# BEYOND THE LAW OF THE SEA

## New Directions for U.S. Oceans Policy

George V. Galdorisi, Kevin R. Vienna

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George V. Galdorisi
and Kevin R. Vienna

*Foreword by William L. Schachte, Jr.*

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To our wives, Becky and Kathy,
for their patience, understanding
and support

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# FOREWORD

As a member of the United States Delegation to the United Nations Conference on the Law of the Sea and, subsequently, as the Department of Defense Representative for Ocean Policy Affairs, I have had a unique opportunity to be involved in the formulation and implementation of United States oceans policy and the law of the sea. I also have seen the impact of this important segment of international law on both the United States and the world community as we grapple with the challenge of applying the rule of law to the over seventy percent of the globe covered by water. Additionally, during three decades of service in the Navy, I have observed, first-hand, the importance of the rule of law on the oceans and the pivotal role that the United States plays in formulating this body of law.

The importance of the law of the sea in general and the United Nations Convention on the Law of the sea in particular, is evidenced by the fact that the United Nations Conference on the Law of the Sea was the most extensive international negotiation ever conducted and the resulting Convention was the most comprehensive international treaty negotiated before or since. Accordingly, it is an area worthy of research, scholarship, and coherent analysis. Surprisingly, no previous books on the subject have addressed the many facets of the law of the sea.

This book combines, in a balanced way, the views of law, history, and policy as they relate to the law of the sea in general and to the United States participation in this area in particular. This interdisciplinary approach adds depth and detail to the subject and frames the subject superbly for the academic, the policy maker, the researcher, or the practitioner.

Although the 1982 United Nations Convention on the Law of the Sea (along with the companion Agreement) was signed by the President in July of 1994 and submitted to the Senate for its advice and consent in October of that year, as of

this writing, the Treaty has yet to gain Senate approval. Even assuming Senate advice and consent, this text importantly emphasizes and demonstrates that the Convention on the Law of the Sea does not end the requirement for the United States involvement in the development of oceans law and policy. Rather, a universally adopted Treaty is the critical first step in oceans policy formulation and should serve as a springboard for continuing national attention.

Although it properly addresses all areas of the law of the sea, this text has a distinct national security orientation. A pivotal chapter of the book, chapter six, sets forth and defends the proposition that the Convention on the Law of the Sea is central to United States interests in the maintenance of stability and predictability in ocean spaces. Debate in this important policy area remains vital, and this book contributes immeasurably to shaping that debate.

During the current decade, some of the best scholarship in the United States and elsewhere on oceans law and policy has occurred in ephemeral form—such as Department of State Information Papers, Department of Defense White Papers, and papers presented at symposia sponsored by a variety of oceans policy groups such as the Center for Oceans Law and Policy, the Law of the Sea Institute, the Council on Ocean Law, and the Ocean Governance Study Group, among others. This book preserves a great deal of this scholarship in an enduring form.

The background of this book's authors is unique and contributes, in a synergistic manner, to the quality and utility of this work. Captain Galdorisi is an unrestricted line officer, has extensive operational experience, and has written extensively on the law of the sea. Captain Vienna studied under Professor John Norton Moore at the University of Virginia and has extensive operational law experience at sea as a fleet judge advocate and naval officer. Together, they have the perfect credentials to produce a work of scholarship that is of enduring value.

*Beyond the Law of the Sea: New Directions for United States Oceans Policy* is a critical link in the continuum of scholarship on the law of the sea. No other work combines the depth of research, focused analysis, and clarity of presentation that this book does. Policy makers, policy analysts, and mariners will all find this book equally valuable.

William L. Schachte, Jr.
Rear Admiral,
Judge Advocate General's Corps,
United States Navy (Retired)

# PREFACE

This book is about the law of the sea. It examines the concept of "law" for the oceans within the context of international law and briefly examines the involvement of the United States in the historical development of the law of the sea. Next, it focuses on the way in which United States Ocean Policy has been affected by the 1982 Convention on the Law of the Sea and how future policy will be defined within the context of the Convention.

