nets, prescribing lights for all ships, and prohibiting the cutting of nets, except in extreme cases. Rules of salvage also found general approval. It might also be mentioned that here too, as in the 1839 Convention, jurisdiction for policing purposes over the fishing vessels was reserved exclusively to the State whose flag was shown.

Strictly speaking, the 1882 Convention was a success, for it accomplished what it set out to do. The international police system set up for the whole of the North Sea Fishery has had the desired effect of minimizing disputes between fishermen of different nationalities in that region. Except for minor changes the Convention has remained in force until to-day. With the wisdom of hindsight, however, we may criticize the Convention on two grounds. In the first place, the delegates failed

to take advantage of an auspicious and historical occasion to promote the national exploitation of the fishery. Means could have been provided for the scientific investigation of conservation problems prior to the erection of machinery for the international regulation of the fishery. Convened on a regional basis, this conference might have served as a model of enlightenment for succeeding generations faced with similar problems in other parts of the world. In the course of events it was only after the North Sea fishery had begun to decline and the trawlers had turned to more distant grounds, that the North European nations collaborated to form the Permanent International Council for the Study of the Sea. The chance of a new approach was missed, and the initiative passed to the New World.

The reason why this chance was missed is related closely to the second general criticism of the Convention: the need for scientific research on an international footing was obscured by, and subordinated to, the need for a definition of the territorial sea and inland waters. The fault does not lie in a wrong priority of needs but rather in a confusion of aims, to the detriment of both. As we have seen, this was not the first time that fishery problems were to be bedevilled by conflicting views as to a more complex and further-reaching problem, the international law of

the territorial sea. The British Government, in curious contrast to its attitude adopted earlier in the century, desired to avoid any definition at all of the territorial belt, or exclusive fisheries zone, but it was objected that at a special convention dealing with the high seas it was impossible to do otherwise than begin by defining the limits within which it was intended to operate. The French delegates proposed that the extent of territorial waters should, for fishery purposes, be defined in precise terms, and it was urged that the boundary everywhere should be fixed at three miles from the low-water* mark, whatever might be the configuration of the coast. This limit was to be applied also to bays, the distance of three miles to 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".[4] An exception was made in the case of the Zuider Zee, and it was agreed also to exclude the Skagerrack, the fisheries of which were stated to be not international, but "essentially within the jurisdiction of the States to which the shores belong". The Norwegian fjords and indentations were not to be treated separately and for this reason, among others, Norway and Sweden, who also objected to this criterion of measurement, were unable to accede to the convention.

* Low-water mark is, incidentally, a misnomer, for the low tide leaves no recognizable mark in the way that the high tide does, on the sea-shore.

It was sufficiently disturbing that Norway and Sweden were prevented from participating by the majority adoption of the three-mile and the ten-mile rules. But this adoption has been shown to be doubly unfortunate by the recent judgment of the Anglo-Norwegian Fisheries Case (I.C.J. 1951), which suggests that such conventions as that of 1882 tended to reinforce a mistaken belief in the internationally binding character of the Anglo-American rules of delimitation of the territorial sea. The fact that these rules were accepted, tacitly or expressly, by most of the principal maritime powers, does not appear to have established them as part of international law. As argued by Fulton, there appears to be little doubt that, in many cases at least, the three-mile boundary which became the common denominator in so many fishery conventions, was inadequate from the point of view of international law generally. In the light of present troubles, the mésalliance of these two points of view has much to answer for.

III The Moray Firth Fisheries

The view is frequently expressed that the most effective method of conserving fisheries with the least possible conflict between states is by the unilateral assertion by a maritime country of a right of jurisdiction over the fisheries outside its territorial waters. Such an assertion

can be based either upon a claim to sovereign rights over the waters involved, or upon a claim to sovereign rights in the sea-life, because of the animal's peculiar habits which associate it with particular shores. The latter argument was advanced in the Bering Sea fur seal controversy, which will be discussed in a later chapter.[5] As far as the North Sea is concerned, the former type of argument was more likely to prevail. One of the most famous fishery controversies was that which raged round the Moray Firth, which is a much-fished estuary on the North-East coast of Scotland. In order to meet the growing threat of trawlers to the line fishermen in that region, and to the fisheries themselves, the recently formed Scottish Fishery Board had prior to 1895 been instrumental in having passed a number of local ordinances and bye-laws affecting large areas of water outside the three-mile zone.

In 1905 a case was brought before the Sheriff Court at Dornoch arising from a violation of these new enactments. (Peters v. Olsen 7 Court of Session Reports, 5th Series.) Olsen, flagmaster of the Norwegian ship "Catalonia", was prosecuted for trawling within a prohibited area beyond the three-mile limit from shore but within three miles of the ten-mile base-line across the Dornoch Firth, which was sanctioned by the North Sea Convention of 1882. Olsen's plea of no jurisdiction was sustained on the Ground

that the "Catalonia" was registered in Norway and Norway did not subscribe to the North Sea Convention. On appeal to the High Court of Justiciary in Edinburgh the decision was reversed, the judges holding that the prohibition in The Herring Fishery (Scotland) Act of 1889, being quite general in terms, was applicable to foreigners as well as to British subjects, and that it was not for them to draw a distinction which had not been made by Parliament.

Thereafter, Scottish courts using Peters v. Olsen as a precedent applied trawling regulations against all foreigners as well as nationals, and there followed a series of convictions against Norwegian masters for violations by local courts. The most famous of these was Mortensen v. Peters (SLT Reports XIV 1906-7, p. 227) in which the Sheriff went further in holding that the Moray Firth was within the territorial waters of Scotland. On appeal, to a Full Bench of the High Court of Justiciary, the conviction was unanimously upheld. In the leading opinion Lord Dunedin treated the question as one of construction only, since the courts had nothing to do with whether an Act of the Legislature was ultra vires or in contravention of international law; they had only to give effect to it. Accordingly, the Court's ruling issued from the absolutely sovereign role of British Parliament in its function of law-making, so that no appeal to the text of an international convention, even one ratified by

the British Government, can overrule the presumed intention of the Legislature.

The exercise of this jurisdiction against foreign trawlers attracted a fusillade of diplomatic protest challenging the British claim to the Moray Firth and contiguous waters. In view of these protests, and also because of the mounting pressure from trawling interests at home, the British Government eventually decided to release the foreign ships which had been seized and to refrain from prosecutions of this kind against foreign trawlers under the 1889 Act. In so doing it lent weight to the view that any regulation of fisheries beyond territorial waters could be made only through bilateral or multilateral agreements. By rigorous adherence to its traditionally held three-mile and ten-mile rules, the British Government had created an extraordinary position in which British trawlermen were debarred from fishing in their home waters while foreign trawlers were legally free to come and go, to the considerable consternation of the former. In practice, ruffled feelings were gradually assuaged by discreet concessions made at diplomatic level, but the lesson in favour of international fishery regulation has never been more painfully learned. This case is notable also as an early and striking illustration of the basic conflict between fishing interests which depend upon the high seas off foreign coasts and those which use both high seas and territorial waters off their own coasts.

This conflict was particularly marked after the establishment of steam-trawling.

IV The Norwegian Fisheries

Between the two world wars the North Sea basin was recognized to be seriously overfished, particularly the plaice and haddock grounds on the Dogger Bank. More and more capital was being invested in modern trawlers which employed the most efficient fishing methods and could stay out at sea for many days on end, often ranging into distant waters. Cod was the goal and the exploitation of rich fisheries was begun off the coasts of Iceland and North Norway. The significance of this for international law was that it brought foreign fishermen for the first time into the fishing grounds of Nordic countries which had consistently declined to accept the generally observed three-mile and ten-mile rules, referred to above. Since these countries differed fundamentally from the other European states in their views as to the proper measurement of the territorial sea and inland waters it was inevitable that clashes between their nationals should become more frequent. This clash of views was reflected in the large number of convictions of British trawlermen for fishing in allegedly Norwegian territorial waters, and since many of these prosecutions brought vociferous protests

from the British Government, it was only a matter of time before matters were brought to a head. Action was pending in the late 1930's but the Second World War delayed proceedings and it was not until the Anglo-Norwegian Fisheries Case came before the International Court of Justice in 1951 that all the issues were brought into the open at an international judicial hearing.

In the form in which it was presented,[6] the case concerned the validity under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Norwegian Decree of the 12th July 1935, for that part of Norway situated north of 66°28.8' north latitude, practically all enclosed in the Arctic Circle; and the validity of the base-lines of the marginal sea drawn in such delimitation. The decree fixed 48 points on the mainland and on the islands, islets and skerries ("skjaergaard") along the coast, between which straight lines were drawn to constitute the base-lines from which the marginal sea of Norway was to be measured. The base-lines under the decree passed from point to point without anywhere following the tide-mark along the coast and frequently without touching the headlands of the individual bays. The total length of the straight base-lines was about 600 miles and these lines varied in length from about half a cable (approximately 100 yards) between closely

adjacent islands to 44 miles in the extreme instance. Eighteen lines exceeded 15 miles in length. The four-mile width of the Norwegian marginal sea was not at issue, for in its Reply the British Government declared that it would not contest this long-standing claim on the part of Norway, adding that this was not to be construed as British acceptance of similar claims on the part of any other country. Though the 1935 Decree referred to the Norwegian fisheries zone without specific mention of the territorial sea, the Court had no doubt that it delimited what Norway conceived to be its territorial sea; and the parties presented the case on this basis.

After hearing very lengthy presentations on both sides, the Court adjudged that the 1935 Decree did not constitute a violation of international law and that the lines of delimitation of the Norwegian fisheries zone, and the base-lines of the marginal sea contained therein, were valid. In the course of its judgment the Court held that the straight lines method of delimitation is not necessarily confined to bays; straight lines may also be drawn "between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the "skjaergaard" inter faces terrarum".[7] The Court held also that the

ten-mile rule for bays "has not acquired the authority of a general rule of international law"[8] and that it was inapplicable as against Norway, with its deeply indented coastline. Nor does the practice of states alone justify the formulation of any general rule of law as to the maximum length of straight lines drawn between island formations in the "skjaergaard".

This judgment must be ranked as one of the most far-reaching and most controversial events in the history of international fishery regulation. The rules of law laid down by the Court are fundamentally divergent from those accepted by the majority of states at the Codification Conference on Territorial Waters held at The Hague in 1930, and they are a dramatic affirmation of the present trend back to the mare clausum in many parts of the world, with repercussions far beyond the North Sea. Indeed even before the case was heard, the preliminary acceptance by Britain of the Norwegian claim to a four-mile zone was highly significant, marking as it did a departure from the uniformity of the traditional three-mile rule by its most ardent champion. In view of the great importance attaching to this case it will be necessary to analyze it, and the circumstances leading to it, in some detail.

In the 16th century, towards the end of the (original) mare clausum era, the Kingdom of Denmark-Norway still maintained pretensions to exclusive sovereignty over all the Northern Seas. These claims were disputed by Elizabeth I of England between 1583 and 1602 with respect to the fisheries off Iceland and Norway, and in negotiations with Denmark English diplomatists at this time championed the freedom of fisheries on all seas. But as we have noted, the accession of James I brought the Scottish policy of exclusive fishery into favour in the English court, and the rising challenge of Dutch maritime power gave birth to a more jealous naval policy on the part of their British rivals. James attempted to exclude Dutch fishermen from the fisheries off the English coast, but also agreed with Christian IV of Denmark-Norway, by royal letter in 1616, that British nationals would thenceforth refrain from whaling and fishing off Norway. James was as good as his word and it was to his letter of 1616 that the International Court of Justice attributed the absence of British fishing-boats from Norwegian waters down to 1906. However that may be, British fisheries in that region suffered a sharp decline until the trawlers appeared in the opening years of this century.

After 1616 the Dutch continued to contest Denmark's large claims. Then Norway's own fisheries dwindled and until the second half of the 19th century the most important

fisheries off the north coast of Norway were those of Russia, based at Archangel. In the mid-18th century payment was made by the Russians for the privilege of fishing beyond one league from shore and of landing for bait and for curing the catch. But by 1830 these payments were made in respect only of the right to land, and the fishery beyond one league from shore was recognized by Norway to be free. Meanwhile, Denmark was forced to reduce her maritime pretensions. The Royal Resolutions of 1756-9 defined a league for the purposes of prize rule as equal to four miles, and in 1812 a new decree stated that "in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea-league from the island or islet farthest from the mainland not covered by the sea." The one league limit had begun in 1745 solely as a neutrality limit but, as had happened elsewhere in the world, the neutrality limit was extended to apply to fisheries. It is noticeable that the four-mile league entered Danish-Norwegian practice in prize law almost half a century before the three-mile league entered international practice as the neutrality limit of the United States during the Napoleonic Wars. In the Fisheries Case Britain stressed that its admission of acquiescence in the four-mile league used by Norway was due to its greater antiquity as an international custom.

In 1927 the eminent Norwegian jurist Rœstad pointed out the improbability of the 1812 Decree having been intended to lay down imaginary straight lines as a basis for the delimitation of the territorial sea since the traditional Norwegian law was associated with the range of vision, which pre-supposes a base-line on the actual land. Norway's system of straight base-lines, therefore, did not derive directly from the 1812 Decree but from constructions put upon that decree in later legislation, namely the Royal Decrees of 1869 and 1889. These decrees in effect formed the bridge in Norwegian law between the rules of delimitation for the purposes of neutrality and for the general purposes of all state interests, of which the fisheries were an outstanding case in point. Moreover, in the eyes of the Court the delimitation effected by the Decrees of 1869 and 1889 "constituted a reasoned application of a definite system applicable to the whole of the Norwegian coast-line and was not merely legislation of local interest called for by any special requirements." [9] In other words, the Norwegian system of straight base-lines was considered to date from 1869.

Only the French Government queried the 1869 Decree and the explanation given by the Norwegian Ministry for Foreign Affairs appeared to satisfy the French Government, for the latter did not pursue the matter further. This presumed

acquiescence by the French is important, for the Norwegian Reply contended that "in spite of the adoption in some treaties of the quite arbitrary distance of ten sea-miles (between islets) this distance would not appear to have acquired the force of an international law." The Court held that it must be presumed that Britain, being vitally interested in matters affecting the North Sea fisheries, must have known of the existence of the 1869 and 1889 Decrees, yet made no official protest and was accordingly considered to have acquiesced in the Norwegian system of delimitation described therein.

As soon as British trawlers appeared off North Norway in 1906 the problem of delimitation of Norwegian waters was brought into sharper focus. In 1911 a Royal Commission was set up to inquire into the limits of territorial waters on the Finmark coast, and in its Report, published in 1912, the Commission stated categorically that Norway claimed as fjords not only the waters enclosed by the mainland but also those waters possessing the character of fjords by reason of a series or group of islets on one or the other side. "En général, dans les cas particuliers, on prendra le plus sûrement une décision en conformité avec la vieille notion juridique norvégienne, si l'on considère la ligue fondamentale comme étant tirée entre les points les plus extrêmes dont il pourrait être question, non-

obstant la largeur de la ligue."[10] But the Red Lines drawn by Norwegian experts during the 1924-5 Conversations between the Norwegian and British Governments were still much closer in many cases to the coast than the lines drawn under the 1935 Decree.

At the 1930 Codification Conference on Territorial Waters Norway, in opposing the views of the majority of states in the matter of delimitation, made a clear-cut claim to its own system of straight base-lines, but did not expressly subscribe to the principle of following the "general direction of the coast". In the Fisheries Case Norway contended that the failure of the 1930 Conference to reach universal agreement had put an end to the whole system of fixed maritime limits, arguing that the littoral state is never entitled simply to fix the extent of its coastal waters in accordance with its "legitimate interests". As this would have repudiated the need for consent by other states, which is the basis of customary international law, Norway was forced to abandon the theory of "legitimate interests" except in the matter of delimitation of base-lines. But it is clear that the principle under which a unilateral extension of maritime limits is not binding on other states without their acquiescence is relevant also in the case of the extension of inland waters. The Court emphasized in its judgment that the delimitation of sea areas has always an international aspect. "It cannot

be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the 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." [11]

In the St. Just Case (1933) the Supreme Court of Norway anticipated the 1935 Decree and in delivering the majority judgment, Judge Klaestad, who was later to be one of the judges in the Fisheries Case held that: [12]

(a) the four-mile limit does not follow all the curves of the coast but must be drawn in accordance with straight base-lines; and

(b) the base-lines must be drawn in accordance with the general direction of the coast.

The judgment in this case also upheld the 1869 and 1889 interpretations of the 1812 Decree, adding that the latter had never been understood or applied "in such a way as to make the boundary follow the sinuosities of the coast or to cause its position to be determined, by means of circles drawn round the points of the "skjaergaard" or of the mainland furthest out to sea - a method which it would have been very difficult to adopt or to enforce in practice, having regard to the special configuration of the coast."

The 1935 Decree in its preamble sets out the considerations on which the Norwegian method of delimitation is based,

referring to:

(a) "well-established national titles of right,"

(b) "the geographical conditions prevailing on the Norwegian coast",

(c) "the safeguard of the vital interests of the inhabitants of the northernmost parts of the country";

and it further relies on the Decrees of 1812, 1869, and 1889 already referred to. These four factors - historic title, geographical realities, economic interests and acquiescence - were all to be taken into account by the Court in the Fisheries Case.

The major premise of the Court's findings was that "since the mainland is bordered in its western sector by the "skjaergaard", which constitutes a whole with the mainland, it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters"; and this solution was dictated by geographical realities. The low-water mark rule was accepted by both parties as the criterion of delimitation but they differed as to its application.

Three methods of delimitation associated with this rule were reviewed by the Court. The first and simplest was that of the tracé parallèle, "which consists of drawing the outer limit of the belt of territorial waters by following the

coast in all its sinuosities."[13] The Court held that the method could not be applied in the case of a deeply indented coast-line, such as that of Eastern Finmark, or where it is bordered by an archipelago such as that of the "skjaergaard" along the western sector of the Norwegian coast. Here the great number of bays and islands form too many exceptions to the coastline rule for that rule to be relied upon. "The base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast-line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast viewed as a whole, calls for the application of a different method."[14]

The second method mentioned by the Court was the "arcs of circles" method (courbe tangente) which was stated to have been proposed by the United States delegation at the 1930 Conference, although actually in use by mariners much earlier. The Court held that since this method was admitted by Britain to be "not obligatory by law", it was not necessary to discuss its merits.[15] It seems unfortunate that the Court discarded this rule so readily, for the normal way of determining distance at sea is by means of arcs of circles and this could be applied also to measuring the distance of a

ship from the nearest point of land. It would seem appropriate also that littoral states might consider the same mode of measurement for the territorial belt, starting from the low-water mark on land. Such a method would allow the coastal state to obtain the maximum area of water that can be covered by a three- or four-mile limit. In the case of minor sinuosities on a rugged coast-line such arcs drawn from the outermost headlands would intersect at a point further from land than the arcs drawn from points on shore within the folds of minor sinuosities. This method would not of course solve the problem of bays and islands but neither would it complicate it. It would have the advantage of describing an outer rim of the territorial sea that followed the coast-line without reproducing the configuration in every detail and suffering the inconsistencies of the tracé parallèle method.

In the third method adopted by Norway - that of straight base-lines following the general direction of the coast - the Court expressed its approval, provided that the coastal state had "not encountered objections of principle by other States." For determining the extent of the territorial sea,[16] the Court specified three kinds of criteria which, "though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question";

(1) "the close dependence of the territorial sea upon the land domain", allowing coastal states only minor departures from the general direction of the coast to meet "practical needs and local requirements." Though generously phrased, this criterion is restrictive in intent and is based on the universally accepted rule that territorial waters are appurtenant to the land.

(2) "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them." This was the criterion which applied most tellingly to Norway, for in the Court's opinion the sea areas lying within the base-lines claimed under the 1935 Decree were sufficiently closely linked to the land domain to be subject to the regime of internal waters.

(3) "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." Professor Waldock comments on this:[17] "The Court seems to have treated Norway's economic-historic interest as a supplementary factor confirming and, if necessary, actually legalizing a line the conformity of which with the general direction of the coast might on purely geographical grounds be open to argument."

> Certainly it is true that criteria of this third kind would seem to place the judicial reasoning on a more subjective level than is normal or desirable in such contentious matters.

The Court goes on to point out that "although the ten-mile rule (as applied to bays) has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." Furthermore, there is no general rule of law that can be applied to the various formations of the Norwegian "skjaergaard": "the attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays . . . have not got beyond the stage of proposals."[18]

The combination of the Court's "general direction of the coast" ruling with its rebuttal of any general rule delimiting bays, seems to blur, if not to obliterate entirely, any distinction between historic and ordinary bays. Henceforth,

it would appear that any bay enclosed by a base-line which can be said to follow the general direction (not the line) of the coast may be claimed as inland waters. Only in cases of manifest abuse of the "general direction of the coast" principle would a plea to historic title to inland waters be relevant.