The book comprises three main sections. First, it examines the evolution of the concept of the law of the sea, reviewing important elements of the negotiations at the United Nations Conferences on the Law of the Sea, first in 1958, and ending with the conclusion of the Third Conference in 1982. Second, it "baselines" just what the 1982 Convention prescribes in areas most important to the development of U.S. policy. Third, it examines the oceans policy issues facing the United States as 1982 Convention achieves wider adoption.

This book is intended for several audiences. For those interested in the law of the sea, it should serve as a resource for understanding its development and effects. For those interested more generally in American foreign policy, it can serve as important illustration of how important issues challenge and shape the evolution of policy. Accordingly, the book should be useful to those interested in international negotiations and international security. For the informed public, generally, this book is intended to provide a thorough, yet readable, companion that provides insights into the 1982 Convention on the Law of the Sea, the most comprehensive international negotiations ever undertaken, which now provides the foundation for the rule of law over that 70 percent of the earth covered by water. Furthermore, the book examines the implications of this Convention for the United States as it develops policy to enhance its core political, economic, and security interests.

As with most works of this genre, the majority of the book is descriptive, in that it examines historical process and elaborates on rules. It concludes,

however, with a consideration of ocean policy challenges confronting the United States and the means of addressing them. Finally, it urges a systematic, intelligent, and active approach in making and managing oceans policy to attain optimum results.

An effort of this scope would not be possible without the unselfish help from a number of people. Rear Admiral William Schachte, Jr., JAGC, USN (Ret.) provided encouragement, support, and invaluable advice from the inception of the project. His profound knowledge of the entire spectrum of law-of-the-sea issues and his experience in shaping its recent history served as "ground truth" as we refined the focus of this work. Captains Jack Grunawalt and Ralph Thomas, on the faculty at the Naval War College, provided early encouragement and direction and helped shape the outcome. Captain Dave Peace, JAGC, USN, the director of the Office of the Judge Advocate General of the Navy's International Law Division, and his capable assistants, Lieutenant Commander Pete Pedrozo and Lieutenant Carl Tierney, provided general comments and frequent updates on the progress of the Law of the Sea Convention as it made its way through the Executive Branch to the Senate. Ms. Maureen Walker, Department of State, supplied extensive background on the law of the sea and invaluable insight. Finally, Dr. Lee Ann Otto, Chairman of the Department of Political Science at the University of San Diego, and Mr. William Aceves, a doctoral candidate at Harvard University who has conducted extensive research in the field, reviewed early drafts and provided essential commentary.

For the assistance of these and many others, we express our deepest thanks.

# BEYOND THE LAW OF THE SEA

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*Chapter One*

# INTRODUCTION

The long-awaited adoption of the 1982 United Nations Convention on the Law of the Sea by the community of nations represents a watershed for the maritime interests of the international community. This Convention, the final result of the largest single international negotiating process ever undertaken, has enormous implications for the conduct of maritime affairs among nations. As the world's leading maritime state, the United States has a huge stake in the Convention.

For the United States, the Convention represents much more than simply another international treaty. There are vital, immediate, national interests that hinge on continuing U.S. involvement with this Convention. Our core strategic interests—political, economic, and security—are critically dependent on the free access to, and unhampered use of, the 70 percent of the globe covered by water. A universally ratified Convention supports these interests. The Convention is not a panacea. Its rules are not perfect. But widespread acceptance is likely to guide the behavior of nations, promote stability of expectations, enhance adaptation to new circumstances, narrow the scope of disputes to more manageable proportions, and provide a workable framework for issue resolution.[1]

Over a decade and a half ago, in April 1982, the Reagan administration voted against the 1982 United Nations Convention on the Law of the Sea, becoming one of only four nations to vote against the final Convention.[2] Eight months later, in December 1982, the United States stood on the sidelines as 117 other nations and two entities signed the Convention on the first day it was opened for signature.[3] In every sense, the United States made a major policy statement by not signing a treaty that had taken nearly a decade of exhaustive work to produce.[4]