In pleadings before the Court Norway placed a good deal of reliance on the special character of the Norwegian coast, and the Court accepted the view that the coast-line rule was inapplicable to it on this account. There remains unanswered the question how far the emphasis placed by the Court on the exceptional character of Norway's coast limits the scope of the new "general direction of the coast" rule. In his Dissenting Opinion Sir Arnold McNair drew a comparison between the coast-line of North Norway and that of North-West Scotland, which is "not only heavily indented but possesses in addition a modest 'island fringe', the Outer Hebrides, extending . . . for a distance of nearly one hundred miles . . ."[19]; and many other equally broken coast-lines could be cited also, to qualify for the Norwegian rule. On the other hand, just prior to the Fisheries Case judgment the American geographer S. Whittemore Boggs (American Journal of International Law 1951 p. 249) actually used a section of the Norwegian "skjaergaard" to illustrate a perfectly normal delimitation by arcs of circles. Certain passages in the majority judgment give the impression that the Court considered the Norwegian coast to be wholly ex-

ceptional and applied an exceptional rule. But the Court stressed that it was only applying general international law to a specific case, and although Norway's 1935 line may be a precedent for the method of applying the "general direction of the coast" rule on other exceptionally broken coasts, it is not a precedent for unlimited straight base-lines all round every coast. It remains to be seen how many countries will be encouraged to copy the Norwegian straight base-line system in order to enlarge the extent of their internal waters as well as their territorial belt. The temptation will be strong for those that have already made exorbitant claims over the high seas such as some of the Latin-American countries. Iceland was already committed to follow the Norwegian system and the Fisheries decision encouraged her to ban all foreign trawlers from extensive areas of her coastal waters in which they had fished for nearly a hundred years to the serious depletion of the stocks there. This has prompted Professor Waldock to ask the question whether members of the international community have not some sort of prescriptive right to the use of the high seas within established boundaries. "At a time when some reversal of movement from the mare clausum to the mare liberum is already evident, it is particularly necessary that the consensual basis of maritime rights should not be unduly weakened."[20]

In holding that the Norwegian system had the "general toleration of the international community", because of the lack of diplomatic protest against the Decrees of 1869 and 1889, the Court seems to have laid a heavy onus on states to scrutinize the domestic legislation of other states, lest their silence be interpreted as acquiescence and prejudice their interests. The Court's ruling seems to suggest that actual knowledge is sufficient to set the prescriptive period of "toleration" running against the state concerned. But Judge Read in his Dissenting Opinion expresses the view that states are entitled to rely on established rights under general law and not bound to raise objections until their interests are directly affected. However, it seems unsafe to remain silent in the knowledge of such a claim. Perhaps the moral is that those states which are concerned with preserving the freedom of the seas should pursue a more energetic policy by making more frequent objections or reservations against claims considered to be objectionable. It may be that the United Nations Legislative Series of government enactments in specified fields will help somewhat in this respect.

Caution should be exercised in drawing conclusions from the Court's references to historic title. It is brought out in the context of the judgment that the historical factor is only one of several - geographical, economic,

and otherwise - considered as evidence of the vital economic interests of the coastal population in the disputed sea areas. Thus the historical reference is only one of many factors that might be taken into account in applying the general principles of international law.

Enough has been said to stress the great importance of the Anglo-Norwegian Fisheries Case to the future of the international regulation of fisheries. Whatever might be thought of the merits of the judgment laid down, it can at least be truly said that the shock it has administered, particularly to lawyers trained in the Anglo-American school of jurisprudence, has been a healthy one, dispelling many cobwebs of prejudice and clearing the way for fresh thinking in one of the most unsatisfactory terrains of international law. It is noticeable that the four judges who dissented in whole or part were all trained in the Anglo-American legal system, and this has been regarded by some as evidence of the existence of two distinct approaches to the problems of international law. If this is a true diagnosis, the Fisheries case may come to be treated as the turning-point in the predominance of Anglo-American juridicial thought in the international field. It might be argued that the British case attempted too much, propounding a set of rules alleged to be general principles of law, and that this unofficial "codification" of the law of the sea

failed in the same way as the official codification failed in 1930.

In Chapter 3 we pleaded the cause of the fisherman, defending his interests where they might conceivably be overlooked when the problems are macroscopic. The presentation of the British case seems to have been more directly oriented towards the recognition of a general rule that could be applied more or less equally across the world. The two dissenting judges were implicitly of the view that the interests of the fishermen, Norwegian or foreign, were somewhat irrelevant, and this follows logically from the prior assumption that the extent of the territorial sea, subject to certain exceptions, was determined by geometrical rules. By this logic, there is no room for sentiment in geometry, and a purely abstract system cannot take account of special human needs. The majority, however, did not confine itself to stating the exception but declined altogether to grant the general rule, and it results from the decision that the protection of the economic interests of its people may lawfully be considered by a government in defining the limits of its territorial waters.

Before we leave this chapter, essentially related to the Northeast Atlantic region as a whole, mention should be made of the more recent international agreements affecting fishing in that area. By means of studies initiated

by the Permanent International Council for the Exploration of the Sea, a Baltic Convention was concluded in 1929 by Denmark, Germany, Poland, Danzig, and Sweden, prohibiting trawling and providing for a closed season. Another convention was concluded in 1932 for the protection of the plaice fishery in the Skagerrak, Kattegat and the Sound, between Sweden, Denmark, and Norway. In 1937 a further convention was signed in London by Belgium, Denmark, Germany, Iceland, Irish Free State, Netherlands, Norway, Poland, Sweden, and the United Kingdom, which attempted to incorporate the provisions of the 1837 and 1882 Conventions. Its purpose was to prevent disputes arising out of trawling and to pass extensive conservation measures which could be modified later by the International Council for the Exploration of the Sea. This convention was never brought into force, however, and a similar attempt made in London in 1943 was equally abortive. A third conference was held, again in London, in 1946, and this, the so-called International Overfishing Conference, was attended by delegates from twelve states and by an observer from the United States. Recognition was given to the "necessity for some international control of fishing effort, mainly in the North Sea, and possibly in other seas adjacent to the British Isles, threatened by overfishing." A Standing Advisory Committee was appointed

to study methods of preventing overfishing in these areas and adopted a draft Convention regulating meshes and the size limits of fish, which came into force in 1953. A Permanent Commission has also been set up to consider what further conservation measures may be required, and some of this investigation is now being conducted in collaboration with the International Commission for the Northwest Atlantic Fisheries, whose "jurisdiction" overlaps to a certain extent.

Chapter 9: The Northwest Atlantic Region

("All your strength is in your union
All your danger is in discord"

- The Song of Hiawatha - Longfellow)

The North Atlantic has produced the oldest fisheries in the Western Hemisphere, some of which have been established for more than 300 years. The fisheries of the Northwest Atlantic, in particular, have been the cause of much political manoeuvring on the part of the states with imperial and other interests in that region and, as we have noticed in Chapter 4, the fishing industry of the North American Maritimes was at the centre of events which culminated in the defeat of the French Empire on the American continent, the birth of the United States, the collapse of the British mercantile system in the Maritimes, and the Confederation of Canada.

I General Historical Survey

It can be said in truth that the fishing industry associated with the Northwest Atlantic dominated the economic history of the Maritimes almost from the date of discovery by John Cabot in 1497, and a long series of fishery legislation and treaties can be traced from

the earliest days of colonization. The earliest recorded attempt to regulate these fisheries is a list of orders issued on the thirteenth day of August, 1611, by a Mr. John Guy, then Governor of the Colony of Newfoundland:[1]

"Whereas by authority of our sovereign Lord James, by the grace of God of England, Scotland, France, Ireland, and Newfoundland King, a plantation and government is begun to be settled within this country of Newfoundland; And whereas among those persons that use the trade of fishing in these parts, many disorders, abuses, and bad customs are crept in which are continued and yearly practised more of a corrupt usage than of malicious designs, forasmuch as it concerneth not only the benefit and profit of the trade of fishing, but also the public behoof and good, if all such grievances should be stopped, to the end that all persons should reform themselves in their proceedings and not plead ignorance that any prohibition was made, The now Governor of the said country in our said Sovereign Lord the King's name doth straightly charge and command all persons of what nation soever, that shall frequent those parts to exercise the trade of fishing, as well strangers as subjects to our said Sovereign Lord the King, that they offend not in any thing forbidden by

virtue of this proclamation, under the penalties herein specified, and as they will answer to the contrary at their perils."

The nub of the problem was that to catch cod fresh bait was required, usually caplin or squid. The cod fishery off the banks of Newfoundland was open to all but to fish it profitably foreign fishermen had to come within the three-mile zone to get the bait. It was also necessary to have the liberty to cure and dry the catch before carrying it home. Moreover, it was usually imperative for the foreign fishermen to land for repairs or to take on supplies of food, water, and salt. More often than not the shallower and warmer waters close to the shore, which teemed with halibut, mackerel and herring, proved to be an irrestible temptation, particularly in a poor cod season.

Disputes between local and foreign fishermen became so frequent that formal treaties were employed from an early date to sanction inshore fishing and the use of the shore. By the Treaty of Utrecht 1713, under which France ceded Newfoundland to Britain, French fishermen were granted continuance of a share of inshore privileges, along with British fishermen, from Cape Bonavista in the East to Cape Riche on the West, on the north side of the island; and the right to land and dry fish on that shore,

the "French shore", was given exclusively to the French. The British restricted themselves to other parts of the coast. French rights were modified in 1783 and the "French shore" was curtailed, but the use of what was left remained exclusively with the French.

Before the War of Independence all British colonists enjoyed equal privileges in fishing, but during the negotiations preceding the Treaty of Paris 1783 the question arose how far these privileges could be restored to United States fishermen. Britain denied them the right to fish in the three-mile zone of British waters or to land at all for drying or curing. By way of compromise it was finally agreed that the United States fishermen could fish on the Newfoundland coast but not land on the shore. They were also permitted to fish off other British colonial coasts and to land in any unsettled bays of Nova Scotia, the Magdalen Islands, and Labrador, as long as these shores remained unsettled, With the War of 1812 the rights of United States fishermen to fish in British waters and land on British soil terminated, and in any case most of the Nova Scotian coastline was by then thickly populated. By the Treaty of Ghent 1814 the British Government stated "they did not intend to grant the United States <u>gratuitously</u> the privileges formerly conceded to them by treaty of fishing within the limits

of British territory, or of using the shores of British territories for purposes connected with the fisheries." They contended that the claim advanced by the United States of immemorial and prescriptive right was quite untenable inasmuch as the Americans had, until the Revolution, been British subjects and that the rights which they had possessed formerly as such could not be continued to them after they had become citizens of an independent state. This led to a number of disputes and in 1818, at the suggestion of the United States Government, a Convention was negotiated in London between the parties.

The 1818 Convention of Commerce is one of the few which mark an era in the diplomacy of the world, introducing the formal regulation of trade by two governments, an idea now taken for granted in the arts of modern international trade. It is a remarkable document from many points of view, not least that it is the first treaty which commuted the cannon-shot rule into the three marine miles of coastal jurisdiction. From the particular aspect of fishery regulation, the most important part of the Convention is contained in Article I:

> "Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish, on certain Coasts, Bays, Harbours, and Creeks, of His Britannic Majesty's Dominions, in America;

it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have, for ever, in common with the Subjects of His Britannic Majesty, the liberty to take fish of every kind, on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands on the western and northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours and Creeks, from Mount Jolly, on the southern Coast of Labrador, to and through the Straits of Belleisle, and thence northward indefinitely along the Coast; without prejudice, however, to any of the exclusive rights of the Hudson Bay Company; and that the American fishermen shall also have the liberty, for ever, to dry and cure fish in any of the unsettled Bays, Harbours, and Creeks of the southern part of the Coast of Newfoundland, hereabove described, and of the Coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the Inhabitants, Proprietors or Possessors of the ground. And the United States hereby renounce for ever any liberty

heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry or cure fish, on or within three marine miles of any of the Coasts, Bays, Creeks or Harbours, of his Britannic Majesty's Dominions in America, not included within the above-mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

Under this Convention arose the "headland question", Britain insisting that the three-mile limit in the case of large bays extended from headland to headland and did not follow the sinuosities of the shore. Thus Britain claimed the whole of the Bay of Fundy, the Baie des Chaleurs, and Miramichi Bay. The United States protested, although their own bays of Delaware and Chesapeake were held to be internal waters and not open to foreign fishing. In 1836 the Legislature of Nova Scotia passed the so-called "Hovering Act" which legalized the seizure of

foreign vessels trespassing within the three-mile limit. The difficulties became acute as a result of the development of the mackerel fishery which was prosecuted by the use of purse-seines on the inshore fishing grounds which were becoming especially important to the New England fishermen. In 1847 negotiations were opened between Britain and United States for the establishment of reciprocal free trade between Canada and the United States, coupled with the concession of some fishing privileges to United States fishermen. Owing to tariff difficulties the United States appeared anxious to have the fisheries question dealt with separately but to this the British Government would not assent. At last in 1854 Lord Elgin negotiated such a treaty in Washington. Its main provisions with regard to the fisheries were that British waters on the east coast of North America were thrown open to United States fishermen, and United States waters north of the 36th degree latitude were thrown open to British fishermen, excepting always the salmon and shad fisheries which were reserved to the subjects of each country.

This Reciprocity Treaty of 1854 brought considerable benefit to Canadian trade and the fisheries enjoyed a period of relative calm. Reciprocity rights with the United States formed a protective umbrella at a time

when Britain had committed herself endearingly to the cause of free trade. With the repeal of the last of the Navigation Acts in 1849 the Mother Country had cut the umbilical cord attached to the Canadian Provinces. In 1866, However, the United States decided upon a policy of protection for her industries and the Reciprocity Treaty was abrogated. American privileges under the treaty lapsed and reverted to those under the 1818 Convention. After an abortive attempt to permit United States fishermen to fish in all Canadian waters on condition that they pay a nominal licence fee, under the federal jurisdiction of the newly-formed ~~Confederation~~ Dominion of Canada, it became necessary to take strict measures to enforce Canadian rights, and several United States vessels were captured and forfeited for infringing provisions of the 1818 Convention. Eventually in 1871 the Treaty of Washington was concluded between the two federal states whereby American fishermen obtained the use of inshore fisheries all along the British coasts of Newfoundland, Nova Scotia, New Brunswick, and Quebec, with the right to land and cure fish at any place so long as they did not interfere with private rights. In return reciprocal free trade was agreed upon in fish and fish oil, so that Canadian fishermen gained access to the valuable American market. To make up the surplus

value of the privileges granted to the United States a sum of $5½ million was assessed, and ultimately paid, in favour of Canada. But this treaty too failed to last, and in 1885 the United States Government gave notice of its termination.

Once again the conditions of the 1818 Convention automatically became effective and once again American fishermen continued to break the regulations. A Canadian protection fleet was formed, American vessels were seized, and in 1886 Canada prohibited the purchase of bait by American fishermen. The dissension led to a proposal for a new reciprocal treaty, another ad hoc International Commission was appointed in 1888, and the second Treaty of Washington was negotiated. While the provisions of this treaty were less favourable to the United States than the previous treaties, in that they provided for a delimitation of the fishing areas, concessions were recommended and, as before, free intercourse of trade in fish and fish products was permitted between the two countries. However, the U.S. Senate refused to ratify the 1888 Treaty, and in the hope that agreement would ultimately be realised, the Canadian Parliament continued the issuance of modus vivendi licences by annual statute until 1892, and then by orders-in-council from year to year until 1924.

II The Hague Award of 1910

The increasing difficulties with respect to the rights of American fishermen off Newfoundland and the demand of the Newfoundland Government for free access to the U.S. markets resulted in the submission of the issues to arbitration before a tribunal at The Hague in 1910. This was one of the first and most important of the Hague Awards under the Permanent Court of Arbitration system and as it has borne a considerable influence on the shaping of international law in relation to fisheries, it will be necessary to look at the findings in some detail.

The tribunal was asked to construe the scope and meaning of Article I of the 1818 Convention (quoted above) in several specified respects. Under the terms of the Convention Britain claimed the right to make regulations in the treaty waters without United States consent, provided such regulations were "reasonable as being, for instance, appropriate or necessary for the protection and preservation of such fisheries; desirable on the grounds of public order and morals; equitable and fair as between local fishermen and inhabitants of the United States".[2] The United States denied this right "unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great

Britain by common accord and the United States concurs in their enforcement."[3]

The tribunal was unable to agree with the United States contention that, since the French right of fishery under the 1713 Treaty was never subjected to regulation by Great Britain, the inference was warranted that the American liberties of fishing were similarly exempted. Britain's treaty obligations to France and the United States in relation to the fisheries were not identical, and the analogy itself was invalid since France, in ceding the island of Newfoundland over which she had previously exercised sovereign rights, had made specific reservations in "the right to fish and to use the strand", which were accepted by Britain. Nor did the liberties of fishing, accorded "for ever " to the inhabitants of the United States acquire a character exempting them from local legislation; the perpetuity of the grant and the specific liberties enjoyed under it bear no precise relationship to each other. The arbitrators refuted the argument that the liberties granted to the United States constituted an international servitude in their favour over the relevant territory of Great Britain. The liberties constituted at most an economic right and in no sense conferred a sovereign right, which would be the essential ingredient of a servitude in international law,

if such were susceptible of proof. It was indeed questionable whether the doctrine of international servitudes could apply to the modern state system; certainly no modern state, such as Britain, had ever admitted partition of sovereignty.

In the view of the tribunal the treaty conveyed not a common right of fishery, but a liberty to fish in common. If the consent of the United States were required for the execution of fishery regulations a general veto would be accorded to them in what was essentially domestic legislation of a sovereign state affecting its own territory. Britain was not only entitled, but obliged, to provide for the protection and preservation of the fisheries, "always remembering that the exercise of this right of legislation is limited by the obligation to execute the treaty in good faith." Accordingly, Britain had the right to impose reasonable regulations relating to the fisheries without the consent of the United States, provided such regulations were not in violation of the 1818 Treaty;[4] and United States fishermen should be obliged to obey the fishery laws in common with fishermen who were British subjects. But if the reasonableness of the regulations were contested by the United States, the matter should be submitted to an impartial authority; and it was recommended that before a contested regulation became effective it should be referred to a permanent mixed fishery commission.

Another most important question submitted to the tribunal concerned the delimitation of the three-mile zone when applied to bays, creeks and harbours. Britain contended that the United States had renounced the right to fish within all bays and within three miles thereof; that is, that the word "bays" in the 1818 Treaty was used in both a geographical and territorial sense, thereby excluding American fishermen from all bodies of water on the non-treaty coast known as bays on the charts of the period. The United States maintained that the word "bays" was used in the territorial sense and therefore limited to small bays; that they had renounced merely the right to fish within such bays as formed part of His Majesty's dominions, that is to say territorial bays; that only such bays whose entrance was less than double the marine league were renounced; and that in such cases the three marine miles were to be measured from a line drawn across the bays where they were six miles or less in width.

The tribunal denied that the three-mile rule asserted by the United States to be applicable to coasts should be strictly and systematically applied to bays."As no principle of international law recognizes any specified relationship between the concavity of the bay and the requirements for control by the territorial sovereignty, this tribunal

is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule; nor can this tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as ten-mile or twelve-mile limits of exclusion based on international acts subsequent to the Treaty of 1818 and relating to coasts of a different configuration and conditions of a different character."[5] Moreover the three-mile rule was not applied strictly or systematically to bays either by the United States itself or any other Power. Accordingly, it was held that the word "bays" must be construed in its geographical sense, and in the case of such bays "the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay;" "At all other places the three marine miles are to be measured following the sinuosities of the coast."[6] In view of the difficulties involved in the practical application of this rule, it was recommended that in the case of bays not specified in the treaty "the limits of exclusion should be three miles seaward from a straight line across the bay at the part nearest the entrance at the first point where the width

does not exceed ten miles."[7]

The ten-mile rule was approved by virtue of the fact that it had been adopted by Britain in treaties with France, the North German Confederation, and the German Empire, and in the North Sea Convention of 1882. Further, "though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers."[8] In a somewhat diffuse Dissenting Opinion delivered by Dr. Luis M. Drago, the reasoning is rather different: lacking a general principle of law universally applicable to ordinary, non-historical bays, reference must be made to the custom and usage of each individual state as reflected in its treaties and "general and time-honoured practice"; a reading of the British fishery treaties since 1818 show a constant reliance on the three-mile and ten-mile rules, which appear for fishery purposes to be inseparably linked together; but since there is no certain rule to guide the parties in the present case, due to the lack of precedent before 1818, no ruling should be adopted without a new treaty being entered into. In Dr. Drago's view, it went beyond the scope of the Award to recommend a special series of lines of delimitation, however practical.

At the suggestion of the Hague Award, a Permanent Mixed Fishery Commission was set up by Britain and the United States so that any future fishery disputes, wherever their origin, could be settled by arbitration.

During the First World War an International Commission was set up by the Canadian and United States Governments, and this commission recommended as a war-time measure the granting of full port privileges on a reciprocal basis for their respective vessels. It was also urged that the sale of bait and supplies and the disposal of catches be permitted on each other's land territory close to the fishing banks. These recommendations became effective immediately and Canada no longer demanded the purchase of modus vivendi licences by American vessels. In 1921 the United States Government unilaterally cancelled the war-time privileges accorded to Canadian vessels, and two years later Canada retaliated by cancelling the gratuitous issue of modus vivendi licences, so that United States vessels became subject once again to the provisions of the 1818 Treaty.

There is no doubt that Britain and, later, Canada, have used the right of granting American vessels favoured treatment in territorial waters as a gambit in bargaining for lower tariffs. But the advantages which Canada has to offer to-day are no longer of much importance. The develop-

ment of the fresh fish trade on the banks relatively near the New England ports and the development of new trawler techniques, where bait is no longer a necessity, have seriously reduced the value of these advantages. Even in 1929, 99% of the total landings at the principal New England ports consisted of fresh fish, and one per cent salt fish. Moreover, only five per cent of the New England catch was taken in Canadian and Newfoundland waters. Since 1891 the cod fishery has steadily declined, being replaced by haddock and mackerel fisheries.

In 1918 the Canadian Fisheries Association passed a resolution to the effect that the Governments of Canada, Newfoundland, and the United States should provide for the formation of a permanent international scientific commission to collect data relating to the fishing grounds common to two or more of these countries. This commission was formed with the additional participation of France. International problems related to various phases of the fishing industry were investigated, the chief of which were the migrations of cod, haddock, and mackerel. Efforts were also made by the council to bring about improvements in the collection of fisheries statistics in the various countries.

III International Northwest Atlantic Fisheries Convention

In more recent years these fisheries of the Northwest Atlantic have been frequented by more and more countries

and it became clear that the problems of that region could no longer be overcome by the machinery established on the traditional bilateral (or tri-lateral) basis. In February 1949 a multi-lateral agreement, the International Convention for the Northwest Atlantic Fisheries, was signed at Washington by the representatives of eleven countries "sharing a substantial interest in the conservation of the fishery resources of the Northwest Atlantic Ocean". The signatories were Canada, Denmark, France, Iceland, Italy, Newfoundland, Norway, Portugal, Spain, United Kingdom, and the United States of America. The Convention entered into force on July 3, 1950, upon the deposit of instruments of ratification by four signatory Governments, namely those of Canada (by then including Newfoundland), Iceland, United Kingdom, and United States. By 27th January, 1953, all signatory Governments had deposited their instruments of ratification. Under the Convention the contracting Governments set up the International Commission for the Northwest Atlantic Fisheries, to which each of the contracting Governments might appoint not more than three Commissioners and one or more experts or advisers.