Throughout the preceding decade of detailed dialogue, the United States was deeply involved in the negotiations of the Third United Nations Conference of the Law of the Sea (UNCLOS III).[5] The final product codified existing practice

and established new norms of international law in many areas of oceans policy. Coastal jurisdiction and management in territorial seas, contiguous zones, and a 200-mile exclusive economic zone; marine passage and overflight through straits and archipelagos used for international navigation; a special status for archipelagic States; management of fisheries in the high seas and in exclusive economic zones, coastal and flag State jurisdiction over vessels for the purpose of preventing environmental disasters, the general ocean environmental obligations of States, the right to conduct ocean science research; the creation of a system for managing the exploitation of deep seabed minerals; and dozens of other issues were addressed in the comprehensive, 320-article, nine-annex, final document.[6]

By the end of the 1970s, the Carter administration appeared ready to sign the treaty, which contained several fundamental compromises between the Western powers and the developing world, including maintaining an acceptable transit passage regime through international straits to offset extension of the territorial sea to a maximum breadth of twelve nautical miles.[7] The treaty also applied the principles of the "common heritage of mankind" as the guiding philosophy in regard to exploitation of the deep seabed's mineral resources.[8] As Ambassador James Malone, one of the Reagan administration's special representatives at UNCLOS III would say, "After the close of the ninth session of UNCLOS III, the United States was clearly on the verge of signing the treaty."[9] As the principal other blue-water naval power, the Soviet Union was also prepared to sign the treaty and indeed had been on the same side of many critical negotiating positions with the United States in the course of UNCLOS III, particularly on all navigational issues.[10]

By late 1982, as UNCLOS III drew to a close, the treaty had become much more than a piece of paper—it was an international state of mind. It created new international law, codified much of what was customary law in the law of the sea, and established new norms in the negotiation of multi-State agreements.[11] It came as a great disappointment to large segments of the international community when the newly inaugurated Reagan administration, dissatisfied with the seabed mining provisions of the Convention, decided not to sign the final accord.[12] To much of the world, it appeared that the United States wanted to select among the benefits of the treaty, principally the articles relating to navigation and overflight rights, without accepting the negotiated compromise positions in the document relating to deep seabed mining.[13] On a more fundamental scale, in the view of some commentators, the failure of the United States to sign the treaty may have called into question the leadership of the United States with respect to the promotion of international law and order.[14]

Momentous changes to the political, economic, and security environment occurred in the period since the United States elected to vote against the treaty. Significantly, the international community labored mightily, primarily behind the scenes, to make the treaty more acceptable to western nations in general and the United States in particular. For the first time in over five decades, the United

States has an unprecedented window of opportunity to realize a long-standing strategic objective of U.S. oceans policy—the entry into force of a widely accepted and comprehensive treaty on the law of the sea, which, among its more important provisions, preserves traditional freedoms of navigation and overflight essential to our national security and economic well being. Modifications to the objectionable Part XI, deep seabed mining portions of the Convention, spearheaded by the United States, and supported by the other industrialized nations, have opened the way for the United States and other maritime powers to become parties to this important instrument that promotes the maritime interests of the international community as a whole.

The United States has crossed the Rubicon. On 7 October 1994, President Clinton submitted the Convention, along with the Agreement modifying Part XI of the Convention, to the United States Senate for its advice and consent. The Senate may choose to act on the treaty in the near term, or delay acting on it, perhaps indefinitely. Should the Senate act favorably on the treaty and give its advice and consent, what does accession to this Convention portend for United States maritime policy? As the international community continues to adapt to the rules of the Convention—in areas ranging from freedom of navigation and overflight, to deep seabed mining, to environmental protection, to the prevention of piracy, and others—how should United States oceans policy adapt to complying with the rule of law as outlined by the Convention, while at the same time securing the advantages of this comprehensive oceans regime? Does the United States have the mechanisms in place at the federal, state, and even local levels, to craft a comprehensive oceans policy that supports our diverse political, economic, and security imperatives?