Previously, three international conferences had been held in London - in 1937, 1943, and 1946 - but of these only the last one, the Convention of the International Overfishing Conference of 1946, came into force, and not until April 5, 1953. The earlier two conferences had considered the whole

of the North Atlantic but the 1946 Conference, at the suggestion of the United States, was restricted to consideration of the area east of 42° west longitude, because it was appropriate to separate the North Atlantic into eastern and western sections for conservation purposes. Similarly, the area to which the 1949 Northwest Atlantic Convention applies is expressly defined but in this case it is much more extensive than the scene of the age-old fishery disputes which we have been considering hitherto from various aspects: from a line 39° north latitude, south of Rhode Island, U.S.A., as far north as 78° 10' north latitude, off the west coast of Greenland. This huge area was, however, divided into five sub-areas, and in the Annex to the Convention various signatory states were designated to one or more of these sub-areas as Panel representatives for an initial period of two years, whereafter the Panel representatives are reviewed annually by the Commission. Panel representation is determined on the basis of "current substantial exploitation", in the sub-area concerned, of fishes of the cod group, of flatfishes, and of rosefish, "except that each Contracting Government with a coastline adjacent to a sub-area should have the right of representation on the Panel for the sub-area". Commissioners of Contracting Governments not participating in a particular Panel may attend the meetings of such Panel as observers.[9]

The functions of the Commission include scientific

investigation, statistical compilation, and the publication of scientific, statistical, and other information relating to the Northwest Atlantic fisheries.[10] Each Panel is responsible for keeping under review the fisheries of its subarea and the scientific and other information relating thereto, and it may make recommendations to the Commission for:[11]

a) joint action by the Contracting Governments;

b) specific studies and investigations;

and c) alteration of the boundaries of its subarea.

Matters may be referred to it by the Commission for investigation and report. Such recommendations to the Commission may refer to one or more of the following measures:[12]

1) open and closed seasons;

2) closed waters for purposes of spawning or the protection of small or immature fish;

3) size limits for any species;

4) prohibited fish gear and appliances;

and 5) over-all catch limit for any species.

Most important for the future of fishery regulation are the provisions of Article X:

"1. The Commission shall seek to establish and maintain working arrangements with other public international

organisations which have related objectives, particularly the Food and Agriculture Organisation of the United Nations and the International Council for the Exploration of the Sea, to ensure effective collaboration and co-ordination with respect to their work and, in the case of the I.C.E.S., the avoidance of duplication of scientific investigations.

2. The Commission shall consider, at the expiration of two years from the date of entry into force of this Convention, whether or not it should recommend to the Contracting Governments that the Commission be brought within the framework of a specialised agency of the United Nations."

In the first seven years of its life the Commission has kept in particularly close touch with the Fisheries Division of the F.A.O. and a Resolution has been passed[13] testifying to the Commission's gratitude for the information and encouragement it has received from that source. Special collaboration has been necessary, and most readily undertaken, with the I.C.E.S.[14] by reason of the overlapping of the latter's north-west region with the Commission's sub-area I, between Greenland and Iceland. Apart from the F.A.O. and I.C.E.S., observers have been received from other bodies, such as the Permanent

Commission of the International Fisheries Convention (1946), the International Pacific Halibut Commission, the International Pacific Salmon Fisheries Commission,[15] the World Meteorological Organisation,[16] the Special Committee of the International Geophysical Year (C.S.A.G.I.), and the Commission Internationale pour l'Exploration de la Mer Méditerranée (C.I.E.M.M.);[17] and observers have been sent on behalf of the Commission to the meetings of other organisations such as the International Fishing Boat Congress (October, 1953), the General Fisheries Council for the Mediterranean (October, 1953), the International Union of Geodesy and Geophysics (September, 1954), and the United Nations International Conference on the Conservation of the Living Resources of the Sea (April, 1955). In addition, West Germany, U.S.S.R., and the Netherlands have sent observers to one or more meetings of the Commission. The Federal Republic of West Germany took a particularly active interest in the Commission's proceedings, and on 29th June, 1957, it deposited ratification of its adherence to the International Convention for the Northwest Atlantic Fisheries with the Depositary Government (U.S.A.), bringing the total membership to eleven.

At the Second Annual Meeting, the Commission resolved to remain an independent body outside the framework of the United Nations,[18] but re-asserted its appreciation of the help

received from the F.A.O., the U.N. Specialised Agency in Rome. In view of the above list, the Commission certainly cannot be accused of lacking the spirit of international co-operation, but it remains to be seen how much closer the Commission can be brought to a working relationship with other regional fishery commissions and, perhaps some day, under a uniform system of fishery regulation in global terms.

It is still too early to pass a sober judgment on the results of the I.C.N.A.F., but it can be truly said that from the first it has worked as a bona fide international body, and not just as an annual conference convened to resolve various interests of the member Governments. Its place in the history of international co-operation in fisheries is assured as being the first international body established in advance of a serious crisis in the natural resources under its care. Usually, as we have seen and shall see again, international action has not been undertaken until catastrophe was imminent. Admittedly, at the time of the Commission's inception in 1949, there were a few signs of depletion of stocks, particularly off the New England coast, but by and large it remains true that the Commission's function will be the positive and heartening one of sustaining healthy and plentiful stocks at the optimum scientific level. As a controlled regional experiment on a wide, multilateral basis, it may provide the blue-print for the future regulation of the world's fisheries.

Chapter 10: The North Pacific Region

("In the full tide of successful experiment"

- First Inaugural Address - Jefferson)

We have now arrived at what is in many respects the most valuable and most significant chapter in the history of international fishery regulation - the North Pacific. The fisheries of the coastal and off-coast waters of the North American continent, in particular, have enjoyed the benefits of enlightened control; great and spectacular successes have been made both in the scientific development and maintenance of the fisheries and in the advisory and administrative machinery set up by the interested governments to supervise the scientists. Also within our purview, for the purposes of this chapter, are the adjacent seas of the northern North Pacific stretching from the coast of Alaska as far westwards as the Seas of Japan and Okhutsk. Here too recent events have shown the trend towards international co-operation in scientific fishery control.

There is much to be said for the argument that those responsible for the co-ordination of North American fishery resources started with many advantages; to-day the United

States of America and the Dominion of Canada share a common purpose and ideal, both politically and economically, their peoples speak the same tongue, arise from a similar racial heritage, and the mutual goodwill of their governments is firmly rooted. The similarity of North American origins and institutions should not, however, be allowed in detraction from what has been accomplished between them; other countries have been involved too in their fisheries and have contributed in no small measure to these achievements. Like the fisheries of the other regions we have studied, those of the North Pacific were born in conflict, and to trace the emergence of international order out of this conflict we shall first review the rise of the fur seal fisheries in the Bering Sea and adjacent waters.

I The Fur Seal Fisheries

In 1799 Paul I of Russia issued an ukase granting the Russian-American Company its first charter, with exclusive rights and privileges, to carry on hunting and trading "in the northeastern seas and along the coasts of America". At this time the extreme northwestern tip of the North American continent belonged to Russia but the exact extent and nature of jurisdiction in those remote parts was in

constant dispute, and Great Britain, the United States and Russia were all rival claimants for jurisdictional as well as trading rights in those unsettled areas. In 1821 another ukase was promulgated, by the Emperor Alexander, whereby the aforesaid rights and privileges were "exclusively granted to Russian subjects", and all foreign vessels were forbidden, except in case of distress, "not only to land on the coasts and islands belonging to Russia . . . but also to approach them within less than a hundred Italian miles". Both Britain and the United States protested against this ukase, and in 1824 the latter concluded a treaty with Russia agreeing on a dividing line between their respective "spheres of influence", so that each was left by the other to compete with Britain in a separate area. A year later a treaty was negotiated between Britain and Russia under which the former was granted trade privileges similar to those accorded to the United States in the 1824 treaty, and another line was drawn by which the British Government recognized the eastern-most limits of Russian territory on the American continent. In 1867 the Russian Emperor ceded to the United States the territory now known as Alaska, "all the territory and dominion" which he possessed "on the continent of America and in the adjacent islands". The Alaskan boundary on the east coincided with that drawn in the 1825 treaty with Britain.

By far the most valuable resources of Alaska at this time were its sea products, particularly the precious fur seals which migrated to and from the Bering Sea each year. These pelagic seals had attracted great numbers of schooners from several countries and the callous and indiscriminate slaughter that frequently took place reached horrific proportions. Many of the seals congregated in vast schools on the islands of the Bering Sea and adjacent waters, and thereby came under territorial jurisdiction on land or within the three-mile zone, but the seals are prodigious travellers and are usually found in transit on the high seas. Soon after the annexing of Alaska, the killing of fur seals came under the ban of United States legislation, but the extent of the waters to which these laws were to be applied was not defined. At first there was no international controversy but inevitably foreign vessels began to violate these regulations and in 1886 and 1887 several British Columbian sealing schooners were seized by American officials. The British Government (on behalf of Canada) intimated its objections on the ground that all the vessels were seized outside the three-mile zone and therefore beyond American jurisdiction under international law. Protection of the fur seals was agreed to be necessary, preferably on an international basis, and in 1887 the United States submitted a draft proposal for such a scheme to France, Germany,

Britain, Japan, Russia, Sweden and Norway. Most of the Governments approached expressed their more or less unqualified approval, including Britain, but diplomatic negotiations culminated in a bilateral treaty which was signed in 1888. This treaty was delayed, however, by the U.S. Senate, and ~~after a delay~~ eventually the matter was postponed at the request of the Canadian Government. Instrumental in the breakdown of these negotiations was the failure in the same year to find a solution of the Northwest Atlantic fisheries problem between Canada and the United States, which resulted in the rejection by the U.S. Senate of the second Treaty of Washington. In the following year there were more seizures of British Columbian vessels outside the three-mile zone, negotiations were resumed, and in 1890 the British Government submitted a draft convention which provided for a closed season in the Bering Sea, but this offer was rejected by the United States.

Eventually on the 29th February, 1892, Britain and the United States concluded a treaty of arbitration, and a tribunal of arbitrators to hear the issues was appointed. As with most arbitrations the problem of treaty interpretation loomed large in the proceedings and served to overshadow the discussion of international law principles per se, but this hearing was most important for the world's fisheries not only because of the juridical ground that was covered by

both parties but also because of the influence that the Award was to have in later years.

The tribunal found, in the first place, that, despite the claims to a mare clausum expressed in the 1821 ukase, Russia had admitted in negotiations prior to the 1824 and 1825 treaties that her jurisdiction should be restricted to the range of cannon-shot and up to the cession in 1867 had never asserted in fact or exercised any exclusive jurisdiction in the Bering Sea or exclusive rights in the seals beyond their territorial waters.[1]

Secondly, Britain had never recognized or conceded Russian claims to jurisdiction over the Bering seal fisheries.[2]

It was unanimously agreed that the term "Pacific Ocean" in the 1825 treaty was intended to include the Bering Sea, and the majority found that no exclusive rights in the Bering Sea were held or exercised by Russia after the 1825 treaty.[3]

The tribunal was of the unanimous opinion that all the rights of Russia as to jurisdiction and the fisheries east of the water boundary specified in the 1867 cession treaty passed unimpaired to the United States under that treaty.[4]

Probably the most important and most interesting, as well as the most controversial, part of the proceedings related to the question what rights of protection or property the United States had, if any, in the fur seals schooling

outside the three-mile zone. It should be stressed that although the original Alaskan court, in dealing with the foreign sealers, had proceeded on the doctrine of mare clausum, the United States Government never asserted this doctrine and later disavowed it expressly. More than once the American arguments insisted on a vital and valid juridical distinction between the "exercise by a nation of sovereign jurisdiction over the high seas - a sovereign jurisdiction of a character which makes the high seas over which jurisdiction is attempted to be extended a part of the territory of the nation, giving the nation an exclusive power over it - and the assertion of a right to exercise acts of force on the high seas for the purpose of protecting a property, or an industry, or a people; one of them being an assertion of sovereign jurisdiction, the other no assertion of sovereign jurisdiction at all, but simply a right of self-protection and self-defence, which a nation acting as an individual, always has."[5]

Great Britain, though admitting the existence of jurisdictional rights apart from sovereign rights - a distinction which she held to justify the so-called "Hovering Acts" - took the position "that no question of exclusive jurisdiction in a defined area can exist apart from territorial dominion, from sovereign powers, over the area; because the assertion of exclusive jurisdiction is an assertion that nobody else

has a right to go there; is an assertion of the right to exclude everybody else from that place; is an assertion of the right to treat the particular area covered by so much water just on the same principle as it were so much land and a part of the admitted terra firma of the particular Power that is claiming to exercise it."[6]

As we have seen, the United States was to be quite consistent in maintaining the distinction between sovereign rights and exclusive rights. Even after the Presidential Proclamations of 1945, claiming exclusive American rights of mineral exploitation on the sea-bed and subsoil of the continental shelf and of fishery conservation within specified zones contiguous to American waters, the United States Government eschewed all mention of sovereign rights. The main trouble with the distinction is not only that it is an exceedingly tenuous one and difficult to justify even in strict legal theory, but also, and more important, that it induces states to make bolder, unilateral claims on the high seas to a degree that the distinction becomes totally irrelevant, indeed unrealistic. It is the thin end of the wedge which has come to be interposed into the principle of the inviolability of the high seas. In fairness, it may equally be said that it is an honest recognition of the need to meet the new problems of an advanced society of nations and an attempt to solve the riddle in juridical terms.

One may question the method without decrying the motive.

The United States counsel went further and claimed that the action taken by the U.S. Government to exclude pelagic sealers from the Bering Sea was based upon a property right in the fur seals. The habits of these animals, it was agreed, are sufficiently peculiar to distinguish them from floating fish, since they use the land for mating purposes. The fact that they migrate over enormous distances of ocean cannot break the vital territorial link with their place of origin and probable return. Because of this link they fall under the tenets of private law which establish a property right in animals ferae naturae; "fur seals are indisputably animals ferae naturae and these have universally been regarded by jurists as res nullius until they are caught; no person therefore can have property in them until he has actually reduced them into possession by capture." [7] By choosing to school on or in American territory, they are so reduced and become the property of the United States, wherever they may later migrate." "Whenever any useful wild animals so far submit themselves to the control of particular men as to enable them exclusively to cultivate such animals and obtain the annual increase for the supply of human wants and at the same time to preserve the stock, they have a property in them." [8] Accordingly, pelagic sealers, bent on exterminating the property of others

on the high seas, are pirates and as hostes humani generis should be outlawed; on the moral plane, the United States policy of preservation should be regarded as a mission in trust for mankind.

The British reply was more legalistic, pointing to the absence of precedent as being "fatal to the United States claim which conflicts with the undoubted right of individuals to fish for seals in the high sea, a right which cannot be diminished or taken away by a Government to which the owners of the right owe no allegiance."[9] Property in animals ferae naturae was in law dependent upon in manu possession, an essential element of ownership, and this element was not constituted by the fleeting or occasional visitation of the seals to a territory under sovereign jurisdiction. Moreover, the position of the American counsel was further weakened by the fact that no municipal law of the United States had treated the species, individually or collectively, as the subject of protection and property rights on the high seas.

After seeking to have various extra-legal factors taken into consideration, particularly on the strength of natural law, the United States Counsel proceeded to cite several analogies to the extra-territorial jurisdiction claimed in the Bering Sea. Numerous instances were mentioned to prove that a right of self defence beyond territorial waters

exists in time of peace. In the case of revenue and customs legislation, executive action was frequently taken to enforce such measures as far as four leagues from the shore. Also, extra-territorial jurisdiction for the protection of colonial trade had been upheld by the United States Supreme Court in Church v. Hubbart (cited by L.C.J. Cockburn in Queen v. Keyn). Yet these were not considered to be in violation of the freedom of the seas. Analogy was made to the British jurisdiction over the pearl fisheries of Ceylon and the French jurisdiction over the coral fisheries of Algeria.

Britain held in turn that a different principle of law operated in the case of sedentary fisheries, since the fact of attachment to the soil constituted a special case.[10] Moreover the title to the Ceylon fisheries was based on a prescriptive right which did not apply to the Bering Sea. It was conceded that moral principles might be invoked with force in the application of law, since the moral law was a living constituent of all positive law, but only that part of morality which was accepted by all nations to be legally binding could be considered as part of international law. The United States could only exercise those rights of protection which were recognized by international agreement; even then, they were only applicable to nationals of states that were parties to the agreement.

The tribunal held that the United States had no right of protection or property in the fur seals outside the three-mile zone, and United States regulations with respect to these seals could not be enforced against nationals of foreign states. In view of these findings, the arbitrators went further, under the terms of the arbitration, and provided nine articles for adoption by both parties for the joint regulation of the fishery.[11]

1) Sealing was absolutely prohibited to all nationals of the United States and Britain alike within a 60-mile zone around the Pribiloff Islands (including territorial waters).
2) A closed season was established for defined areas of the high seas.
3) Only sailing vessels were to be allowed to participate in sealing, subject to the conditions specified in these Articles.
4) A licence must be secured from the appropriate Government for each vessel engaged in sealing and a prescribed flag must be flown at all times while so engaged.
5) Accurate records of catches and related matters must be kept by the master of each vessel engaged in sealing, and at the end of the sealing season

such information must be collected by the appropriate Government and exchanged for similar data collected by the other Government.

6) The use of nets, firearms, and explosives in sealing activities was forbidden, except for shotguns outside the Bering Sea in season.

7) The responsibility for selecting suitable men to engage in sealing activities rested with the appropriate Government.

8) Indigenous Indians were declared to be exempt from the provisions of these Articles, insofar as their traditional hunting was concerned.

9) The provisions of these Articles were to remain in force until abolished or modified by mutual consent, and in any event they were to be subject to revision in five years time.

It should be observed that this tribunal was not called upon to decide whether the three-mile limit was established in international law, since this was not an issue between the parties. Nor was it asked to prescribe a method of measurement for the delimitation of a fishing zone. Since the arbitrators were limited to answering the five questions submitted to them, there could be no full or final solution of the problem. The fact that the United States had not forbidden its own nationals to engage in sealing weakened

its moral authority in imposing drastic restrictions on non-nationals. This seemed to indicate that it was not the protection of the fur seals which was the paramount consideration, but the exclusive use of the fishery by its nationals. In the light of more recent developments, it is clear that such an unpropitious attitude begs the very question whether international co-operation is feasible in the regulation of the fishery. Lastly, we may note the significant fact that the majority of the arbitrators unhesitatingly preferred the alternative method of protecting fur seals through joint regulations. From this date forward in the North Pacific region the need for joint regulations was to be taken more and more for granted in the case of international fisheries, particularly where signs of depletion were in evidence but eventually also where only the possibility of depletion was to be seen.

In 1893 two United States sealing schooners were seized more than three miles out by the Russians who justified their action on similar grounds to those used by the United States against Britain but, again like the United States, avoided the assertion of a claim to sovereign rights in the sea where the seizures took place. In this case, however, Russia denied that her full territorial jurisdiction was restricted to the three-mile zone. The question of compensation for the seizures was submitted for arbitration to

Mr. T.M.C. Asser of the Netherlands in 1900. In the proceedings the United States adopted the role of Great Britain in the Bering Sea Arbitration and Russia became the defender of sea products for all humanity, like the United States in 1893. The United States declared specifically that she regarded the decision of the Paris tribunal as an authoritative declaration of international law. Once again the treaties of 1824 and 1825 were cited in evidence, this time to substantiate the view that there were no property rights in the fur seals outside the three-mile zone. The Russian case, on the other hand, emphasized the inadequacy of the three-mile limit in view of the destructive effects of modern fire-arms on seal-herds. Mr. Asser found that in the absence of a specific sealing convention between the parties the ordinary rules of jurisdiction under the law of nations must prevail; that under international law territorial jurisdiction stopped three miles out and that accordingly the Russian seizures were illegal.

This Award, then, involved the recognition that:

a) the jurisdiction of the state does not extend outside the territorial sea for the purpose of fishery protection;

b) the extent of the territorial sea is one marine league from shore;

and c) when the fishery interests of a state are damaged by acts committed outside the three-mile zone, even when these acts are recognized as destructive, the coastal state is powerless to act unless authorized to do so under an international agreement.

In 1911 Russia and Japan agreed to subscribe to a system of regulations adopted by the United States and Great Britain in the Convention for the Preservation and Protection of Fur Seals. Pelagic sealing - that is, the "killing, capturing or pursuing in any manner whatever of fur seals at sea" - was absolutely forbidden over an extensive area north of the 30th parallel of north latitude of the Pacific Ocean, including the seas of Bering, Kamchatka, Okhotsk, and Japan. Enforcement of the treaty was lodged with patrols of the United States, Russia, and Japan, but vessels guilty of violations were to be turned over to the authorities of their own nation, which alone would have jurisdiction to try the offence and impose penalties. Those who suffered economically due to the restrictions would receive compensation. Japan found, however, that the protected seals fed upon the fisheries in the home seas which were commercially valuable to Japanese fishermen and in danger of depletion. Accordingly, she gave notice of abrogation in 1940 and the treaty terminated in 1941, just before the outbreak of general hostilities

in the Far East. The weakness of the 1911 Convention lay in its failure to provide for continuous or periodic scientific investigations on the fisheries concerned, and this was the ostensible cause of the final break-down when Japanese and United States scientists were unable to agree on the habits of the seal. Politically too the two Powers were approaching head-long collision and it may be regarded that in the long-term, historical point of view, the fishery disputes were only a minor symptom of a feverish conflict.