The following chapters will address these matters. To provide context on the "law" of the sea, the next chapter examines some fundamental concepts in international law. Next, the processes and interests involved in negotiating the Convention will be examined, including consideration of why the United States found the Convention unacceptable in 1982. Developments since 1982 are then viewed, including those critical events that have successfully modified previous deficiencies in the Convention's provisions.

Later chapters will review why the Convention's provisions and their wide international acceptance are essential to United States security. The final chapters examine the importance of "oceans policy," the fundamentally constitutive nature of the Convention, and the continuing policy challenges for the United States as we face new directions in the law of the sea.

## NOTES

1. William Schachte, Jr., "National Security: Customary International Law and the LOS Convention" (address at the Georgetown International Law Symposium, *Implementing the United Nations Convention on the Law of the Sea*, Washington, D.C., January 1995). Rear Admiral Schachte, Judge Advocate

General's Corps, U.S. Navy (Retired) is a noted expert on the law of the sea, having served as Department of Defense representative for Oceans Policy Affairs, Judge Advocate General, and a long-time architect of U.S. oceans policy positions.

2. Statement of Ambassador James Malone, special representative of the president for the Third Law of the Sea Conference, before the House Foreign Affairs Subcommittee on 12 August 1982 in Department of State, "Law of the Sea and Oceans Policy," *Current Policy* no. 416 (Washington, D.C.: United States Department of State, Bureau of Public Affairs, 1982), 2. Ambassador Malone's comments followed President Reagan's 9 July 1982 statement in which the president explained the United States' objections to the Part XI deep seabed mining provisions of the 1982 LOS Convention. The other three countries voting against the treaty's adoption were Israel, Turkey, and Venezuela. Nations abstaining were the United Kingdom, the Federal Republic of Germany, Belgium, Netherlands, Luxembourg, Italy, Spain, Thailand, and the entire Soviet Bloc, except for Romania.

3. James Malone, "Who Needs the Sea Treaty?" *Foreign Policy* 54 (1984): 44. Ambassador Malone served in a number of capacities as a Reagan administration expert on the law of the sea, first as special representative for the Third United Nations Conference on the Law of the Sea, later as assistant secretary of state for Oceans, International Environmental and Scientific Affairs, and finally, as chairman of the United States Delegation to the Law of the Sea Conference.

4. R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester, U.K.: Manchester University Press, 1983), 14. A second edition of this respected work, with an added section on maritime boundaries, was published in 1988. The entire UNCLOS process continued virtually unabated for a quarter of a century. UNCLOS I, attended by fifty-eight States, convened in Geneva in 1958. It drafted four conventions. UNCLOS II convened in 1960 but failed to adopt any Conventions. Dissatisfaction with the results of these two conferences caused the United Nations General Assembly to convene a Sea Bed Committee in 1967. Based on the Sea Bed Committee's report, General Assembly Resolution 2570 authorized the convening of a Third United Nations Conference (UNCLOS III). The first meeting of this conference was held in 1973 and the various committees met at least semiannually until 1982. In a press release dated 13 December 1991, retiring U.N. Secretary-General Perez de Cuellar emphasized the extent of the efforts that went into negotiating the law of the sea. According to the secretary-general, "The international community has invested some twenty-two years of effort and substantial resources in negotiating it—three years of preparatory work, ten years of negotiations and a further nine years preparing for its entry into force." This statement is reprinted in Council on Oceans Law, *Oceans Policy News* (February 1992).

5. John Stevenson and Bernard Oxman, "The Future of the United Nations Convention on the Law of the Sea," *American Journal of International Law* 88

(1994): 494. See also Malone, "Who Needs the Sea Treaty?" 48. Ambassador Malone's 1984 *Foreign Policy* article is still widely quoted, over a decade later, in fora ranging from academic publications to congressional testimony.