On 8th December, 1942, 19th December 1942, and 26th December, 1942, the Canadian and United States Governments exchanged diplomatic notes concerning measures to be taken for the protection of the seals in the Bering Sea and defined areas of the northern Pacific Ocean. These exchanges culminated in a Provisional Fur Seal Agreement, whereby the nationals of each country, with the exception of"Indians, Aleuts and other aborigines dwelling on the coasts of the waters defined", were forbidden to engage in sealing. It was further provided that in the case of sealskins taken under the authority of the United States on the Pribiloff and adjacent islands, 20% of the annual catch was to be delivered to the Canadian Government; in the event of the the seals resorting to Canadian territory, a similar delivery

was due to the American Government by Canadian authorities. Special licences were available to nationals of either country for the purposes of scientific investigation. The United States reserved absolute discretion in the regulation of the Pribiloff sea herds within her jurisdiction. The regulations were enforceable on the high seas by authorized officers of either country who could seize and detain any person violating the regulations, but the latter had to be handed over to the authorities of his own country, which alone had jurisdiction to try the offence and impose penalties.

The post-war years of rehabilitation saw renewed attempts by the fur seal governments to reach agreement on the protection of the herds and these diplomatic activities resulted in an Interim Convention on Conservation of North Pacific Fur Seals signed on 9th February 1957, by Canada, Japan, the Union of Soviet Socialist Republics and the United States of America. In this convention the parties agree to co-ordinate their scientific researches and to co-operate in investigating the fur seal resources of the North Pacific to determine:

a) what measures may be necessary to make possible the maximum sustainable productivity of the fur seal resources so that the fur seal populations can be brought to and maintained at the levels which will provide the greatest harvest year by year; and

b) what the relationship is between fur seals and other living marine resources and whether fur seals have detrimental effects on other living marine resources substantially exploited by any of the parties and, if so, to what extent.[12]

A specific research programme is laid out for each party to be conducted year by year, and provision is made for the exchange of scientific personnel and information. In order to realise the purposes of the Convention each party agrees to prohibit pelagic sealing in the Pacific Ocean north of the 30th parallel of north latitude, including the seas of Bering, Okhotsk, and Japan by any person or vessel subject to its jurisdiction.[13] The Convention establishes the North Pacific Fur Seal Commission, whose functions will include the formulation and co-ordination of research programmes, recommendation for implementing these to the parties, study of data obtained, recommendation of appropriate measures that might be taken by the parties and, at the end of the fifth year after entry into force of the Convention, of the methods of sealing best suited to achieve the desired objectives. The Commission is composed of one member from each party and each party has one vote.[14]

Vessels suspected of offending against the prohibition of pelagic sealing may be boarded by an authorised official

of any of the parties, except within the territorial waters of another state, and if there continues to be reasonable cause for suspicion the person responsible may be detained and delivered to the authorities having jurisdiction over the person or vessel. Only the latter authorities have jurisdiction to try the offence and impose penalties.[15]

The prohibition does not apply to Indians, Ainos, Aleuts or Eskimos dwelling on the coast of the waters mentioned, provided they pursue their traditional methods of hunting.[16] Both the U.S. and U.S.S.R. undertake to deliver to Japan and Canada each 15% of their annual catch of sealskins. Further provisions are made to divide the direct and indirect costs involved in pelagic research equitably among the parties.[17] The parties agree to meet after six years to consider the Commission's recommendations, based on data received, as to what further agreements may be desirable in order to achieve the maximum sustainable productivity of the herds.[18]

The very title of this convention indicates that it is intended to be merely an interim arrangement for pooling scientific researches to establish a basis for a more lasting and further-reaching settlement by the parties. No powers of regulation are entrusted to the Commission outside the closely defined limits specified in the Convention

and it can do no more on its own initiative than make recommendations to the parties. The significance of the Convention lies in the appointment of the first international body entrusted with the scientific research of the Pacific fur seals, and in the first equitable sharing of catches on a multilateral basis. It remains to be seen how far these advances will encourage the vesting of discretionary powers in the Commission if and when the need is proved.

II The Pacific Halibut Fisheries.

For both the scientist and the lawyer, the true origin of modern international fishery regulation lies in the measures applied to the Pacific halibut, the giant flounder that lives in the waters of the continental shelf from California to the Bering Sea. As the first international attempt at conserving and rebuilding a marine fishery, the treaty between Canada and the United States, signed in 1923 and ratified in the following year, has an honoured place in the history of international co-operation as well as of fishery regulation. Halibut fisheries are truly deep sea activities and are mainly concentrated in international waters. In both the scientific and the legal sense, the element of inaccessibility must have seemed a formidable

obstacle to the international control of the fishery. But for the first time the highly complex biological problem of controlling the mortality rate of a particular species over a vast area of international waters was brought together and grasped as a whole through a unified complete system of statistical observation that recognized no boundary lines. Previously scientists had worked out the rates of growth of fish and speculated as to what restraints were necessary;they had discovered spawning seasons and times and specified what times were or were not proper for fishing. But up to 1924 they had lacked the means of putting such theories into action on an international footing for the benefit of all parties interested in the fishery.

There were also many important advantages from the start. The fishermen using the fishery were relatively homogeneous; they were helpful and intelligent, speaking the same language and operating on the same banks. In many of the great fisheries of the world the gear differs greatly from vessel to vessel and undergoes with time a gradual but great change in structure and efficiency. But in the Pacific halibut fishery the gear has been much more constant and better standardized. On the other hand, the fishery has expanded and changed considerably under the evolution of powered engines. Particularly in the early twenties the use of diesel engines enabled the fishery to expand

westwards and the result has been a lower catch per unit but a much more representative sampling of the grounds. The distribution of halibut, as a demersal species, is of course strictly limited by the physical conditions of the ocean, and the waters into which commercial fishing had extended formed a more or less natural unit of distribution outside of which no great supply could be expected. This has clearly helped scientists considerably in controlling productivity and given them advantages they do not possess when they approach the same problems in relation to the pelagic species, such as salmon, mackerel, herring and fur seals, where other methods of control are required.

The Pacific halibut fishery from its beginning in 1888 has been prosecuted jointly by the fishing fleets of Canada and the United States. The annual catches increased with the growth of the fishery and the exploitation of new fishing grounds until 1915, in which the catch was 69 million pounds. Thereafter, in spite of greatly augmented fishing and the inclusion of more and more grounds, annual catches declined to a level of about 50 million pounds. Faced with this decline in yield the halibut fishing industry, particularly in the United States, began to advocate the institution of winter closed seasons and the prohibition of fishing upon certain nursery grounds. Marketing conditions were the primary reasons for these recommendations. As a

result of the findings of the United States - Canadian Joint Commission of 1918, a convention was negotiated between the two countries in 1919 but failed to be ratified due to the inclusion of controversial provisions regarding customs regulations and regular port-use privileges. In consequence of further representations made by the Canadian halibut industry to the Royal Commission of 1922 and the continued activity of the United States industry, a new convention was drawn up in 1922 omitting certain items of the 1919 draft and making conservation the primary consideration. Thus was born the historic 1923 Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean.

The convention established a three-month winter closed season, first effective in November 1924. It provided for the appointment of the International Fisheries Commission, the first of its kind in the world, with two members from each country, to investigate the fishery and recommend measures for its preservation. After intensive scientific investigations had shown that the stocks of halibut were in an overfished, low-yielding state and that the statutory three-month winter closed season alone was not effective in stopping the intensification of the fishery and further decline, the Commission recommended additional remedial measures to the two Governments.

A new convention was signed in 1930 and ratified in 1931, which continued the Commission and the closed season. It empowered the Commission to change or suspend the closed season; to divide the convention waters into areas and to limit the catch of halibut to be taken from each during its fishing season; to regulate the licensing and departure of vessels for the purposes of the Convention; to collect statistics; to fix the type of gear to be used; to close grounds found to be populated by small immature halibut; and to conduct such investigations as were necessary into the life history of the halibut. Implementing legislation made the enforcement of any regulations that might be adopted under the Convention the responsibility of the individual Governments. Since 1932 regulations to control the fishery have been adopted annually and approved by the President of the United States and the Governor-General of Canada.

A third convention was signed and ratified in 1937, extending the Commission's previous regulatory authority. It provided for the control of the capture of halibut caught incidentally to fishing for other species in areas closed to halibut fishing, and for prohibiting the departure of vessels to any area when those which had already departed would suffice to take that area's catch limit. Under regulation which began in 1932 the stocks on some grounds had doubled in size by 1940. Larger individual catches were

made with one half the fishing effort. As the density of the stocks increased the Commission from time to time increased the annual catches allowed. The policy followed was to hold the annual catches from the stocks slightly below the additions being made by growth and new recruits. The total coast catch reached 54 million pounds in 1940 and almost 58 million pounds in 1950.

During this period the much larger catches per trip and a greatly increased fleet sharply reduced the length of the fishing season. It became evident that because the stocks of halibut on the different grounds were not equally available at all times of the year, some were no longer contributing to the fishery in the proportion of which they were capable. In 1946 the Commission recommended to the Governments treaty changes that would enable it to broaden the period of year over which halibut might be caught. Most important of these recommendations was one which would permit more than one fishing season in any area during a single year. The Canadian Government believed that such an extension of regulatory power was permitted under the terms of the 1937 Convention, but the United States Government advised the Commission that it lacked authority so to divide the season. In view of these conflicting interpretations it was decided to formulate a new treaty. Between 1951 and 1953 pending action upon the Commission's recommendations

three underfished sections of the coast were closed to fishing during the regular season and opened at a more appropriate time when other sections were closed. A significant increase in the utilization of their underfished stocks resulted and the total annual catch reached 60 million pounds.

Late in 1953 the fourth halibut convention signed by Canada and the United States was ratified, under which the Commission was given still broader powers including the authority to establish one or more open or closed seasons each year in any area. The Convention waters are described as "the territorial waters and the high seas off the western coasts of Canada and the United States, including the southern as well as the western coasts of Alaska".[19] It has increased the responsibilities of the Commission by requiring the development of the stocks of halibut to levels which will permit the maximum sustained yield and maintenance of stocks at those levels. Any regulatory actions of the Commission are, however, made contingent upon investigations indicating the necessity of such actions to the objectives of the Convention. Authority for the application of size limits in addition to catch limits is specifically provided. Provision is made for regulating the retention of halibut caught incidentally while fishing for other species or in portions of areas both open or closed to halibut fishing, rather than

only in closed areas. The Commission is permitted not only to conduct fishing operations for investigative purposes at any time, but also to authorize such operations.[20] Vessels actually engaged in fishing halibut on the high seas in violation of the Convention may be seized by authorized officials of either country but must be handed over to the authorities of the appropriate country, which alone has jurisdiction to conduct prosecutions for violations of the Convention and to impose penalties.[21] The Commission is re-titled the International Pacific Halibut Commission, since it is no longer the only international fisheries agency, as it was in 1923. Membership of the Commission is increased from four to six Commissioners, three from each country. Whereas the previous halibut conventions provided no rules of voting, it is specified that all decisions of the Commission shall be made by the concurring vote of at least two of the Commissioners of each country.[22]

The responsibilities of the Commission were further augmented by the International North Pacific Fisheries ~~Commission~~ Convention, signed and ratified in 1953 by Canada, Japan, and the United States. This requires Canada and the United States not only to develop the stocks of halibut and maintain them at levels of maximum productivity but also to demonstrate that they are being fully utilized.

To fulfil its duties under the new Halibut Convention the I.P.H. Commission in 1954 undertook a broad ten-year programme of research to secure the factual information which would permit it to adopt regulations for attaining the maximum sustainable yield. Additional funds were required to provide for the greater expense of administering multiple open seasons and of conducting the new research programme. A beginning was made to this project in the latter half of 1955 when the requisite funds were made available. Under the authority of the new Convention the period of fishing was extended in 1954 by the use of multiple open seasons with intervening closed periods, and this method was continued without significant change in 1955, 1956, and 1957. In 1954 a record catch of 71,200,000 pounds was made; in 1955, 59,100,000 pounds; and in 1956, 67,500,000 pounds. Thus the multiple-season system of regulation during these years has spread fishing over a larger season and has increased fishing in the underfished grounds and the annual yield from these.

By way of postcript, it is indicative of the spirit of co-operation existing among the Pacific halibut fishermen that in 1956, though the legal opening date of the first season in a certain area was 12th May, the fleets of both countries agreed on an eight-day voluntary delay, so that fishing was postponed until the 20th of May.[23]

Before leaving the Pacific halibut fishery we may note that Canadian and American vessels using that fishery were granted reciprocal privileges in respect of each other's ports of entry under the Convention for the Extension of Port Privileges of 1950. The provisions of this convention allowed these fishing vessels:

1) to land their catches of halibut and sable fish without the payment of duties, and
   a) sell them locally on payment of the applicable customs duty;
   b) trans-ship them in bond under customs supervision to any port of their own country; or
   c) sell them in bond for export; and

2) to obtain supplies, repairs and equipment.

On 31st March , 1953, the Coastal Fisheries Protection Act[24] was passed by the Canadian Parliament banning from Canadian territorial waters all foreign fishing vessels for any purpose unless authorised by the Act and the regulations under it, or any other law of Canada, or a treaty. There is no express reservation for the traditional principles of international law guaranteeing the right of innocent passage or the right to seek refuge in time of distress. We might note in passing that draft Article 16 on the Law of the Sea, prepared by the International Law Commission for

the forthcoming international conference at Geneva, expressly stipulates that "the coastal State must not hamper innocent passage through the territorial sea." The prohibition of the Canadian Act also applies to all fishing activities, the unloading of fish or supplies, the acquisition of bait, supplies, or marine plants.[25] No person may bring into territorial waters fish received outside from a foreign fishing vessel.[26] Wide powers of inspection, seizure and forfeiture are granted to Canadian protection officers and persons guilty of offences under the Act are liable to very severe penalties.[27] The implications in international law of such drastic unilateral measures to discourage foreigners from participating in coastal fisheries, except by way of treaty or other special provisions, will be considered in the concluding chapter. Suffice it to point out in this context that measures such as these tend to preserve the status quo, seem to be a short-term expedient pending the elaboration of more sophisticated attitudes to fishery regulation and a recognition of the limitations of regulation by bilateral or narrowly multilateral conventions.

III The Fraser Salmon Fisheries

Salmon have long been one of the most valuable natural resources along the Pacific coast. For many years the Fraser River watershed provided the spawning grounds for vast numbers

of sockeye salmon which formed the basis of the most prosperous fishery of the Puget Sound - Gulf of Georgia region. Since many of these salmon, when they return to spawn in British Columbian waters, first pass through State of Washington waters, this fishery has always been something of an international problem. It was obviously of equal importance to both American and Canadian salmon fishermen that the fish should be enabled to spawn each year, regardless of the location of the spawning grounds, but it was found difficult to persuade fishermen to restrict their present catches in order that their catches in four years' time should be as good.

The first international study of sockeye salmon was undertaken in 1892 when it was reported that the fishery was in healthy condition. However, after some failures, a treaty (the Bryce-Root treaty) was drawn up between Canada and the United States and ratified in 1908. This provided for the joint control of all fisheries of international scope and an International Fisheries Commission was established to supervise this matter. The Commission agreed upon a uniform system of "protection, preservation and propagation" of salmon in the Fraser River which was promptly approved by Canada. The United States failed to adopt the regulations, however, and Canada withdrew her support, so that the 1908 Convention became inoperative.

The failure of the huge 1913 run to appear in its cycle year 1917 led to the formation of the Canadian-American Fisheries Conference. A treaty was proposed, essentially the same as the Bryce-Root Treaty, but this failed to obtain the approval of the U.S. Senate, mainly on account of American tariff policy, both in 1919 and after revision in 1920. Because of the wide migrations of the salmon, depletion of the fishery was impossible to arrest by national measures alone, and so Canada turned to the State of Washington for co-operation. Representatives met and considered possible remedies for the declining fishery, proposing in the end that a complete cessation of salmon fishing be enforced for five years, but no agreement could be reached on future joint action. Another Fisheries Commission was formed in 1922 to open negotiations for a treaty but its efforts received little attention in Washington or Ottawa. Later in 1928 a new treaty was drafted which provided that : (1) regulations promulgated by the Commission would be enforced by agencies of the respective Governments; (2) catches would be divided as equally as was practicable between the two countries; (3) the cost of scientific investigations, fish cultural operations, and the removal of obstructions to migration would be shared equally by the two Governments. A treaty was signed on March 29, 1929, but failed to be approved by either Canada or the United States. This treaty was re-written to include the control

of all nationals of either country who fished in waters outside the entrance to Juan de Fuca Strait. In this form it was ratified by Canada, but was delayed by the U.S. Senate until certain understandings were arrived at. Eventually, ratifications were exchanged on 28th July, 1937, and at the fifth attempt the sockeye salmon of the Fraser River passed under international control.

In the Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries in the Fraser River System, the treaty waters were to comprise defined areas of the territorial waters of the two countries and of the high seas, including the Fraser River and the streams and lakes tributary thereto.[28] The International Pacific Salmon Fisheries Commission was established, consisting of three representatives from each country.[29] The Commission was to investigate the Fraser River sockeye salmon, its natural history, hatchery methods, spawning ground conditions and other related matters. It possesses the power to improve facilities for the propagation of sockeye salmon within the waters covered by the Convention and to undertake stocking where deemed desirable. It may <u>recommend</u> to the High Contracting Parties the removal of obstructions to the ascent of the salmon up the Fraser and its tributaries, and the expense of such engineering works shall be borne equally between the two Governments.[30]

The limitation or prohibition of sockeye salmon fishing under the Convention shall be applied equally to all, and not just to part, of the three defined areas of Canadian and American territorial waters and of the high seas contiguous thereto. Any order of this kind applies only to nationals, inhabitants and vessels of Canada and the United States.[31] During the spring or chinook fishing season the Commission may prescribe the size of meshes in order to secure the proper escapement of sockeye salmon. At any other time of the year the taking of sockeye salmon in Canadian or American waters is not prohibited and any gear may be used, subject only to the laws of the State of Washington in American waters and the federal laws of Canada in Canadian waters. Whenever the taking of sockeye salmon on the high seas is not prohibited by the Convention, the gear must be approved by the Commission.[32] All decisions of the Commission must be passed by an affirmative vote from at least two representatives of each country.[33] Each country is responsible for the enforcement of the convention regulations against its own nationals.[34] Offenders on the high seas may be seized by an authorised official of either country and handed over to the appropriate authorities, who alone have jurisdiction to conduct prosecutions and impose penalties.[35]

The delay on the part of the United States Government between the signing of the Convention in 1930 and its

ratification in 1937 was ended by the acceptance of the following conditions:

a) The Commission was empowered to authorize any type of fishing gear contrary to the laws of the State of Washington or of the Dominion of Canada;

b) The Commission was not to promulgate or enforce regulations until scientific investigations provided for in the Convention have been made, covering two cycles of sockeye salmon runs, or eight years; and

c) The Commission was to set up an Advisory Committee (consisting of five representatives from each country) with a full opportunity to attend all non-executive meetings and to examine and be heard on all proposed orders, regulations, or recommendations. [36]

The first great test for the Commission was when it was discovered in 1941 that great damage had been done to the salmon on their run by a recurring obstruction at Hell's Gate Canyon. The Commission itself, lacking regulatory powers at that time, could do no more than recommend to the High Contracting Parties that this serious obstruction be removed. The scientists were able to prove conclusively

that this obstruction had been a major contributory cause to the decline of the fishery, which had lost hundreds of millions of dollars to both countries, in terms of food, since 1913. The Commission's recommendation was accepted and by 1945 fishways had been constructed at Hell's Gate Canyon for less than $1 million. Smaller obstructions elsewhere were found and similar fishways were built.[37]

In 1946 regulatory powers were granted to the Commission and henceforward annual regulations in relation to the fishery have been recommended to, and enforced by, the two countries. The primary objectives for the first four years of regulation (1946-49) were:[38]

1) To provide rigid protection to those races that have suffered most severe depletion;
2) to increase escapement to all areas, thus allowing for an early return to the maximum productivity of all races;
3) to allow for the maintenance of the industry during the first cycle of rigid regulation by nearly normal fishing on the most abundant races; and
4) to provide as nearly as practicable the equal sharing in the annual catch by the nationals of each country.

Under the impetus of these new measures stocks have been recovering rapidly, and it was largely a tribute to the

success of these regulations that in December, 1956, the two Governments signed a Protocol to the 1930 Convention whereby the conservation of the pink salmon in the Fraser River system was to be co-ordinated with the programme already established for the sockeye salmon. The Convention as amended by the Protocol shall apply to pink salmon with the exception that the stipulation that "the Commission shall not promulgate or enforce regulations until the scientific investigations provided for in the Convention have been made, covering two cycles of sockeye salmon runs, or eight years," shall not apply to pink salmon.[39] The scope of the Commission's regulatory powers was made more explicit by the addition of the following clause:

> "All regulations made by the Commission shall be subject to approval of the two Governments with the exception of orders for the adjustment of closing or opening of fishing periods and areas in any fishing season and of emergency orders required to carry out the provisions of the Convention."[40]

The Advisory Committee is expanded from five to six representatives of each country, and provisions are made for the co-ordinated investigation of pink salmon for the purpose of determining the migratory movements of such stocks. In the seventh year after the Protocol came into

force the parties will meet to determine what further arrangements for the conservation of pink salmon stocks of common concern may be desirable.[41] It may be supposed that the methods of conservation to be used for the pink salmon will be similar to those used for the sockeye salmon, since the same machinery has been set up for both species, but it cannot be assumed that the technical problems will be identical. Other problems will have to be faced soon, related to the actual or potential clash of interests between salmon fishing, on the one hand, and various operations in irrigation, sewage, mining, timber, and hydro-electric development, on the other. In particular, river dams may provide a menace to the proper cultivation of salmon fisheries, and when the fisheries are of an international character intriguing legal questions will have to be solved without the benefit of precedent. The toughest trials of the Pacific salmon fisheries may be yet to come.