6. United Nations, *1982 United Nations Convention on the Law of the Sea*, United Nations Publication, 1261 (New York: United Nations, 1982), reproduced from U.N. Document A/CONF.62/122 of 7 October 1982. The text also incorporates the two English corrections contained in U.N. Documents A/CONF.62/122/CORR.3 of 23 November 1982, and A/CONF.62/122/CORR.8 of 26 November 1982. The final Convention was the most comprehensive codification of maritime law ever assembled by the international community. The 320 articles and nine annexes (containing over 300 more articles) contained in the Convention constitute a guide for behavior by States in the world's oceans, defining maritime zones, laying down rules for drawing sea boundaries, assigning legal rights, duties and responsibilities to States, and providing machinery for the settlement of disputes. See generally Robert Friedheim, *Negotiating the New Ocean Regime* (Columbia, South Carolina: University of South Carolina Press, 1993).

7. Churchill and Lowe, *Law of the Sea*, 61. The width of the territorial sea has always been a contentious issue. The 1982 Law of the Sea Convention set the limit of territorial waters at twelve nautical miles in accordance with the clearly dominant trend in State practice.

8. Martin Harry, "The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?" *Naval Law Review* 40 (1992): 210.

9. Malone, "Who Needs the Sea Treaty?" 48. See William Schachte, Jr., interview with George Galdorisi, 14 June 1995, Washington, D.C. (on file with author). Rear Admiral Schachte emphasized the prominent role that Ambassador Malone played in the Reagan administration's law of the sea policy making process.

10. Mark Janis and Donald Daniel, *The USSR: Ocean Use and Ocean Law* (Kingston, Rhode Island: University of Rhode Island Press, 1974). The United States' position on straits passage has been well known for some time. The forcefulness of the Soviet position on this issue at UNCLOS III is less well known. For example, the Soviet draft articles on Straits Used for International Navigation stated that "No State shall be entitled to interrupt or suspend the transit of ships through straits or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind."

11. Churchill and Lowe, *Law of the Sea*, 16. Between 1973 and 1980, numerous negotiating drafts evolved that allowed UNCLOS III committee members to voice their opinions. As the process continued with semiannual meetings, an increasing level of consensus was reached among UNCLOS III delegates. See also United Nations, *The Law of the Sea: Annual Review of Ocean Affairs, Law and Policy, Main Documents* (New York: United Nations, 1993), 3-28.

12. Statement of the president before the House Merchant Marine and Fisheries Committee on 29 January 1982, reprinted in Department of State, "Law of the Sea," *Current Policy* no. 371 (Washington, D.C.: Department of State, 1982), 2. In articulating U.S. objections to the draft articles, the president noted that "Our review has concluded that while most provisions of the Draft Convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable." See also Elliot Richardson, "The Politics of the Law of the Sea," *Ocean Development and International Law* 11 (1982): 10. Ambassador Richardson, the chairman of the United States law-of-the-sea delegation from 1977 to 1980, describes the uncertainty created by the U.S. decision and notes that: "delegates were stunned by the announcement of the United States government."

13. Report of the president of the conference, U.N. Document A/Conf. 62/C. 141 (1982), reproduced in M. H. Nordquist and C. H. Park, eds., *Report of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea* (Honolulu: Law of the Sea Institute Press, 1983).

14. James B. Morell, *The Law of the Sea: An Historical Analysis of the 1982 Treaty and Its Rejection by the United States* (Jefferson, North Carolina: McFarland and Company, 1992), xiv.

*Chapter Two*

# THE LAW OF THE SEA AND INTERNATIONAL LAW

## HISTORICAL DEVELOPMENT OF THE LAW OF THE SEA

"International Law" can be described as "that body of rules or norms that are considered legally binding by States in their intercourse with each other."[1] As Rear Admiral (retired) and former Judge Advocate General of the Navy, Horace B. Robertson, Jr., has observed, several portions of this description warrant further comment:[2]

- The description refers to "rules or norms." The term "rules" connotes greater specificity than "norms," but each refers to the creation and existence of rights and obligations.
- These rules or norms are considered legally binding. States comply with international law because they feel legally obligated to do so, not just because they want to or are merely morally obligated to do so.
- The rules, generally, apply specifically to countries—sovereign, independent States.