IV The Alaska Salmon Fisheries

Fishing activities have long been intense and profitable in the waters off the Alaskan coast and around the Aleutian Islands, and in the early 1800's competition became quite bitter between rival fishermen from Great Britain, Spain, Russia and the United States. In 1824 the trading companies of Russia and the United States signed a convention providing

"that the North Pacific should be open to citizens of both nations for fishing, trading and navigation," and the American fishermen took an increasingly conspicuous share in these fisheries. Even before the United States purchased Alaska in 1867, U.S. schooners had fished for cod in Alaskan waters, and after that date the cod fishery grew rapidly. The most productive banks of all were in the Aleutian area. In 1878, about a decade after salmon fisheries were established on the Columbia and Fraser Rivers, the first two salmon canneries were built in Alaska, and in 1889 United States legislation was enacted for the control of the Alaskan fisheries. Strict measures, based on scientific findings of the Fish and Wildlife Service of the U.S. Department of the Interior, were enforced, prohibiting the erection of dams and barricades, and authorizing the investigation of the habits, abundance and distribution of salmon. As early as 1914 an Aleutian Island Reservation was established for the conservation of native birds, reindeer, and fur-bearing animals, and for the encouragement and development of the Aleutian fisheries. This particular area was placed under the authority of the Departments of Commerce and Agriculture which required all residents of the Reservation to secure licences before engaging in commercial fishing there. The same regulation applied to "anyone desiring to enter the Reservation for

the purpose of fishing . . . or engaging in commercial fishing, salmon canning, salmon salting, or otherwise curing or utilizing fish or other aquatic products, or for the purpose of engaging in any lawful business . . . "[42]

In 1921 an additional clause was appended to the above regulation: "no permit to engage in any of the activities named above will be granted to an alien or to any corporation more than 50% of which is owned by aliens. Permits to enter the Reservation for the purpose of engaging in any business will be granted only when the department concerned is convinced that by so doing the objects for which the Reservation was established will not be endangered thereby."[43] In the following year an Alaska Peninsula Fisheries Reservation was created for the protection of the fisheries there and their encouragement and development. Regulations were issued retaining the system of permits but requiring that the previous year's catch be reported before a permit was issued. In 1924 the White Act was passed for the protection of the Alaskan fisheries in general, certain types of gear were prohibited and seasonal closures were enforced.

By the 1930's Japanese fishermen were frequently being accused of "invading" the Alaskan fishing grounds, and their highly efficient floating canneries began to prove a serious menace to the carefully regulated fisheries

of these waters. In 1930 they had begun intensive crab fishing in the Bering Sea, and eventually an informal understanding was reached through diplomatic channels that the United States would leave the Bering crab untouched if the Japanese did likewise with the Alaskan salmon. In 1937 the Japanese fishing interests proposed a joint company of floating salmon canneries in Bristol Bay, pointing out that Japanese labour would lower costs and make good profits likely . The offer was rejected by the representatives of the American salmon industry who foresaw serious results for the conservation programme. The Japanese Government asserted that fishermen were allowed under international law to take fish on the high seas, but despite this right it tried to prevent unnecessary friction by restraining its nationals from fishing in Alaskan waters. The U.S. Department of State indicated that it was prepared to justify the protection of these fisheries on the basis of the comity of nations. Legislation was introduced from time to time into Congress, but not passed, calling for the exercise of protective jurisdiction on the high seas, but any hope of judicial or political settlement vanished, in 1941, in the smoke of battle.

V International North Pacific Fisheries Convention

After the War, Japanese fishing rights and activities

were drastically curtailed by the Occupying Powers, but as tension eased some of these restrictions were lifted and it became obvious that international co-operation was essential for the smooth operation of the Pacific fisheries. Clearly, the effective continuance of bilateral agreements, such as the halibut and sockeye salmon conventions, depended ultimately upon the co-operation of other nations, particularly Japan which, by virtue of geographical proximity and enormous fishing capacity, was bound to become interested in the same waters. In an exchange of notes with Mr. John Foster Dulles, on February 7, 1951, Prime Minister Shigeru Yoshida of Japan stated: "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."

Article 9 of the treaty of peace with Japan, signed at San Francisco on September 8, 1951, provides as follows: "Japan will enter promptly into negotiations with the Allied Powers so desiring 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." [45]

Japan was as good as her word and immediately issued invitations to the United States and Canadian Governments to attend the Tripartite Fisheries Conference in Tokyo. Out of this meeting evolved the International Convention for the High Seas Fisheries of the North Pacific Ocean, which came into force, upon the exchange of ratifications between the Contracting Parties on 12th June, 1953.

The Convention covered an area of water not strictly defined, but described as "all waters, other than territorial waters, of the North Pacific Ocean, which for the purposes hereof shall include the adjacent seas." [46] The International North Pacific Fisheries Commission was set up to "promote

and co-ordinate the scientific studies necessary to secure the maximum sustained productivity of fisheries of joint interest to the Contracting Parties and to recommend such measures to such Parties", with the express hope that each party would "carry out such conservation recommendations and provide for necessary restraints on its own nationals and fishing vessels".[47] The Commission is composed of three national sections, each comprising not more than four national representatives. Each section has one vote, and all decisions of the Commission must be unanimous between the parties whose interests are affected.[48] In Section I of the Annex to the Convention, Japan agrees to abstain from fishing halibut, herring and salmon in certain specified areas of water, and Canada and the United States agree to carry out the necessary conservation measures in accordance with the provisions of the Convantion. In Section II of the Annex, Japan and Canada agree to abstain from fishing salmon in certain specified areas of water and the United States agrees to carry out the necessary conservation measures in accordance with the provisions of the Convention. The Commission shall determine annually whether the stock in these areas shall continue to qualify for abstention as set out in the Annex; if not, it shall be removed from the Annex, but not before five years after the coming into force of the Convention. The Commission shall also study,

upon the request of any party, any stock of fish in the Convention area, the greater part of which is harvested by one or more of the parties, for the purpose of determining whether such stock qualifies for abstention under the provisions of the Convention. If so, it shall recommend:

(i) that such stock be added to the Annex;

(ii) that the appropriate party or parties abstain from fishing such stock;

(iii) that the party or parties participating in the fishing of such stock continue to carry out the necessary conservation measures.[49]

There are further provisions, apart from abstention, for the conclusion of joint conservation agreements in respect of any stock of fish in the Convention area, which is under substantial exploitation by two or more parties and is not already covered by a conservation agreement between these parties.[50] Only those national sections engaged in the substantial exploitation of such stock of fish may participate in any decision and recommendation. All conservation measures are to be applied equally to all parties engaged in substantial exploitation of the stock. It is specifically mentioned that the exploitation

is hereby legally limited or regulated by each party, for the purpose of maintaining its sustainable maximum productivity. There can be no recommendation for abstention on the part of any party in respect of:

(a) any stock substantially exploited by that party for 25 years;

(b) any stock harvested in greater part by any country or countries not party to the Convention;

(c) "waters in which there is an historic intermingling of fishing operations of the parties concerned, an intermingling of the stocks of fish exploited by these operations, and a long-established history of joint conservation and regulation among the parties concerned, so that there is consequent impracticability of segregating the operations and administrative control."[51]

The important effect of these provisions is that Japan is bound not to meddle, directly or indirectly, in the regulated halibut and salmon fisheries which are covered by bilateral treaty, or with the joint herring fishery, which is not so covered; and Japan and Canada are bound not to meddle in defined parts of the American Alaskan salmon fishery which

has long been under exclusive scientific control. The Convention, therefore, goes a long way towards protecting these established fisheries, and at the same time it does not deny to the other parties fishery resources of a wide area which are not yet fully exploited and may be conserved by joint measures. This is accomplished within the framework of international law, without offending the traditional concept of the free seas. It is specified that joint action will be decided upon by the parties if a country not party to the Convention appears to affect adversely the operations of the Convention. The Convention itself is so framed that there seems a good chance of accepting other parties to it, provided they are willing to adhere to the provisions outlined therein.

If a vessel belonging to one of the parties is caught in abstained waters on the high seas authorized officials of any party may board the vessel to examine records and question personnel. If the vessel is caught actually engaged in operations violating the Convention or is suspected on reasonable grounds of having been so engaged immediately beforehand, the officials may arrest the persons responsible and detain them until delivered to the appropriate authorities of the party involved. Only the latter may try the offence and impose penalties.[52]

In the Protocol to the Convention it is spelled out that the delimitation of the area of abstention by Japan from fishing salmon and of conservation on the part of Canada and the United States is deemed to be provisional only and subject to re-adjustment if and when the Commission determines a line dividing salmon of Asiatic origin from salmon of Canadian and United States origin. If the Commission fails within a reasonable time to recommend unanimously such a line of division, three neutral scientists will be appointed to consider the matter and the delimitation of the majority will be recommended by the Commission to the parties. It is stipulated, however, that this procedure is designed to cover a special situation, and is not to be considered a precedent for the final resolution of any other matters that may come before the Commission.

It is believed that the Commission's scientific investigations represent the largest co-ordinated and unified fisheries research programme ever undertaken. Up to now this programme has concentrated mainly on determining the continental origin of stocks of salmon on the high seas and on determining whether there is need for joint conservation measures for the king crab stock of the eastern Bering Sea. The vast area of the North Pacific Ocean in which salmon are found and the unique scientific problem of determining the continent of origin and area of

mixing, involving annual fluctuations of salmon abundance, by species, by continental origin, and in response to environmental factors, has required research on an unprecedented scale. By means of morphological and meristic measurements, an impressive volume of statistics has accumulated with respect to the growth and racial characteristics of the North Pacific salmon, and rigorous studies have been made in the related fields of anatomy, physiology, biochemistry, parasitology, serology and oceanography. In August 1955 the three countries, independently of the Commission, undertook a comprehensive, co-ordinated and systematic oceanographic survey of the North Pacific, called Operation Norpac, and a wealth of useful information was garnered.[53]

The Committee on Biology and Research, appointed by the Commission, has laid particular stress on the need for co-ordination of research in the following matters:[54]

(1) techniques of collecting data and of sampling;
(2) the compilation of statistics;
(3) the interpretation of scales in age determination and growth studies, a particularly difficult field in which to obtain standardization and one in which the exchange of material is imperative;
(4) oceanographic observations and plankton collections.

Although results are still preliminary and incomplete, they are sufficient to show that the various lines of research together give promise of leading to a successful solution of the problems set by the Protocol. Progress has also been reported in the development of techniques for the study of salmon distribution and movement and for the identification of salmon stocks. Returns from salmon tagged and released by United States vessels in various areas of the high seas have been received from Russian sources, as well as from Japanese and American.

Little is known of the abundance, age and growth, life history and migrations of the king crab. While data are being accumulated rapidly from the commercial fishery, special research cruises, and tagging operations, no decision can yet be made on whether or not there is a need for joint conservation measures.

The excellent progress of all these investigations has caught the attention of scientists across the world. Observers have been sent to meetings of the Commission from the Union of Soviet Socialist Republics, as well as cognate organisations such as the International Northwest Atlantic Fisheries Commission, the International Pacific Halibut Commission, the International Pacific Salmon Fisheries Commission, the Inter-American Tropical Tuna Commission,

and the Fisheries Division of the Food and Agriculture Organisation. Co-operation and exchange of information have been maintained also with the Pacific Marine Fisheries Commission and the International Technical Conference on the Conservation of the Living Resources of the Sea.

VI The Northwest Pacific Fisheries

Up to the Second World War Japanese fishing-boats were rampant throughout most of the Northwest Pacific, including the Seas of Japan, Okhotsk and Bering. Most of Japan's salmon fishing was done in the Kamchatka and Kurile regions as far north as Siberia but, as we have seen, they began to take an interest in the Alaskan fisheries in the 1930's. The Siberian fishery was a constant potential threat, however, to Japan's export trade in canned salmon and crab, and it figured in repeated controversies, mainly of a political character, with the Russian Government. On the basis of agreements with the Romanoff (and later Soviet) Government, Japan had been allowed to use trap-netting methods for salmon and provided with land bases and processing factories along the far-eastern coast of Siberia. As the balance of power swung in favour of Soviet Russia and that Government took a more active interest in her own fisheries, more and more restrictions were imposed on the

Japanese. However, this type of fishing constituted the most substantial part of the pre-war salmon industry of Japan; it continued in operation to a modified extent during the Second World War, but ceased entirely to exist in 1945. In 1952 Japan opened up new salmon fisheries between the Aleutian Islands and Kamchatka, and in the home waters off Hokhaido and the southern Kuriles. Since then the regulations for the conservation of the Japanese salmon fisheries have fallen under one of three categories:

(i) the prohibition of all salmon fishing in rivers, with the exception of egg collecting and a few small-scale commercial fishing operations;
(ii) the limitation of the number of traps to be operated on the coast;
(iii) the restriction of the number of drift-netters for offshore operations.[55]

Also, the number of fishing boats allowed to operate in the mother-ship fishery in the Aleutian and Kamchatka waters is under the control of the Fishing Agency but the regulation governing this type of salmon fishery has no direct connection with the conservation of salmon stocks in Japanese fresh waters.

The lack of a conservation policy which assures the spawning escapement by adjusting the fishing seasons and by

providing the catch limits has been a serious defect which threatened to undermine the Japanese salmon resources. However in April 1956 negotiations were held between delegates of the Japanese and Soviet Russian Governments, and both parties recognized the necessity of taking joint measures to maintain the maximum sustained productivity of the Far East fisheries, including the salmon and trout fisheries. As a result of the negotiations, a convention was signed in May, 1956 and came into force in July of the same year. The Convention waters were described as "comprising the whole of the Northwest Pacific waters, including the Sea of Japan, the Sea of Okhotsk and the Bering Sea (but excluding territorial waters)"[56]; it was stipulated that "none of the provisions of the Convention should be regarded as affecting in any way the positions of the Contracting Parties concerning the limits of their territorial waters and their jurisdiction over fisheries therein".[57] Both parties agree to take co-operative measures for the conservation and development of the fishing resources of the area and for this purpose the Northwest Pacific Japan-Soviet Fisheries Commission was established, consisting of two national sections, each comprising three members appointed by the respective Governments.[58] The Commission shall determine the gross annual haul for any species of herring, salmon, trout, and crab covered by the Annex to the Convention and

fix the proportion applicable to each party.[59] Movable fishing-gear is banned within 20 miles of the coast in certain defined areas, and within 40 miles elsewhere.[60] The Commission was also made responsible for co-ordinating scientific surveys and research programmes and for making recommendations thereon to the parties. When the gross annual haul was set for each party, a licensing system was to come into operation.[61] Rights of seizure and detention over offenders were guaranteed to both parties, but the jurisdiction to try cases and impose penalties belongs exclusively to the country to which the offender belongs.[62]

At the first session of the Commission heated debate took place as to the total allowable catch of salmon and trout in 1957, and as the members were unable to reach an agreement negotiations had to be taken to the level of the Japanese Foreign Minister, Kishi, and the Soviet Ambassador in Tokyo, Tevosyan. At first the Ambassador offered acceptance of a total catch up to 120,000 tons "as an exceptional measure" on condition that salmon and trout fishing in the Okhotsk Sea "would be drastically reduced this year and should be stopped entirely in the future". Japan could not agree to these two conditions and talks were continued. Eventually, final agreement was reached; the expression "as an exceptional measure" would be deleted, the fleets of both countries would be permitted to fish in the Sea of

Okhotsk, and the catch in that region would be limited at 13,000 tons. Final details were negotiated by the Japanese Minister of Agriculture and Forestry and the Soviet Deputy Minister of Fisheries, and the regulations came into force in April 1957.[63]

These early differences illustrate the difficulties confronting the Commission in finding a joint conservation policy that can be reconciled with the interests of both parties. It is an unhappy omen that the Commission's machinery broke down so early after its inauguration and devoutly to be wished that the procedure of referral to the ministerial or diplomatic level will not be regarded as a precedent to be followed in future difficulties. The best hope of an international commission, composed of fishery experts and scientists, is that the conservation of the fisheries at their highest level of productivity will remain to be the primary consideration, as expressed through impartial investigation. It is too early to cast judgment on the Commission's achievements but it is probably true that of all the bi-lateral arrangements that we have reviewed, the Russo-Japanese will be the most difficult to accomplish, due to the basic divergence between the fishery interests of the parties and to the complex political ramifications involved. To this extent the results of

the Russo-Japanese Commission may prove to be the truest touchstone for future international fishery co-operation.

Section D

The Problems and Solutions in Prospect

We have now reached a stage in the analysis of the evolution of international fishery regulation where an attempt might be made to summarise the problems and to outline the likeliest solutions. The sociological and biological aspects of fishery regulation were condisered briefly in the first instance in order to indicate the depth and complexity of the problem as a whole, particularly when affected by political issues, and to avoid the fallacies of omission that often invalidate a specialist approach. The various types of procedures, institutional and otherwise, that have been used to overcome particular problems as they arose, and latterly to anticipate problems that might arise, have been described sufficiently to suggest the character of techniques that can be employed to solve such problems in the future. But the success of institutional and other procedures will obviously depend to a large extent on the effectiveness of the legal framework within which they must be conducted. If the possibility of treating the international regulation of fisheries as a purely legal problem is a manifest absurdity, none the less absurd is the hope of finding a separate and insulated body of law relating to the fisheries. For this reason it has been necessary to take into account the whole

picture of recent trends in the general law of the sea.

The maritime part of international law is based on customary law which has evolved over long years of mercantile practice among the carriers of the principal maritime powers of Europe, particularly Britain, France, Holland and Greece. These long-standing practices were sanctioned and reinforced by the decisions of the courts of admiralty. Especially influential in the formation of the law of the sea was the English Admiralty Court. The refinement of these maritime practices commonly observed by the leading traders was gradual but by the 17th century they had crystallized into the form of law and were recognized as binding on all nations. In 1689 Sir Charles Hedges, Judge of the English High Court of Admiralty, stressed the international character of this law: "The Court of Admiralty is a Court of Justice, and the judge who is sworn to administer it is as much obliged to observe the law of nations as the Judges of the Courts of Westminster are to proceed according to the Statutes and the Common Law." Later, the decisions of such eminent United States judges as Chief Justice Marshall and Justice Story were to become linked with the English precedents, and together they played a major role in the development of the law of the sea. This is made evident by the fact that these Anglo-American admiralty decisions formed the basis of the great bulk of rules embodied in

the maritime conventions such as those signed at the Hague Codification Conferences of 1899 and 1907, and the 1909 Declaration of London signed by ten Powers who affirmed that it corresponded "in substance with the generally recognized principles of international law".

On 24th February, 1958, an international conference was convened at Geneva by the United Nations, in accordance with the recommendation of the International Law Commission, with the main purpose of examining various aspects of maritime law on the basis of draft Articles adopted by the Commission in 1956. These draft Articles were not only an attempt to codify the existing maritime law as it relates to the regimes of the high seas and the territorial sea, but were also intended to be an instrument de lege ferenda, with a view to satisfying urgent new needs such as submarine mineral exploitation and fishery conservation. The Commission has been necessarily wary of treating its task from any partial and particular point of view, and has taken pains to adopt a general approach that is rooted in principle and yet tempered by a judicious regard for the changing priorities in international society. In analysing the relevant Articles, however, we must keep our own problem of fishery conservation uppermost, since we are, in this paper, primarily concerned with the law from the fishery point of view. By referring to the

comments made by various Governments upon the Articles we shall gain an insight into the degree of success, if any, that can be expected from the Geneva Conference; and in the light of our study of procedures in fishery regulation we shall be in a position to weigh the probable consequences for men and fishes.

Chapter 11: The International Law

("Reason is the life of the law"
- First Institute, Coke.)

One of the principal reasons for the failure of the 1930 Codification Conference was the total lack of agreement on the breadth of the territorial sea, and indeed it could not even be decided whether the breadth should be uniform everywhere, erga omnes. Since then the traditional three-mile rule, which had been insisted upon without success by most of the principal maritime powers, has been deserted by an increasing number of the states. Even Great Britain, one of its most zealous champions, has conceded the existence of a four-mile belt in the case of Norway (Anglo-Norwegian Fisheries Case I.C.J. 1951), without extending this concession to any other state claiming more than three miles.

The fact that the possibility of uniformity in the breadth of the territorial sea has further receded since 1930 is the only conclusion that can be made after noting the trend in state practices, as brought out in the "Second Report on the Territorial Sea"[1] by the special Rapporteur of the International Law Commission on 19th February, 1953. Of the sixty-

odd countries listed, only 23 categorically name three miles as the limit of their territorial sea. Countries such as Argentina, Chile, Ecuador, and El Salvador were cited as having extended their three-mile belt since the end of the Second World War. Admittedly, the number of 27 states which, on the strength of this list, adhered to the three-mile rule at that time, included the overwhelming preponderance of maritime nations, and important exceptions, such as Norway and Sweden, were regarded as just that, exceptions to a time-honoured rule. But this argument for the existence of an international and binding rule, based on the practices of the sea-faring Powers, had lost much of its cogency when mineral resources in the sea became accessible and the need for fishery conservation became imperative. The rights of free navigation, which formed the pith and substance of the principle of the freedom of the seas, were no longer admitted by all to be sacrosanct, but had to compete for consideration with newer rights claimed by coastal states to the resources of the sea. We have seen that the theory of the continental shelf dramatized by the Truman Proclamation of 1945, introduced further juridical confusion as to the nature of rights in the sea, and that a state's interpretation of these rights influenced its decision whether to claim territorial sovereignty or merely limited rights of jurisdiction and control over extended areas of the sea.

Even since 1953, when the Rapporteur's list of state practices was submitted to the Commission, more states have forsaken the three-mile tradition and struck out on an independent course;[2] once again, in many cases, the precise nature of a claim for extension depends upon the construction to be given to the actual wording of the relevant decree or proclamation, in light of the above-mentioned distinction. The United States claims that the distinction has a vital juridical significance and has consistently maintained that the three-mile breadth of its territorial sea has not been affected by the 1945 decree. Similarly, Brazil's claim to the continental shelf in 1950 was made without prejudice to navigation and fishing rights, and accordingly she still upholds the three-mile rule. In the same year Pakistan claimed a right to the continental shelf but also specified that this would not affect the character of the superjacent waters. However, in 1953 Chile, Peru and Ecuador all claimed 200 miles, elevating earlier claims over the resources of the sea, its bed and subsoil, into full territorial claims. In September, 1955 the Government of Israel proclaimed a six-mile limit, and in successive years India and Ceylon made similar extensions. Moreover, the attitude of the People's Republic of China is still uncertain, since it is still deprived of its voice in international circles, but the indications are that twelve miles will be the likeliest limit.

The most recent, at the time of writing, of the claims of a sensational nature is that made by the Indonesian Government to all the seas between the islands of the Indonesian Government. "All waters around, between and connecting the islands or parts of islands belonging to the Indonesian archipelago, irrespective of their width or dimension, are natural appurtenances of its land territorial and, therefore, an integral part of the island or national waters subject to the absolute sovereignty of Indonesia. The peaceful passage of foreign vessels through these waters is guaranteed as long and in so far as it is not contrary to the sovereignty of the Indonesian State or harmful to its security." The statement has also specified that a 12-mile belt of territorial sea would be observed, measured from straight base-lines drawn between the outermost points of the islands of the Republic. The exact distinction between the larger claim and the 12-mile claim has not so far been explained in juridical terms, although the larger claim has been said to be based on historic, geographical and economic grounds.

Despite such extravagant pretensions, most states still hold that, even though there is no uniform ruling on the breadth of the territorial sea, extensions should be reasonable and compatible with international practices; accordingly, there should be some definite limitation on the claims that

can be made. When the International Law Commission considered the matter, it agreed that such a limit should be set at twelve miles, beyond which any unilateral extension of territorial waters would be an infringement of the principle of the freedom of the seas and contrary to international law. Because of the wide differences of opinion de lege ferenda existing among members of the Commission, and differences in state practice, the Commission declined to make any further recommendation with regard to the breadth of the territorial sea, leaving it to an international conference of plenipotentiaries to decide whether a uniform delimitation should be made, and, if so, where the limit should lie between three and twelve miles.

"Article 3: 1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles, and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the

territorial sea should be fixed by an international conference."

The variety of comments made by Governments on this tentative position offers little hope, prima facie, for agreement on a uniform breadth. At one extreme, Iceland[3] criticized the Commission's work in general for failing to give guidance on the scope of a coastal state's jurisdiction over its fisheries, and expressed the view that it should have the right to exercise exclusive jurisdiction over coastal fisheries up to a reasonable distance, without reference to any delimitation of the territorial sea, contiguous zones, superjacent waters of the continental shelf, or anything else. In 1948 Iceland laid claim to the waters of the continental shelf for the purpose of establishing "conservation zones" for fishermen. Therefore, where there is a conflict of interests between the use and conservation of a fishery, the coastal state should have absolute priority up to a reasonable distance, and the measurement of that distance would vary according to local conditions. The need for this safeguard is particularly marked in the case of a country such as Iceland, which is almost entirely dependent for its subsistence on its exports, of which fishery products make up 97%. The Icelandic Government admitted the dangers of abuse that might arise out of a general a priori recognition of a coastal state's right to determine the "reasonable distance"

within which it might exercise such exclusive jurisdiction, but it suggested that these dangers could be lessened, if not eliminated, by requiring each unilateral claim to be subjected to the approval of an arbitral tribunal. It is true that arbitration has been quite a successful method in the past for resolving disputes between two parties, particularly with regard to North American waters, but to seek arbitration on such a matter by reference to economic criteria, without the guidance of legal principle, would be to invite a settlement that was more arbitrary than arbitral.

The most ardent of all supporters of the case for unilateral rights are Chile, Ecuador and Peru, which closed their ranks at a trilateral conference in Santiago in 1952 in order to press their claims to a 200-mile territorial zone. Having reached a common agreement, these three countries have since then been trying to have their views adopted by the Organisation of American States. Most Latin American countries are more concerned with establishing exclusive rights of mineral exploitation in the sea-bed and subsoil for considerable distances out to sea, and less with the conservation of fisheries, but this does not apply to Chile, Ecuador and Peru, where the continental shelf plunges suddenly into deep waters close to the shore. The result of this confusion of aims within the Organisation has been a

lack of unanimity on the part of the Latin American countries with regard to the nature and extent of jurisdictional claims to the high seas. In commenting upon the I.L.C.'s draft Articles, Peru[4] cites approvingly the Principles of Mexico on the Juridical Regime of the High Seas, to the effect that "each State is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological and biological factors, as well as the economic needs of its population and its security and defence." Similarly, in criticizing Article 3, Chile[5] could see "absolutely no grounds for considering that international law does not permit an extension of the territorial sea beyond twelve miles".

It might be noted in passing that the above-mentioned Principles of Mexico were passed, against the vote of the United States, at a meeting of the Interamerican Council of Jurists convened in Mexico City in 1955. Included in the Principles[6] were stipulations that coastal states should have the right "to adopt, in accordance with scientific and technical principles, measures of conservation and supervision necessary for the protection of the living resources of the sea contiguous to their coasts beyond territorial waters"; and "the right of exclusive exploitation of species closely related to the coast, the life of the country, or the needs

of the coastal population, as in the case of species that develop in territorial waters and subsequently migrate to the high seas, or when the existence of certain species has an important relation with an industry or activity essential to the coastal country or when the latter is carrying out important works that will result in the conservation or increase of the species." The range of these claims is somewhat startling, but significant since they emanate from South American juridical tradition which has contributed so much in scholarship to the development of international law. The Principles were declared to be the "expression of the juridical conscience of the Continent", but in the following year the conscience of the Continent suffered remorse at Ciudad Trujillo and the Specialised Conference of the O.A.S. merely adopted a Resolution, listing the agreements and disagreements as to the law of the sea existing among the members of the Organisation.

India[7] has suggested the establishment of a 100-mile belt of "coastal high seas", within which the coastal state would have the pre-emptive right to take conservation measures in specified areas. Other states interested in fisheries in these areas would be expected to enter into negotiations with the coastal state regarding the adoption of such conservation measures, which in principle would be applied equally

to all participating in the fishery regardless of nationality. In the absence of a special international agreement, however, it might be wiser to leave the enforcement of these measures entirely in the hands of the coastal state.

Canada[8] maintains that the three-mile zone is inadequate for fishery-conservation and that exclusive rights of jurisdiction should be granted to the coastal state for a distance up to twelve miles. It is felt that the extension of the territorial sea may not be necessary for this purpose and that the conservation of fisheries should in that case be an additional subject of extra-territorial jurisdiction within the contiguous zone. From the fishery point of view, this middle course would be sufficient and reasonable in most cases, and in the view of most fishery scientists it is certainly necessary if maximum productivity of the fisheries is to be reached and maintained. This projected policy would have received the enthusiastic backing of Hjort, Petersen, Fulton and the rest of the early experimenters.

Other traditional fishing countries like Norway, Denmark, Sweden, Britain, and the United States have been particularly apprehensive of any weakening in their stand which might encourage more claims to wider territorial belts and so invalidate the basic concept of the "dependence of the territorial sea upon the land domain." Unilateral rights, as

claimed by many states and justified by certain jurists such as Paul Fauchille, run counter to the judgment handed down in the Anglo-Norwegian Fisheries Case: "The delimitation of sea areas has always an international aspect: it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the 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." But whereas the Scandinavian countries consider it futile to seek a general agreement on the width of the belt which would deprive any state of stretches of the territorial sea over which it has enjoyed unmolested jurisdiction, Britain and the United States still insist that claims in excess of three miles are not justified under international law, except by virtue of special historic reasons. Britain[9] has denied the validity of regional or local solutions of a problem that is essentially global in character. Moreover "in the view of Her Majesty's Government this economic factor,(i.e. fishery conservation) like other economic factors, is not, and can never be, an adequate reason for disrupting a uniform solution of the problems of the territorial sea. Like the other economic factors it is a question which relates to the regime of the high seas rather than to the breadth of the territorial sea. That it may be a peculiarly difficult question in no way affects this basic

principle . . . In the opinion of Her Majesty's Government questions relating to the problem of high seas fisheries, as well as to the equally difficult problem of oil pollution, are eminently susceptible of regulation by international agreement."

Sweden[10] expressly objects to contiguous zones in principle and believes that states wishing to exercise control over foreign ships outside its territorial limits should continue to seek such rights through the negotiation of treaties with states affected (e.g. the U.S. Liquor Treaties, and the 1925 Helsingfors Treaty between the Baltic States). In relation to contiguous zone jurisdiction, Denmark[11] has pointed out that she had long ago assumed responsibilities far beyond her territorial sea in respect of reefs, shoals, and other impediments to navigation" in the Kattegat, the Sound and the Belts", by maintaining buoys, beacons, and other guides for marking fairways in the sea. These responsibilities were stated to rest "partly on an old-established practice and partly on the express provision contained in Article 2 of the Treaty of March 14 1857." In order to meet these responsibilities safely and efficiently, the Danish Government has asked the Geneva Conference for the assurance that regulations issued for this purpose can be enforced against everyone navigating in these waters, irrespective of nationality.

It seems to the writer that if such a guarantee could be given along the lines suggested by Denmark to safeguard shipping, a similar course could be followed in the case of fisheries; so that, by analogy, exclusive rights of control over a fishery could be granted to a coastal state, if it were proven that the coastal state has assumed, or was about to assume, exclusive responsibilities for the conservation of the fishery. This would of course be conditional upon due regard being given to the historic fishing rights of other states whose nationals have since time immemorial and without interruption engaged in fishing in those areas of the high seas. The test of what responsibilities were required in order to conduct proper conservation measures in any particular fishery might be left to a scientific and impartial body such as the Fisheries Division of the F.A.O., and investigations might be instigated by that authority from time to time to determine that the responsibilities were being fully met. Juridically, too, the nexus between responsibilities and rights is appropriate, and if there were to be legal machinery to enforce the rights of a coastal state there should also be machinery to enforce implementation of its duties in the matter of conservation. Furthermore, the question whether the coastal state was free in the first instance to assume exclusive responsibilities of conservation without infringing historic fishing rights of other states

would be one susceptible of proof in court. If, on the other hand, these other states succeeded in proving that they possessed historic rights of fishing, then in fairness they and the coastal state might be directed to make conservation arrangements in consultation with an independent scientific body such as the F.A.O. Newcomers to the fishery would of course be required in law to submit to such regulations as had been established.

The chief benefit of such a scheme, from the fishery point of view, would be that conservation measures would be encouraged on the part of the coastal state (particularly desirable in under-developed regions) without disturbing existing international agreements. Exclusive rights (and responsibilities) of conservation over a fishery would be granted by the Court to the coastal state only if it were proved, on the scientific evidence of the F.A.O. or a similar independent body, that the existing international agreement was inadequate to secure the maximum productivity of the fishery. In practice this would tend to strengthen established Commissions in regional waters. Newcomers to an unregulated fishery would be somewhat restrained from using destructive methods of fishing and encouraged to negotiate with the coastal state for regulations regarding intensity of fishing. Most important of all, the best scientific interests of the fishery would be constantly in the foreground of all discussions.

This kind of legal approach to fishery regulation, based on an "order of priorities", would not be inconsistent with the exclusive right of the coastal state to mineral exploitation in the sea-bed and subsoil, co-extensive with the continental shelf or exploitable parts of the sea-bed (whichever went further). The existence of mineral deposits under or near coastal fisheries would of course be a complication, in fact an unavoidable one which might be anticipated with some foreboding, in the same way as the international regulation of the Fraser salmon fishery might be complicated by Canadian engineering or mining works. The important point to be made is that there is nothing inherently contradictory in law between the existence of national rights of mineral exploitation and of international rights of fishery conservation in the same area of waters. An empirical approach with due emphasis on a system of priorities would make irrelevant any arguments based on the concept of <u>ownership</u> of fish, fisheries, minerals, or the continental shelf itself, and there need be no tampering with the territorial sea, as strictly defined. Nor would there be any need to impose a uniform limit to contiguous fishery zones, any more than for customs, fiscal and sanitary purposes.

This system of priorities would not, therefore, clash in any way with the recommendations made by the I.L.C. with

regard to a contiguous zone:

"Article 66: 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

In June 1952 Britain[12] made an important concession in its traditional attitude to contiguous zones. While still maintaining its opposition in principle to the exercise of extra-territorial jurisdiction by a coastal state, the British Government expressed its willingness to accept the Commission's recommendation on the following three conditions:

"(i) Jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations only;

(ii) Such jurisdiction is not exercised more than twelve miles from the coast;

(iii) This article is read in conjunction with another article stating that the territorial waters of a State shall not extend more than three miles from the coast unless in any particular case a State has an existing historic title to a wider belt."

The writer believes that if agreement can be reached on suitable guarantees for the coastal state's prior rights of fishery conservation and mineral exploitation, then the breadth of the territorial sea would cease to be a stumbling-block to the codification of the law of the sea. If it is still impossible to have the three-mile rule generally accepted, even after recognition of a contiguous zone within twelve miles for certain jurisdictional purposes, it would at least be more feasible that a compromise could be found between three and twelve miles, to be established in law as the uniform width of the territorial sea erga omnes. The writer's arguments for holding that view may be summarised as follows:

(i) The three-mile rule is today considered by the majority of states not to be established in international law, and an increasing number of

states are losing confidence in the possibility of a uniform rule, due to the widely varying and apparently conflicting needs of modern states in different parts of the world.

(ii) On the other hand, some fifty states have restricted their territorial claims to twelve miles or less, leaving only a dozen or so which are likely prima facie to reject a twelve-mile maximum limit. In virtually every case, these "rebels" have one of two sets of rights that they wish to have established in law, either rights of fishery conservation or rights of mineral exploitation in parts of the high seas. But neither of these sets of rights need necessarily involve an extension of territory. Either of these problems is capable of being solved juridically by empirical reasoning, with reference to a recognized order of priorities.

(iii) In the case of fisheries, therefore, the principle of territoriality need be invoked only where the coastal state's right of exclusive use is impaired or threatened. The coastal state could enforce this right of exclusive use in respect of an extra-territorial fishery only by proving in Court, on the evidence of an impartial scientific authority such as F.A.O., that by sharing the fishery it would

be impossible to reach the theoretical maximum level of productivity in the fishery. In practice this would discourage non-coastal states from using destructive methods of fishing and would positively encourage them to adopt common conservation measures with the coastal state. This might impose a heavy burden on the scientists, but surely one that they would very willingly accept in the interests of the world's fisheries.

(iv) In the case of mineral exploitation, there would be even more practical objections on the part of coastal states to anything less than exclusive rights. Whether they could be persuaded to accept anything less would depend upon whether an effective system of legal safeguards could be devised to protect their prior rights to the natural resources of the continental shelf. If this proved to be impossible (and the present attitude of those states that subscribe to the continental shelf theory suggests that it would be impossible) then it would be necessary to concede exclusive rights to the exploitation of the sea-bed and subsoil of the shelf, provided always that this did not interfere in any way with navigational and fishing rights. This concession should not be grudged if in return the "rebels" were to retract their exorbitant claims of territoriality

and accept the Commission's recommendation of a twelve-mile maximum limit for the territorial belt.

(v) Once the problems of fishery conservation and mineral exploitation had been resolved, three main classes of rights would be left in the clear:

a) right of free navigation on the high seas;

b) right of innocent passage in the territorial sea; and

c) right of coastal state to exercise a limited degree of jurisdiction within a specified region of the high seas for certain administrative, non-economic purposes (e.g. customs, fiscal and sanitary regulations).

a) The wide connotation formerly given to this ancient and universally respected principle must suffer a slight diminution, as it becomes subject to more exceptions than were once tolerable. In the same way that the concept of national sovereignty can only be understood today as a legal fiction highly charged with emotion but in practice reducible by reference to a standard of relativity, so the once virtually absolute concept of the high seas must submit to the restraints of common sense in relation to present realities.

b) Navigational rights in territorial waters will not become less important in an age when the volume of international trade is constantly increasing. Apart from occasional infringements caused by extreme but temporary political views, these rights are unlikely to be denied per se, since they are firmly rooted in mutual interest and good sense. (see I.L.C.'s draft Articles Part I Section III).

c) Once the problems of fishery conservation and mineral exploitation had been satisfactory settled, there would be little need except in exceptional circumstances, for a coastal state to extend its extra-territorial jurisdiction beyond twelve miles and the recommendation of the I.L.C. with regard to the contiguous zone would have a good chance of being accepted.

Before concluding this chapter, some notice should be taken of various other draft Articles of the I.L.C., which would have a bearing upon the type of solution suggested above, from the fishery point of view.

In Article 5 the Commission follows the Court's decision in the Anglo-Norwegian Fisheries Case in the matter of straight base-lines:

"Article 5:1 Where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of its low-water mark. In these cases, the method of straight base-lines joining appropriate points may be employed. 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 internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.

2. The coastal State shall give due publicity to the straight baselines drawn by it.

3. Where the establishment of a straight base-line has the effect of enclosing as internal waters areas which had previously been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in Article 15, through those waters shall be recognized by the coastal State in all those cases

where the waters have normally been used for international traffic."

There has been little in the way of adverse comment upon the principle of straight base-lines as such, since it was accepted by the International Court of Justice in December 1950. Britain[13] has pointed out, however, as a condition of this method of delimitation, that the base-lines should only enclose waters that are strictly inter fauces terrarum, "in order to ensure that the baselines are not automatically joined from headland to headland, and that, when dealing with strings of islands, the lines are not invariably used to join the outermost point of one island to that of another." The British Government also stresses the inadequacy of the principle of "the general direction of the coast" as a criterion in drawing the base-lines and underlines the need for an official definition of internal waters. Clearly, attempts to enlarge the territorial sea will be resisted all the more strenuously by the "traditionalist" fishing countries, if the definition of internal waters is too liberal. In practice it might deprive non-national fishermen of ancient fishing rights in waters previously regarded as belonging to the regime of the high seas. For most coast-lines, however, the issue would hinge upon the status accorded to "bays". In order to prevent this system of straight baselines from being applied

to coasts whose configuration does not justify it, on the pretext of applying the rules for bays, it was necessary for the Commission to adopt fairly precise wording, in Paragraph 1 of Article 7, in describing the test of what constitutes a bay.

"Article 7: 1. For the purposes of these Articles, a bay is a well-marked indentation whose penetration is in such properties to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle drawn on the mouth of that indentation. If a bay has more than one mouth, this semi-circle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

2. The waters within a bay, the coasts of which belong to a single State, shall be considered internal waters if the line drawn across the mouth does not exceed fifteen miles measured from the low-water tide.

3. Where the mouth of a bay exceeds fifteen miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn

that line shall be chosen which encloses the maximum water area within the bay.

4. The foregoing provisions shall not apply to so-called 'historic' bays, or in any cases where the straight baseline system provided for in Article 5 is applied."

In its Commentary upon this Article the Commission reveals that the suggested 15-mile rule was arrived at by way of compromise between the 10-mile rule (which was considered too closely associated with the discarded 3-mile rule for the territorial sea and had been expressly rejected by the Court in the Fisheries Case) and a projected 25-mile rule (which would have been just over twice the maximum limit of the territorial sea as suggested in Article 3). Chile[14] has objected to the 15-mile limit as being "exceedingly short", especially in the event that "not even a moderately precise definition has been given of 'historic' bays". Denmark[15] presumably with Greenland in mind, suggests that the straight baseline rule of Article 5 is sufficient to cover all cases of irregular coastlines and that Article 7 might be dispensed with altogether. Furthermore, in the Danish view, geographical peculiarities, as well as economic and security considerations, might justify the application of a baseline exceeding fifteen miles. Britain,[16] on the other hand, still prefers the old 10-mile rule: "Even if the view

is accepted that the 10-mile rule had not acquired the authority of a general rule of international law, it can nevertheless be justified both by historical practice and by the fact that it can more easily be related to the range of vision at sea."

Once again, agreement may prove to be impossible as long as a uniform rule is insisted upon. Norway[17] has suggested that the Geneva Conference should confine itself to establishing a maximum limit for bays, due to the wide variation in geographical conditions. Clearly, however, the attitudes of many states will depend upon which of their bays are regarded as "historic". The Soviet Union[18] is recently reported to have closed off the whole of Vladivostock Bay, apparently on the ground of being "historic", for the purpose of defending missile bases, although it is 120 miles across at its mouth. A "historic" bay is, however, by its very nature something that it would be very difficult, and not altogether desirable, to define in a codification of law. It would be preferable on the whole to leave each case to be decided on its own merits by the judicial process and traditional international law. At any event, the question of delimiting bays is so closely associated with that of determining the breadth of the territorial sea that the difficulties involved therein may evaporate if the paramount problems of fishery conservation and mineral exploitation can be solved.

Under the General Regime of the High Seas the Commission starts off by specifying certain freedoms of the high seas:

"Article 27: The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, inter alia:

1) Freedom of navigation;

2) Freedom of fishing;

3) Freedom to lay submarine cables and pipelines;

4) Freedom to fly over the high seas."

This list is not intended to be exhaustive; to it could be added other freedoms, such as the freedom to undertake scientific research on the high seas. It is interesting to see how as time advances the connotation to be given to such a grand concept as the freedom of the seas actually widens at the same time as modern conditions subject it to successive derogations. In the days of Grotius only the first two particular freedoms, those of navigation and of fishing, would have been specified as constituting the freedom of the seas. As to the derogations, the Geneva Conference itself is a living testimony. In its Commentary the Commission enumerates five classes of rights designed to regulate the otherwise free use of the high seas:

"(i) The right of States to exercise their sovereignty on board ships flying their flag;

(ii) The exercise of certain policing rights;

(iii) The rights of States relative to the conservation of the living resources of the high seas;

(iv) The institution by a coastal State of a zone contiguous to its coast for the purpose of exercising certain well-defined rights;

(v) The rights of coastal States with regard to the continental shelf."

With respect to the flight and maneouvre of aircraft above the high seas, the Convention on International Civil Aviation 1944 provides in its Article 12: "Over the high seas, the rules in force shall be those established under this Convention" and the I.C.A.O.[19] has adopted such rules in an annex to its Convention.