These tenets of international law are particularly germane with respect to the specific body of international law regarding the law of the sea. The development of the law of the sea is inseparably intertwined with the development of international law. It is not at all surprising that the law of the sea enjoys such a prominent place in the deliberations of nations. Efforts to effect order for users of the 70 percent of the earth covered by water represent some of the earliest activities of the international community and grew up in parallel with the first truly international relations coincident with the emergence of independent States.

In the second century, the Roman jurist Marcianus advanced the proposition that the sea was common to all as a part of the natural law, and this position was

codified in Roman law. While the Roman Empire accepted the legal status of the sea as common property for all, nonetheless it declared in the "Theory of Glassators" that it exercised effective control over the Mediterranean Sea. The principle of common use of the sea and its products was not formal international law—because there were no States in the Mediterranean basin independent of the Roman Empire—but rather basic public policy of the Roman State. Because the Mediterranean was a "Roman lake," completely controlled by the Roman Navy, there was no need to assert explicit dominion. Nor was there any need to restrict access to living resources, for the problems of overfishing and depletion of sea resources had not yet emerged. In the final analysis, this exercise of Roman jurisdiction over the adjacent sea was made for two limited purposes: to extend Rome's power onto the sea and to suppress piracy.[3]

With the collapse of the Roman Empire, and the ensuing fragmentation of Western Europe into basically insecure small States, conflicting claims for supremacy over various parts of the seas emerged as States attempted to obtain exclusive control over trade routes and rich fishing grounds.[4] Thus, the continuing tension between coastal State jurisdictional claims and the contradictory claims to "freedom of the seas" is of venerable origin.

The attempted extension of State sovereignty from land to sea was continued as an accepted practice during the Middle Ages as commerce and trade began to develop in the Mediterranean. Early rules were drawn partly from the canons of Roman law, which underwent a revival in Western Europe beginning in the late eleventh century, and partly from State practice, which gave rise to customary rules concerning such things as the exchange of legations and the conduct of war. By the twelfth and thirteenth centuries, the Italian city-states, particularly Venice and Genoa, competed with each other for domination over the Mediterranean and Adriatic waters that provided the connecting link with trade routes to the Far East.

The trend of States to attempt to exercise sovereignty over the oceans also took place beyond the Mediterranean. The Scandinavian countries imposed their control over adjacent waters: Denmark over the Baltic, Norway over the sea routes to Iceland and Greenland, and Sweden over the Gulf of Bothnia. The English claimed the channel between England and France and parts of the North Sea. The exploits of Prince Henry the Navigator in the fifteenth century enabled Portugal to explore the coast of West Africa and significantly, through a Papal Bull, Pope Nicholas V granted Portugal the "exclusive and permanent rights" to that part of Africa.[5]

The historical trend of attempting to place ocean areas under State control culminated in 1494 in the Treaty of Tordesillas, later approved by Pope Alexander VI, in which Spain and Portugal agreed to a division of the world's oceans between themselves, the former claiming exclusive navigation rights in the western part of the Mediterranean, the Gulf of Mexico, and the Pacific, and the latter claiming such rights in the Atlantic south of Morocco and in the Indian Ocean. The demarcation line between the possessions of Spain and those of

Portugal was 370 leagues west of the Cape Verde Islands and ran from the North Pole to the South Pole. Understandably, the major opponents of this move were the two most important maritime rivals of Spain and Portugal, Britain and Holland.[6]

The Treaty of Tordesillas was a landmark event in that it was a formal treaty drawn up by two powerful European maritime powers for the specific purpose of dividing the ownership of the oceans and the land possessions lying beyond into exclusive jurisdictions. The treaty granted to Spain and Portugal exclusive navigational rights and trade privileges covering an enormous span of ocean space. Each nation was to enjoy navigational rights in the other's jurisdiction, but other States did not enjoy these rights. The Papal Bull was a powerful document and prohibited everyone else, under pain of excommunication, from traveling west of the demarcation line, "for the purpose of trade or any other reason to the islands or mainlands, found or to be found," without prior permission.[7]