The question of fishing rights is taken up in greater detail by the I.L.C. in Section 1, Sub-Section B of the Regime of the High Seas (Articles 49 to 60 inclusive). But since this relates more particularly to the basic principles and methods of conserving the living resources of the high seas, it belongs more logically to the organization of procedures,

in the sense in which the writer has adopted the term 'procedures'. Accordingly, consideration of these important Articles will be deferred until the following, and concluding, chapter.

Before we take leave of the general principles of the law of the sea, a brief account must be taken of the Commission's recommendations in respect of the continental shelf, contained in Section III of the Regime of the High Seas (Articles 67 to 73 inclusive). The Commission makes it explicit that it approached the problem of the shelf with the desire "to combine the needs of the exploitation of the seabed and subsoil with the requirement that the sea itself must remain open to all nations for navigation and fishing."[20] The idea that the exploitation of the natural resources of submarine areas should be entrusted to international agencies, instead of to coastal states, had presented itself to some members, but it was finally conceded that in present circumstances such a solution would meet with insurmountable practical difficulties and would not satisfy the more immediate needs of mankind. Accordingly, the Commission went a long way towards accepting the doctrine of the continental shelf, as outlined in Chapter 7.

> "Article 68: The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

The wording of this Article is of extreme importance. It should be noted that the "sovereignty" which is conferred upon the coastal state is limited to such rights as are necessary for the exclusive exploration and exploitation of the natural resources of the shelf. In the words of the Commission's Commentary, "the rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so." The writer has already observed that it might prove necessary to concede exclusive rights in the resources of the shelf to coastal states, and indeed most Governments have accepted this as inevitable, but it does seem unfortunate that it was considered necessary to use the concept of sovereignty. Not only is the term juridically imprecise, but it is also dangerously misleading, from the psychological point of view, suggesting a "territorial" range of jurisdictional powers that would be alien to the principle of the freedom of the high seas. For instance, the Commission has explained that the coastal state would not have the right to prohibit scientific research on the conservation of living resources of the sea but that its consent would be required for research relating to the exploration or exploitation of the seabed or subsoil. But it was decided also by the Commission that the term "natural resources" should include the

products of sedentary fisheries, to the extent that they were natural resources permanently attached to the bed of the sea. This made it necessary for the Commission to make a juridical distinction between fisheries which are sedentary by reason of the biological species and those which are sedentary by reason of the equipment used. Article 60 stipulates that "the regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State, may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals," but that such regulations would not affect the general status of the areas as high seas. Accordingly, scientists would be free to conduct research on such fisheries, without legal restraint of any kind. On the other hand, under Article 68 sedentary fisheries which are permanently attached to the bed of the shelf but not conducted by means of such equipment come under the "sovereignty" of the coastal state, and research which would necessarily involve exploration of the sea-bed could be excluded by that state. It appears that the Commission was aware of this anomaly, for in its eighth session it was suggested that an examination of the scientific aspects of this matter should be left to fishery experts, but the Commission decided not to change the text.[21] Such difficulties,

it is submitted, are accentuated by the introduction of the concept of sovereign rights in the shelf.

The general principle of the freedom of fishing in the high seas is, however, further bolstered by the unambiguous language of Article 69 and Article 71, Paragraph 1:

> "Article 69: The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.
> Article 71: 1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea."

Whatever the ultimate outcome of the Geneva Conference, these two Articles must remain as the bedrock of the law of the sea. Meanwhile, the troubled spirit of Grotius hovers overhead.

Chapter 12: The International Procedures

("'Tut, tut, child', said the Duchess.
'Everything's got a moral if only you can find it.'"

Alice's Adventures in Wonderland - CARROLL)

The Geneva Conference of 1958 must be distinguished from its unsuccessful predecessor at The Hague in 1930. On the surface, both conferences are concerned with finding sufficient common ground among the practices and policies of the participating states to form the consensus to a codification of part of the law of nations. Since this consensus could not be found in 1930, the Hague Conference failed of its purpose. Since then the problems involved in codifying the law of the sea have been increased in number and magnified in size and this would not seem to auger well for the plenipotentiaries at Geneva, who once again represent many conflicting viewpoints. But in 1958 the chances of at least partial success are enhanced by the brute force of necessity, for not only would international unanimity on the maritime law help to meet the vast problems of nutrition and technology that beset the modern world, but also failure could only accentuate the differences between the "haves" and "have-nots", and the political disturbances that result from these

differences. It would be idle to suppose that all conflicts of views can be resolved; yet there is sufficient common attachment to the bulk of the draft Articles of the International Law Commission to make a substantial measure of agreement on many aspects fairly likely. A practical attitude to universal maritime law must somehow be cultivated if anarchy of the sea is to be avoided, and within this framework practicable procedures must be devised for the regulation of the world's fisheries. In this final chapter we shall examine closely the procedures suggested by the I.L.C. and the reactions of various Governments before meeting at Geneva. Then we shall return to the development of international fishery organizations in order to speculate briefly on how these institutional procedures may be affected by the envisaged changes in the law.

During the inspection of the I.L.C. blueprint made in the previous chapter, the writer suggested a "system of priorities" as the likeliest juridical basis of fishery regulation. Such a system must necessarily represent a compromise in fact among three alternative methods for the conservation and development of international fisheries. The first method involves the recognition that coastal and off-coast fisheries are so closely tied nowadays to the economy of the coastal state that the latter has the absolute right to impose such

regulations on the use and conservation of the fishery as it thinks fit, and that if the state's economic interests are prejudiced by the existing conditions of the fishery, it may exclude unilaterally all other states from using it. Stated so baldly, this principle *per se* has little chance of universal acceptance in an age when states must share and co-operate for survival, particularly since an impressive number of international fishery agreements in different regions of the world have brought important mutual benefits to the states participating. Although the method of absolute unilateral rights would satisfy certain legitimate political interests, at least in the short term, it would be at odds with the objectives of the humanitarian, whose ideals of international co-operation must be realised not only for their own sake but simply as the most efficient way of solving world-size problems such as starvation and under nourishment. It would also run counter to the scientist's method of closely integrated team-work; and the world of science, like that of art, has no frontiers.

Advocates of the second method, at the opposite extreme to the first, carry the argument for international co-operation so far as to insist on a supranational body with legislative and enforcement powers. By this means, they say, the interests

of scientific regulation would be assured of international respect, since partial and selfish motives would be cancelled out by the greatest number seeking the highest good, and political considerations would be kept at a minimum. At the same time the social scientists would be quick to stress the danger of trying to impose uniform and cosmic solutions to the shifting and many-sided problems that confront different fishing communities and peoples at different times.

No Hegelian logic is required to forge a synthesis between these two hypothetical extremes, for a third method suggests itself in the principle of compulsory arbitration in all cases of disputes between states. This principle involves acceptance of the actual existence of competing rights, but also the juridical possibility of establishing an order of priorities by which they can be judged. Such an approach would be based upon universal recognition of basic legal principles applicable equally at all times to all mankind. It would be in the traditional line of descent from the common law of nations and could truly be called the international law of the sea. The politican would be assured of impartial investigation and fair dealing, the biologist could expect a reasoned, empirical approach; the social scientist might hope for an equitable correspondence between legal rights and human needs; and the humanitarian would see international order and justice reducing waste as well as antagonism.

The cross drifts of these three fundamentally different attitudes can be followed by tracing the course of the I.L.C.'s deliberations on the "Resources of the Sea" between its third session in 1951 and its eighth session in 1956.[1] Originally the matter was discussed in relation to the problem of the continental shelf, because of the exorbitant claims that were being made by coastal states to remote regions of waters covering the shelf, partly in order to safeguard their alleged rights of fishery conservation, and draft articles were adopted with a view to securing such protection for coastal states without necessitating an extension of sovereignty. After the reactions of the various Governments had been tested, these articles were revised in 1953. At this point it was still believed that the coastal state's rights of fishery conservation could be guaranteed without increasing the breadth of the state's jurisdictional zone, but it was recognized at the same time that where nationals of more than one state were engaged in fishing in a given area, the concurrence of all those states was essential to a satisfactory solution. Accordingly, those states would be placed under the obligation to accept as binding any system of regulations prescribed for that area by an international authority within the framework of the United Nations.

In April 1955, by General Assembly Resolution 900 (IX) of 14th December, 1954, an international conference was convened at Rome, under the auspices of the F.A.O., for the purpose of studying the technical and scientific aspects of the problem of the conservation of the living resources of the sea. Here the tendency was towards making coastal states responsible for controlling fisheries zones contiguous to their coasts and for applying conservation regulations consistent with the technical and scientific principles adopted by the Conference. The final report of the Rome Conference was submitted to the International Law Commission, which adopted it, in an amended form, at its seventh session in 1955. By this stage the suggestion of a United Nations organ with legislative powers in fishery regulation had been dropped and replaced by that of compulsory arbitration in case of dispute. In conjunction with this development express recognition was given to the "special interest" of the coastal state in maintaining the productivity of the fisheries off its coast.

At the seventh session two articles were adopted to protect the "special interests" of coastal states. The first stipulated that 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 coast should be entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there. The second article held that such a state might adopt unilaterally whatever measures of conservation were appropriate in the area where this interest existed, provided that negotiations with the other states concerned had not led to an agreement within a reasonable period of time. There was also provision for compulsory arbitration in the event of differences of opinion between the states concerned. At both the seventh and eighth sessions the insertion of a compulsory arbitration clause was opposed by some members of the Commission on the ground that the proper function of the Commission was to codify the law, not to impose procedures for safeguarding the rules of fishery regulation, but the majority took the view that effective safeguards were necessary for the settlement of disputes by an impartial authority, within the legal framework that the Commission was charged with designing. Although the 1953 proposal to establish a United Nations authority with legislative powers was dropped, the majority expressed the opinion that such a body would be useful for the purpose of conducting technical and scientific studies in fishery problems and of settling disputes of this character between states. On the whole, however, it seemed that the idea of

ad hoc arbitral tribunals was more practical in present circumstances than that of a centralised judicial authority.

In the final draft Articles, as submitted at Geneva, the expression "conservation of the living resources of the high seas" was defined as "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products" (Article 50). This definition was based on the wording adopted by the Rome Conference in 1955, and the Commission also accepted the view contained in the Rome Report that "the immediate aim of conservation of living marine resources is to conduct fishing activities so as to increase, or at least to maintain, the average sustainable yield of products in desirable form". The International Commission for the Northwest Atlantic Fisheries has also stated that its primary purpose is not merely the conservation of stocks, but their development to the maximum level of productivity. The fact that this Article has been accepted, expressly or tacitly, by the Governments, suggests that it has a good chance of being established in law as the basic theoretical principle of fishery conservation. If so, it will become the chief consideration in the minds of the judges or arbitrators who are entrusted with the interpretation of the codified law of the sea.

The prescription of these scientific criteria to be used in the judicial process, if a compulsory arbitral procedure is established, would be a great victory in the cause of the scientific regulation of fisheries, but the victory would be one of form rather than substance unless the distinction between exclusive and non-exclusive rights of fishery jurisdiction is made clear. Iceland[2] has insisted upon a fundamental distinction between the problem of conservation of stocks, on the one hand, and the situation where, despite the adoption of conservation measures, the maximum sustainable yield is insufficient to satisfy the needs of all states interested in the fishery. Iceland uses this distinction and the argument of the coastal state's "special right" to justify an extension of jurisdiction in order to exclude non-nationals from fishing in these coastal regions. This is an extreme viewpoint, but in light of the tremendous importance of Iceland's fisheries to her economy it can hardly be said to be unjust. Because of the social and economic hardships that could fall on the Icelandic fishing communities even though the maximum level of productivity had been reached, Iceland might be considered as a special case, where the economic considerations are so weighty as to provide an exception to the normal rule of fishery jurisdiction. This would be tantamount to

introducing the concept of equity in the judicial process, an element of flexibility in the otherwise strict rule of law. An advantage of this would be that the privileged status accorded to a coastal state in respect of extra-territorial jurisdiction by virtue of exceptional economic conditions could be withdrawn if those conditions ceased to exist. We have seen that the theoretical validity of exceptional economic considerations weighed in the minds of the judges in the Anglo-Norwegian Fisheries Case. The International Law Commission too was aware of the cogency of these considerations, as a moral argument for exclusive rights of fishing outside the normal limits of territorial jurisdiction, but, while drawing attention to the problem, it refrained from making any definite recommendations.

In Article 51 it was recognized that where the nationals of only one state are engaged in fishing in a particular area that state is responsible for adopting measures to regulate those fishing activities, even though they take place in waters adjacent to the coasts of other states. The adjacent coastal state would, however, be entitled, under Article 54, to take part on an equal footing in any system of research and regulation, even though its nationals do not carry on fishing there. Article 51 serves to emphasize

the responsibilities of interested states in the conservation of fishstocks; the duty of conservation is owed not to any state but really to the fishery itself, or rather to the mouths it will help to feed. This would seem to lie close to the argument that high seas fisheries are res communes, as contended originally by the Roman civilians.

The real practical difficulties arise, of course, where two or more states are engaged, or interested in engaging, in fishing in the same waters.

> "Article 52: 1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources. 2. If the States concerned do not reach agreement within a reasonable period of time any of the parties may initiate the procedure contemplated by Article 57."

This article might be interpreted as applying only

to cases where nationals of different states are exploiting the same stock of fish or marine resource in the same area. It has been criticized by Canada for failing to take into account that it may be necessary, in order to provide adequate conservation measures for that stock or resource, to include agreements with other states exploiting the same stock or resource in other areas.

The Commission suggests that in invoking the procedure mentioned in Article 52 the criterion should be that a state is "regularly engaged in fishing" in the area. In the International Convention for the Northwest Atlantic Fisheries the criterion used for determining sub-area Panel representation is that of "current substantial exploitation" (Article IV, section 2); and in the International Convention for the High Seas Fisheries of the North Pacific Ocean conservation measures are applied equally "to all Parties engaged in substantial exploitation" of the stock (Article IV, section 1 (a)). For the sake of uniformity, therefore, a change in the wording of Article 52 to adopt the criterion of "substantial exploitation" might be an advantage.

"Article 53: 1. If, subsequent to the adoption of the measures referred to in Articles 51 and 52, nationals of other States engage in fishing the same stock or stocks of fish or other marine

resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other States do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated by Article 57. Subject to paragraph 2 of Article 58, the measures adopted shall remain obligatory pending the arbitral decision."

In its Commentary on this article the Commission has proposed that the existing regulations should be applicable to newcomers "only if they engage in fishing on a scale which would substantially affect the stock, or stocks in question. "The employment of the "substantial fishing" criterion in this respect would seem to strengthen the argument for changing the wording of Article 52.

Before drafting this article the Commission gave consideration to the "principle of abstention", which had been proposed by several states at the Rome Conference. This proposal provided that;

"(a) When States have created, built up, or restored productive resources through the expenditure of time, effort and money on research and

management, and through restraints on their own fishermen, and

(b) The continuing and increasing productivity of these resources is the result of and dependent on such action by the participating states, and

(c) Where the resources are being so fully utilized that an increase in the amount of fishing would not result in any substantial increase in the sustainable yield, then:

(d) States not fishing the resources in recent years, except for the coastal State, shall be required to abstain from fishing these stocks as long as these conditions are fulfilled."[3]

In view of the need to evaluate scientific and economic criteria in applying such a principle the Commission decided not to make any definite proposals in that regard, leaving it to the states themselves to make special agreements as to abstention. In the International Convention for the High Seas Fisheries of the North Pacific Ocean, the principle of abstention operates if a given stock (a) is being fully utilized, (b) is under conservation regulations, and (c) is the subject of scientific investigation designed to discover whether the stock is being fully utilized and what donditions

are necessary for maintaining its maximum sustainable productivity.[4]

Canada[5] has criticized Article 53 on the ground once again that it is limited in scope to particular areas of water, whereas it should be more concerned with the same stocks of fish which may be found in different areas.

"Article 54: 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 in that area, even though its nationals do not carry on fishing there.

3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by Article 57."

"Article 55: 1. Having regard to the provisions of Paragraph 1 of Article 54, 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 other States concerned have not led to an agreement within a reasonable period of time.

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 scientific evidence shows that there is an urgent need for measures of conservation;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by Article 57. Subject to Paragraph 2 of Article 58, the measures adopted shall remain obligatory pending the arbitral decision."

In commenting upon these two articles, the Indian Government[6] expresses views which may be representative of many under-developed countries. "Although Article 54 recognizes the fact that 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 coasts and the right of such a State to take conservation measures under Article 55, the articles do not go far enough to protect under-developed areas with expanding population and increasingly dependent for food on the living resources of the seas surrounding the coasts. The Government of India are of the view that a coastal State should have the pre-emptive right of adopting conservation measures for the purpose of protecting the living resources of the sea within a reasonable belt of the High Seas contiguous to its coasts." Accordingly, in the Indian view, the coastal state should have a prior and unconditional right to adopt conservation measures or establish conservation zones in contiguous seas, whether or not its nationals have engaged in fishing in such areas. Other states would not be deprived of the right to fish in these waters but when conservation regulations had been established by the coastal state, other states should be required to approach the latter for suitable agreement on the matter. This means that India, in insisting upon a full logical working-out of the coastal state's "special interest" rejects the whole basis of Articles 51 to 56.

It seems to the writer that the coastal state's interest

should not be considered so special as to exclude the need for first producing clear scientific evidence that such conservation measures are necessary and appropriate and that they do not discriminate against non-coastal fishermen. Since the coastal state already has prior rights of conservation under Articles 54 and 55, it should not be allowed to escape the requirements of proving its own bona fides. Moreover, under-developed countries need hardly fear that they are at a serious disadvantage through a lack of scientific facilities, in view of the F.A.O.'s excellent record in helping to promote scientific research in under-developed regions of the world. The organisation of procedures envisaged in the draft Articles would surely do more, not less, to encourage further scientific co-operation in the common welfare.

The criticisms of Peru[7] are even more damaging. Not content with rejecting the principles outlined by these articles, it goes further and accuses the Commission of being influenced by partial interests. "The stipulation that there must be an 'urgent need' for the measures and the proviso that there must be prior negotiations with other States deprive the coastal State's right to adopt measures of conservation of all practical value. If the problem is considered in terms of present political realities,

and not in purely theoretical terms, these conditions will make it impossible for a small State to adopt successfully any necessary conservation measures if these are capable of affecting the commercial interests of a great Power. The provisions proposed by the Commission are of little present or practical value to the coastal States; they seem to be inspired by the interests of the fishing enterprises and to reflect the now very dubious notion of the inexhaustibility of the sea's resources . . . Once the coastal State's interest, which coincides with mankind's, is recognized, the acknowledged principle should be incorporated in regulations in such a way that the coastal State has the power under certain conditions to adopt unilateral conservation measures in the high seas contiguous to its coastal waters."

Norway,[8] on the other hand, believes that the conditions specified in Article 55 Paragraph 2 are inadequate and emphasizes that if conservation measures are to be binding upon states other than those which established them, "they must satisfy conditions which must be defined precisely in order to leave no more room than absolutely necessary for discretion". At the Rome Conference it was shown that often very extensive (and costly) investigations are necessary in order to determine the need for conservation measures

and even then the conclusions may be less than certain. If the economic needs of the coastal state are to be admitted as an important juridical factor, then account must be taken also of the "technical and economic conditions of the fishing industries" of the other states interested in the fishery.

Sweden,[9] while prepared to endorse the principles of conservation contained in Articles 51 to 53, objects to Article 55 on the traditionalist ground that the right to engage in fishing in free waters outside the limits of the territorial sea "is enjoyed ona footing of equality by the nationals of all States." Furthermore, from the conservation point of view Article 55 is unnecessary, since the provisions of Articles 51 to 53 are adequate in themselves, and if the coastal state has "a special interest in the conservation of the living resources of an area adjacent to its territorial sea, the provisions set forth in Article 56 seem to provide the necessary safeguards and to render Article 54 superfluous."

In criticizing Article 55 Britain[10] points to the great difficulties of enforcing unilateral conservation measures by the coastal state on the high seas contiguous to its coast. "The questions arise, by whom should the

measures be supervised, and whether the other States affected would be expected or required to enforce against their own nationals the unilateral measures of the initiating State from which they might dissent, and over which they might be intending to go to arbitration. Alternatively, it may be asked whether it is intended that the State introducing the unilateral measures should be entitled to enforde them against vessels of other flags on the high seas. Her Majesty's Government would observe that agreement on the collective or international enforcement of fishery conservation measures has so far been slow in forthcoming and that the possibilities for the unilateral enforcement of controversial measures would not appear promising."

"Article 56: 1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated by Article 57."

The type of "special interest" referred to in Paragraph 1 might exist in a case where the exhaustion of the resources in the area of the high seas described would affect the results of fishing in another area where the nationals of the State concerned do engage in fishing. For example, Canada and the United States do not fish salmon in the Northwest Pacific, and under the North Pacific Convention (Annex I) Japan agrees to abstain from fishing salmon off the coasts of these two countries. But all those countries are actively engaged in scientific investigations to determine the origin of the salmon stocks intermingling in the North Pacific; and it may yet be proved, even over such a vast area of waters, that the exploitation of the Northwest Pacific salmon fisheries by the Japanese (and Russians) may have a direct effect on the conservation of the North American Pacific salmon fisheries by the United States and Canada, and vice versa. The existence of such machinery for measuring the degree of "special interest" in other fisheries in this case is no doubt mainly due to the fact that the interests involved are mutual, but often it may be found that the influence of one fishery on another is wholly one-sided and wholly prejudicial, so that an international agreement may be more difficult to establish and to enforce. Article 56 seems, therefore, to be a necessary

safeguard to meet such eventualities.

"Article 57: 1. Any disagreement arising between States under Articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement."

Two members of the tribunal would be appointed by each of the parties, only one being a national of the state or states on any one side. The remaining three members, including the chairman, would be appointed by mutual agreement between the parties, or failing that, by the nomination of the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the Food and Agriculture Organisation. This procedure would leave the parties free to seek their own method of settlement first, by mediation, conciliation, judicial settlement, or any other peaceful means. For example the parties may choose to submit the dispute to the I.C.J. or by virtue of treaty obligations to an ad hoc court of arbitration of their own creation. Only in the last resort, where the parties disagree on the method for settling a dispute, does the Article provide for arbitration, but the parties would

still be free to make their own particular arrangements. The compulsory aspect would thus be reduced to a minimum, inasmuch as one of the parties could be forced into arbitration by the other only if all other means failed, but the decision of the arbitral commission would be final and binding on both parties.

"Article 58: 1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal states apply the criteria listed in Paragraph 2 of Article 55. In other cases it shall apply those criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied."

The Commission believes that the arbitral commission should be given a measure of discretion in regard to the criteria to be applied in each case, but suggests that consideration should be given to certain guiding principles; for example, the need for and extent of conservation measures should be proved by scientific findings; no measures should be taken which would discriminate against nationals of non-coastal states; conservation measures must be appropriate to the needs of the fishery and also economically feasible in the existing circumstances.

"Article 59: The decisions of the arbitral commission shall be binding on the States concerned. If the decision is accompanied by any recommendations they shall receive the greatest possible consideration."

Since the arbitral decisions are binding only on the parties and not erga omnes, a newcomer to an area of fishing which has been the subject of an award under this article, may initiate new proceedings under Paragraph 2 of Article 53. The parties would not be bound by any new regulations recommended by the arbitral commission, but it is to be hoped that they would in certain circumstances find it possible to accept such regulations in advance, along the lines of the Fur Seal Arbitration of 1892 between the United States and Britain.

Few states and jurists today concerned with the problems of fishery regulation would deny the need for compulsory arbitration. Many would claim that it is an inadequate procedure on account of the time required to effect such a settlement, and some may fear that their own allegedly inalienable rights might suffer neglect in the judicial desire for a peaceful compromise; but surely none will assert that as a procedure for settling international fishery disputes compulsory arbitration is too drastic

or before its time. If the principle of compulsory arbitration becomes established in maritime law, it will owe a good deal to the Anglo-American juridical influence, for in practice over the last hundred years, Britain, Canada, and the United States have frequently resorted to arbitration as a method of settling bilateral maritime disputes. In a document prepared by the United Nations Secretariat for the Geneva Conference on the Law of the Sea,[11] 54 international adjudications and arbitrations are cited which relate to some aspect of maritime law. Of these cases, the United States appeared as one of the parties in no less than 43, and Britain, often on behalf of Canadian interests, in 32. In some respects the position of the United States is the more surprising for most of the decisions affecting that country were given before 1930; in an age when its contribution to maritime activities was disproportionately modest. But in the first three decades of the present century arbitration treaties and conventions became one of the favourite methods of consolidating American foreign policy. In "Realities of American Foreign Policy", Mr. George F. Kennan relates that: "As a result of this misplaced emphasis the United States Government, during the period from the turn of the century to the 1930's, signed and ratified a total of ninety-seven international agreements dealing with arbitration

or conciliation, and negotiated a number of others which, for one reason or another, never took place. Of the ninety-seven, seven were multilateral ones; the remainder, bilateral." Perhaps it is ironic that this "misplaced emphasis", which has been criticized as politically ingenuous in the past, may yet prove to be the historical ancestor of a quite ingenious solution to one of the hardest political problems of the future!

It has been no part of the writer's intention to predict the exact outcome of the Geneva Conference, but the foregoing analysis of the extraordinarily complicated problems involved has probably proved that the I.L.C.'s draft articles represent the best possible middle course that could be taken and therefore the likeliest possible basis for a lasting settlement, if such is possible. It must be remembered, however, that from the fishery point of view the new code of the sea would not be operating in a vacuum. Section C of this thesis was devoted mainly to an historical analysis of the existing international fishery agreements in three different regions of the world, and it was seen that by far the most successful models have been established around North American waters in the last thirty-odd years. There are, therefore, two strands of North American influence in the history of fishery regulation;

the first comes out of the old Anglo-American tradition of resorting to arbitration in bilateral maritime disputes, the second out of the characteristically North American tradition of organizing institutional procedures by governmental Conventions.

North America and the North Sea do not have a monopoly between them of international agreements for fishery conservation. As early as 1919 the International Commission for the Scientific Exploration of the Mediterranean was established for investigation of the resources of that sea; since the last war its functions have been narrowed and it now has particular interest in the Mediterranean fisheries. To help it in co-ordinating its research the General Fisheries Council for the Mediterranean was formed in 1952 under the sponsorship of the F.A.O. and this body was composed of the majority of Mediterranean states. Its organization and purpose were similar to those of the Indo-Pacific Fisheries Council, which the F.A.O. had set up in 1949 for fishery research in the under-developed regions of the Far East. The fishing grounds of the Mediterranean and the Indo-Pacific had certainly been exploited long before the beginning of recorded history but they had never been organized as fisheries, in the modern sense, and scientific

data and statistics were completely lacking. On the other hand, an entirely new and undeveloped tuna fishery was inaugurated in recent years in the tropical and sub-tropical waters of the mid-Eastern Pacific, governed by the Inter-American Tropical Tuna Convention of 1949 between Costa Rica and the United States. Panama joined in 1953. In the South Pacific, the Permanent Commission on the Exploitation and Conservation of Maritime Resources of the South Pacific was established in 1954 by Peru, Ecuador and Chile, whose common interests and claims we have noted elsewhere. This Commission's terms of reference were very wide, involving the unification of fishing and whaling regulations of the three countries, the promotion of scientific investigations, the compilation of statistics and the exchange of information with other agencies, and the co-ordination of national conservation programmes. The Convention was concluded with the purpose of uniting national policies, not only with regard to fishing, but also to whaling, mineral resources and defence requirements.

In making its comments to the International Law Commission the Norwegian Government[12] took the opportunity to observe that "the proposed Articles appear to have been drafted primarily with a view to fishing. The special problems which arise in respect of whaling and seal-catching do

not seem to have been taken sufficiently into account. Being operated by a small number of catching units, whaling is amenable to other methods of conservation and control than those applied to fisheries." Mention has already been made of the Fur Seal Agreements, but it should also be noted in passing that notable achievements have been made in the conservation of whale stocks, in the Antarctic especially. The principles of international regulation for the whale fisheries were first embodied in the provisions of the International Agreement for the Regulation of Whaling signed in London on June 8, 1937, and Protocols to that Agreement were signed on June 24, 1938, and November 26, 1945. In December 1946 the International Convention for the Regulation of Whaling was signed by fifteen countries - Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the Union of Soviet Socialist Republics, the United Kingdom, of Great Britain, and Northern Ireland, the United States of America, and the Union of South Africa. In recent years Japan and Panama subscribed to the Convention. Detailed prohibitions and regulations are set out in the Annex; amendments may be made from time to time, but subject to the approval of the Governments concerned. In 1949 the International Whaling Commission came into force, under the

terms of the Convention. Most of its work in the meantime is concerned with the co-ordination of research in collaboration with the International Bureau for Whaling Statistics at Sandefjord in Norway. Like the Northwest Atlantic Convention, the Whaling Convention provided (Article III Paragraph 6) that after two years the Contracting Governments would decide whether to bring the Commission within the framework of the United Nations but so far no move in this direction has been proposed.

Inland seas and fresh-water fisheries do not, strictly speaking, fall within the ambit of this thesis, but it will be found that many of the best characteristics of international fishery agreements are featured in the Convention on Great Lakes Fisheries signed by Canada and the United States in September, 1954.

These then are the principal fishery conventions and agreements. The best developed ones we have studied in some detail and, bearing in mind the present developments and likely changes in the law of the sea, we shall conclude by summarising the characteristics essential to international fishery conventions in the future.

1) The problems of conservation of stocks must rank as paramount in the establishment and operations of any Convention. Agreements limited to the erection of machinery

for settling particular disputes among fishermen of different nationalities and agreements to share the products of particular fisheries among states in pre-arranged proportions would be of little value in the long term unless linked with a mutually devised programme of conservation. The vital scientific requirements for the maintenance of stocks at the maximum sustainable level of productivity must remain the core and substance of all Conventions. The general types of conservation measures that can be applied, at the present stage of scientific knowledge, have been enumerated by the Rome Conference of 1955.[13] They may be summarised as follows:

a) Regulation of fishing intensity to maintain or increase the average sustainable catch, either directly by fixing the maximum annual catch, or indirectly by establishing closed seasons or areas or by limiting fishing gear and ancillary equipment.

b) Protection of sizes of fish to improve stocks, by
   (i) regulation of fishing gear to achieve a differential capture of specified sizes;
   (ii) prohibition of landing of fish below a specified size, and requiring their return to the sea alive, if practicable;

(iii) prohibition of fishing in spawning areas or during spawning seasons;

(iv) preservation and improvement of spawning grounds;

(v) measures to differentiate harvesting of different sexes, in order to achieve desirable sex ratio.

d) Measures to improve and increase marine resources by means of artificial propagation and transplantation.

The type of conservation measures best applied to a given species or area (in the high seas) can only be determined by rigorous scientific investigations. The most desirable procedure would be for such investigations to be undertaken by a joint research staff under the direct control of the Commission established by a Convention, as in the case of the Halibut and Tuna Conventions. In deciding what particular measures of conservation are required the Commission should have a wide latitude, in the mutual interests of all states participating in the Convention.

2) Conventions should be open to all states interested in the fisheries covered by its terms of reference. In practice this would be interpreted to mean all states currently engaged in substantial exploitation of the resources,

plus all adjacent coastal states, as in the Northwest Atlantic Convention. Any restriction on the participation by all interested states in a Convention is bound to limit the effectiveness of conservation measures taken under the Convention; and the more interested states admitted in the first instance the fewer difficulties will arise in the case of newcomers to the Convention and to the fishery. Adjacent coastal states should be entitled to participate on an equal footing with the others, even if its nationals do not engage in the substantial exploitation of the stocks covered by the Convention. Freedom of participation by all interested states should be written into any Convention, as in the case of the Inter-American Tropical Tuna Convention.

3) The precise coverage of a Convention may be determined by reference either to a particular species or resource, or to a particular, defined geographical area. In some cases, one or more atocks of a marine species can be separately identified and suitably regulated (e.g. halibut, salmon, tuna, fur seal, whale); in other cases where this is not practicable, because of intermixing or interdependence of several species, a defined area must be included under the general jurisdiction of the Commission. The intermingling or inter-dependence will itself usually be

the subject of scientific investigation (e.g. Northwest Atlantic Convention, North Pacific Convention). In either event, the coverage of a Convention should be exactly stated. Where similar and interdependent stocks exist in contiguous inshore and offshore waters, particular care should be taken to mark off the Convention's jurisdiction (e.g. Northwest Atlantic Convention). The ideal would be of course that both inshore and offshore fisheries be governed by the same Convention, even though territorial waters are included, so that important fisheries may be treated as a unit for conservation purposes. Where territorial waters as well as high seas are covered, the definition of rights of conservation must be especially precise (e.g. Sockeye Salmon Convention).

4) When not all interested states have participated in a Convention, particularly difficult problems are likely to arise between the Member states or Commission on the one side, and newcomers or outsiders, on the other. The rights and duties of outside states will of course be determined by the law of the sea and not by the terms of the Convention, but the latter should be framed in such a way as to facilitate negotiation and peaceful settlement within the framework of the Convention, before having recourse to compulsory arbitration. In some intensely fished areas, where the maximum sustainable level of productivity has been reached and no net gain can be made by the participation of a newcomer

to the fishery, it will appear that the principle of abstention must operate in the interests of the fishery. It is unlikely that this principle can be incorporated in the law of the sea, since the conditions upon which abstention is acceptable will vary greatly from region to region. Some Conventions, such as the North Pacific Convention, have expressly accepted the principle and practise it successfully, on specified conditions relating to particular areas and particular species. If the Convention waters are divided into several areas or sub-areas, newcomers are more likely to be willing to participate in the Convention and abstain from fishing in some areas, provided they are permitted to fish, within reasonable limits, similar stocks in other areas or other stocks in the same area.

5) The legal relationships existing between Member states inter se, and between Member states and the Commission, should be set out as clearly as possible in the Convention. In the general interest the Commission's authority should not be too severely restricted, otherwise its effectiveness will be reduced and the objectives of the Convention delayed. Disputes should be kept as much as possible within the jurisdiction of the Convention, assuming that internal machinery has been created in order to settle such disputes. This will be more feasible in the case of disputes of a scientific

and technical nature, where it may be possible to refer such matters to an independent and impartial body of scientists, none of whom is a national of any of the Member states (e.g. North Pacific Convention). Where legal elements predominate in a dispute, recourse will normally be had to diplomatic channels of the states concerned or, failing that, to international judicial authorities. The ultimate sanction would lie in compulsory arbitration. The problem of enforcement as between Member states would probably be best solved by putting the powers of enforcement, in respect of fishery regulations, into the hands of the Commission's own staff, so that national prejudices may be reduced to a minimum. In view of the coastal state's special or prior interest in the high seas contiguous to its territory, it may be necessary to recognize a special or prior right of enforcement on the part of that state. Abuse of this right would be less likely where the nationals of the coastal state did not engage in fishing in these areas, but it might equally well be that other interests than those of the fishery would unduly influence the coastal state, which would be at odds with the purposes of the Convention. The problem of enforcement, because of its juridical and extra-juridical implications, will always be one that requires an empirical approach, and settlement can only be reached by the <u>consensus</u> of all interested states.

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1 For a general classification of commercially important species see MORGAN, Chapter Three.

2 For a short description of the "plankton pasturage" see MORGAN, Chapter One.

3 'The Oceans, Their Physics, Chemistry and General Biology', P. 841.

4 RUSSELL, pp. 22 - 49.

5 FULTON, p. 698.

6 RUSSELL, p. 73.

7 Rapp. Conseil Explor. Mer CX.

8 RUSSELL p. 109.

9 Grotius on the Freedom of the Seas (tr. Magoffin), p. 57.

10 FULTON, p. 355.

11 Ibid, p. 372.

12 RUSSELL, p. 103.

13 See Chapter 10 (v) infra.

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1 The Economic Importance of the Sea Fisheries in Different Countries - FAO/57/11/7686.

2 Ibid, p. 12.

3 FIRTH p. 20

4. MOLSON pp. 134-157.

5 RUSSELL p. 3

6 MORGAN p. 124.

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1 Polybius - The Histories (tr. W.R. Paton), Vol. i, 9.

2 FENN p. 83.

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1 FENN p. 151

2 Grotius on the Freedom of the Seas (tr. Magoffin) p. 27: "Prius est, eas res quae occupari non possunt, aut occupatae numquam sunt, nullius proprias esse posse; quia omnis proprietas ab occupatione coeperit."

3 Ibid p. 28: "Et eisdem de causis commune est omnium Maris Elementum, infinitum scilicet ita, ut possideri non quat, est omnium usibus accommodatum: sive navigationem respicimus, sive etiam piscaturam."

4 Ibid p. 34: "Est igitur Mare in numero earum rerum quae in commercio non sunt, hoc est, quae proprii iuris fieri non possunt."

5 Ibid p. 34: "Mare ita esse commune, ut in nullius dominio sit nisi solius Dei."

6 Ibid p. 50: "Quare cum nemo sit dominius totius generis humani, qui ius illud adversus homines omnes homini, aut populo alicui potuisset concedere, sublato illo colore, necesse est etiam praescriptionem interimi."

7 Ibid p. 58: "Nemo iam non videt, ad usum rei communis intercipiendum nullam quantivis temporis usurpationem prodesse."

8 Ibid p. 28: "Cuius autem iuris est mare, eiusdem sunt si qua mare alii usibus eripiendo sua fecit ut arenae maris, quarum pars terris continua litus dicitur!"

9 Ibid p. 29: "Quamquam vero etiam ea nullius esse, quod ad proprietam attinet, recte dicantur, multum tamen differunt ab his quae nullius sunt, et communi usui attributa non sunt, ut ferae, pisces, aves, nam ista si quis occupet, in ius proprium transire possunt, illa vero totius humanitatis consensu proprietate in perpetuum excepta sunt propter usum, qui cum sit omnium, non magis omnibus ab uno eripi potest, quam a te mihi quod meum est."

10 Ibid p. 35: "Illud iterim fatemur, potuisse inter gentes aliquas convenire, ut capti in maris hac vel illa parte, huius aut illius reipublicae indicium subirent, atque ita ad commoditatem distinguendae iurisdictionis in mari fines describi, quod ipsos quidem eam sibi legem ferentes obligat at alios populos non item; neque locum alicuius proprium facit, sed in personas contrahentium ius constituit."

11 e.f. The legitimate practice of enclosing parts of the sea adjacent to the property of a private land-owner, in order to form private fish ponds.

12 Grotius (Magoffin) ibid. p. 36: "Similiter reditus qui in piscationes maritimas constituti Regalium nemero censentur, non rem, hoc est mare, aut piscationem, sed personas obligant."

13 Ibid p. 36: "Non enim maris eadem quae fluminis ratio est: quod cum sit publicum, id est populi, ius etiam in eo piscandi a populo aut principe concedi aut locari potest, ita ut ei qui conduxit, etiam interdictum Veteres dederint, de loco publico fruendo, addita condicione si is cui locandi ius fuerit, fruendum alicui locaverit; quae cordicio in mari evenire non potest."

14 Ibid p. 37.

15 Grotius - De iure belli ac pacis (ed. Telders) p. 43: "Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia, id est ut supra diximas, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur."

16 FULTON p. 82.

17 Potter - The Freedom of the Seas pp. 72-80.

18 Vattell - Droit des Gens Bk. 1 Ch. XXIII 286.

19 Ibid 289

20 Azuni - Sistema universale dei Principi del Diritto marittimo dell' Europa p. 76.

21 RIESENFELD p. 279.

22 JESSUP p. 7.

23 FULTON p. 499 (note 1)

24 c.f. COLOMBOS pp. 80-84.

25 Article 6 of 1930 Draft on "The Legal Status of the Territorial Sea".

26 U.N. document A/CN. 4/90 pp. 18-25.

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1 The legal status of sedentary fisheries now depends upon their relationship to the continental shelf. See Commentaries to final draft Articles 60 and 68.

2 At its fifth session, the I.L.C. decided to include sedentary fisheries within the term "natural resources" of the shelf, so that under Article 68 fisheries permanently attached to the sea-bed would be subject to the sovereign rights of the coastal state for the purposes of exploration and exploitation.

3 GIDEL pp. 488-501.

4. For Gidel's dual definition of the high seas, see MOUTON p. 187.

5 Both the high seas and the territorial sea are really subject to an order of priorities, but the order is different in each case. See Chapter 12, infra.

6 Such a test could only be made by an impartial tribunal. See Chapter 13, infra.

7 e.g. Sweden. See U.N. document A/Conf. 13/5: p. 84.

8 FULTON Section II, Chapter 5.

9 See Chapter 10, infra.

10 c.f. I.L.C. draft Article 53.

11 c.f. I.L.C. draft Article 54.

12 BORCHARD pp. 62-63.

13 A.J.I.L. Vol. 40 Supplement pp. 46-47.

14 HURST (Grotius Society) pp. 151-162.

15 Ibid, p. 162.

16 Ibid, p. 164.

17 LAUTERPACHT p. 388.

18 Nevertheless, this is precisely what the I.L.C. has done, in Article 68.

19 Fouchille's "droit de conservation" did not refer specifically to fisheries, but was a general right vested in every state to do all that was necessary to secure its self-preservation. As such it clearly sanctioned a coastal state's unilateral claim to its own exclusive fisheries, as defined by its economic needs.

20 The Commission was unable to maintain this distinction. See Commentary on final draft Article 60.

21 The principle of the coastal state's "special right" was in the final draft limited to floating fisheries, since sedentary fisheries, as defined by the Commission, were embraced by the continental shelf doctrine at the fifth session. See reference 2, supra.

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2 FULTON pp. 612-615.

3 Ibid p. 636 (note 2).

4 Ibid p. 635.

5 See Chapter 10, infra.

6 I.C.J. 1951 Reports of Judgments, Advisory Opinions, and Orders, pp. 116-206.

7 Ibid p. 130.

8 Ibid p. 131.

9 Ibid p. 135.

10 WALDOCK (B.Y.I.L.) p. 121.

11 I.C.J. 1951 Reports p. 132.

12 WALDOCK Ibid. p. 124.

13 I.C.J. 1951 Reports p. 128.

14 Ibid p. 129.

15 Ibid. p. 129.

16 Ibid p. 133.

17 WALDOCK Ibid p. 149.

18 I.C.J. 1951 Reports p. 131.

19 Ibid. p. 170.

20 WALDOCK Ibid p. 171.

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2 SCOTT p. 148.

3 Ibid p. 149.

4 Ibid p. 171.

5 Ibid pp. 183-184

6 Ibid pp. 187-188

7 Ibid p. 188.

8 Ibid p. 188.

9 Article IV

10 Article VI.

11 Article VII.

12 Article VIII

13 1952 Report

14 Ibid.

15 1954 Report

16 1956 Report

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18 1952 Report p. 12.

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2 Ibid p.916.

3 Ibid p. 917

4 Ibid p. 917.

5 LEONARD p. 69.

6 Ibid p. 69.

7 Ibid. p. 70.

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9 Ibid. p. 71

10 MOORE pp. 901-902.

11 Ibid. pp. 925-928.

12 Article II (1)

13 Article III

14 Article V.

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19 Article I (2)

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36 1946 Report p. 10.

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41 Article VI (3)

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46 Article I (1)

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48 Article II (2) and (3)

49 Article III 1 (b)

50 Article III 1 (c)

51 Article IV (1)

52 Article X (1)

53 For a general oceanographic survey of North Pacific, see Bulletin No. 2.

54 1955 Report p. 19.

55 For a general background to the Russo-Japanese fishing controversies see LEONARD pp. 27-34.

56 Article I (1)

57 Article I (2)

58 Article III (2)

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60 1st Joint Communique of Commission (6/4/57) Par. 6.

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