The articulation of rules of international relations under Roman law and custom fell largely upon jurists who reflected the influence of the Renaissance and Reformation. For example, the Italian, Alverico Gentili, published *De Jure Belli* in 1598, which advanced the proposition that a sovereign could legitimately treat waters adjacent to his State in the same way he treated his land territory. The genesis of this concept appears to have been based on the need to prevent piracy and other acts that might threaten the security of a sovereign. In a similar fashion, but for the opposite purpose of establishing non-exclusive use of the high seas, the Dutchman, Hugo Grotius, commonly considered the father of modern international maritime law, regarded reason and natural law as the bases for his statements of the law; State practice constituted only a lesser source of law. This was a definitive break with the past, for it was Grotius who is generally acknowledged as establishing an international regime whose rules remained consistent to the principles and rules he articulated, so that the expectations of States would converge.[8] In *The International Law of the Sea*, author, D. P. O'Connell, amplifies the point made by Grotius:

> The history of the law of the sea has been dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of freedom of the seas. The tension between these has waxed and waned through the centuries, and has reflected the political, strategic, and economic circumstances of each particular age. When one or two great commercial powers have been dominant or have achieved parity of power, the emphasis in practice has lain upon the liberty of navigation and the immunity of shipping from local control; in such ages the seas have been viewed more as strategic than as economic areas of competition. When, on the other hand, great powers have been in decline or have been unable to impose their wills upon smaller States, or when an equilibrium of power has been attained between a multiplicity of States, the emphasis has lain upon the protection and preservation of maritime resources, and consequently upon the assertion of local authority over the sea.[9]

Early treatises on the law of the sea were often written in the context of particular disputes, as were tracts on other subjects of international law. For instance, Grotius's great work, *Mare Liberum*, published in 1608, was written to corroborate the claims of the Dutch East India Company to trade in the Far East, in contradiction to the monopoly on trade in the area claimed by the Portuguese, as well to dispute the claims of Spain and Portugal for exclusive rights to the seas. *Mare Liberum* upheld the doctrine of the freedom of the seas and was seen as threatening contemporary British claims to control the seas around Great Britain.[10] Grotius defended the freedom of the seas by arguing that the sea cannot be owned, that "the sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence it follows, to speak strictly, that no part of the sea can be considered as territory of any people whatsoever".[11]

Grotius's assertions were met by contrary argument from such writers as William Welwood in his *Abridgment of All Sea Lawes*, published in 1613, and John Selden in his *Mare Clausum*, published in 1635.[12] While Welwood accepted Grotius's argument that the high seas were open to free use by all, he contended that the depletion of fishery stocks off the coast of Britain justified a claim of sovereign authority to exclude foreigners from coastal waters. Similarly, Selden maintained that marine resources "may through a promiscuous and common use of the sea, be diminished in any sea whatever," and therefore concluded that any such sea is susceptible to national appropriation. These literary exchanges helped to highlight and clarify understanding of the issues involved in the law of the sea and to refine the concepts upon which it was based.[13]

In the ensuing centuries, exclusive coastal State claims began to recede in the face of emerging Dutch, English, French, and other colonial power interests in free and unencumbered trade and commerce the world over. Eventually, only a relatively narrow band of waters, nominally within cannon shot of a coast (three nautical miles), the so-called territorial sea, was generally recognized as subject to coastal State sovereignty. In his work *De Dominio Maris*, published in 1702, the Dutch publicist Cornelis van Bynkershoek provided a rationale for that limit:

> Wherefore on the whole it seems a better rule that the control of the land over the sea extend as far as cannon will carry, for that is as far as we seem to have both command and possession. I should have to say in general terms that the control from the land ends where the power of man's weapons ends.[14]

Remarkably, this concept of the territorial sea being three miles in width endured until the middle of the twentieth century.

During the eighteenth century, the natural-law traditions of an earlier age began to be displaced by political theories based upon the notion of consensus government such as Rousseau's "social contract." In the realm of international