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THE EXCLUSIVE ECONOMIC ZONE—DEVELOPING COUNTRIES' QUEST FOR A NEW LAW OF THE SEA

The Convention on the Law of the Sea (LOS) was, at long last, open for signature on 10 December, 1982 at the final session of the Third United Nations' Conference on the Law of the Sea (UNCLOS III) after a six-day meeting at Montego Bay, Jamaica. The Conference sat for numerous sessions over 10 years working out substantial and delicate issues involved. At Montego Bay, the Convention was signed by 120 states. This roughly reflects the situation when the Convention was adopted last April at 11th Session of the UNCLOS in New York by a vote of 130 states in favour, 4 against and 17 abstentions. The Convention will enter into force a year after being ratified by 60 states. But only 50 signatures, not ratifications, are necessary for a special Commission to meet in formal session to prepare for the formation of an International Sea-bed Authority (ISA) and to undertake other preparatory steps for implementing some of the Conventions' provisions.

The idea of a *New Ocean Order* was first introduced by Arvid Pardo, the Maltese Representative to the UN in its General Assembly session of 1967. Considering the availability of vast resources in the oceans, the modern technological advancements which made those resources exploitable, and also considering the need for their rational use, avoiding reckless, unplanned and unregulated exploitation of them and the dangerous competition for ocean grabbing that might be unleashed amongst the maritime powers, Mr. Pardo emphasised the question of peaceful uses of the

ocean resources and proposed to evolve some appropriate international regime for the purpose.

One of the major changes in state policies and activities that took place after Mr. Pardo's proposal, one that also became a central issue at the UNCLOS, was that of extending coastal states jurisdiction in the adjoining sea. In the ealry 1970s different theories and arguments were put forward by the developing countries to justify such extension. Finally, such claims got rational expression in the concept of Exclusive Economic Zone (EEZ) which, after prolonged negotiation, was accepted by the 3rd UNCLOS. The core of the concept is that the coastal countries will have sovereign rights for the purpose of exploration and exploitation of both living and non-living resources of the water, sea-bed and subsoil within an area of 200-miles in their coastal seas, with respect to the base line from where the breadth of the territorial sea is measured.[1] Other things involved such as freedom of the high seas, right of navigation, right of overflight, right to lay submarine cables and pipelines are to remain as usual.

The present paper is an attempt at understanding the concept of EEZ in all its politico-economic and legal aspects. Is the concept of Exclusive Economic Zone a viable proposition towards evolving an appropriate international sea regime ? What were the objective conditions that precipitated the evolvement of such a concept ? Will there be much dislocation and chaos in the arena of sea in view of the fact that the new concept has done away with some of the traditional notions of the coastal jurisdiction and the principle of freedom of the high seas ? These are pertinent issues the authors of the paper make an endeavour to raise in this paper. In their efforts to answer these questions, the anothers try to resolve the conflict between the proposed concept and traditional nation with 'functional sovereignty' a new concept which seems to be most appropriately applied in the arena of Economic Zone.

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1. United Nations Convention on the Law of the Sea, Article 57, p. 23.

I

The emergence of the concept of EEZ in the Law of the Sea is primarily the result of the fact that marine resources are predominantly located in areas adjacent to coastal states. The realisation that these resources are not inexhaustible and as such there is high probability of a clear clash of interests between several coastal states and states possessing well-equipped deep-water fishing fleets[2] have also contributed to growth of the concept. The developing coastal states wanted to establish their sovereign rights over the resources of the coastal regions where 90% of the world catch of the fishes are done, where virtually all sea oil and gas deposits now exploitable are situated, where 80% of marine scientific research is conducted and where most shipping now takes place.[3] Besides, the developing nations wanted to be benefitted not only from the exploitation and direct uses of those resources, but also by selling licenses to the developed nations, thus allowing the latter to exploit their coastal resources. Among other reasons, were : (a) the wish of the world community to bring the different coastal zones of different nature and jurisdiction to one single clear-cut limit and jurisdiction[4], and (b) search for an alternative to a 200-mile territorial sea claimed by many Latin American states which was not supported by many others including some of the developing nations.

These were, of course, the factors without which there would have been no Economic Zone concept. But establishment of such a zone would go far beyond attaining only the proposed immediate objectives. Main strength of this concept lies in the fact that the extension of maritime jurisdiction by the coastal states will tend to

2. L.D.M. Nelson, "The Patrimonial Sea", *The International and Comparative Law Quarterly*, Vol. 22, Part-4 (London, Oct. 1973), p. 668.
3. A. K. Zouhair, "The Exclusive Economic Zone : critique of contemporary Law of the Sea", *Journal of Maritime Law & Commerce*, Vol-9, No-4, (Canada), p. 463.
4. T. I. Spivakova, *Prava ei Prirodnie Resurci Pribreznikh Zon* (Law and Natural Resources of Coastal Zones), (Moscow 1978), p. 13.

break the present maritime *status quo* and hence will help change the broad framework of relations amongst the nations to the advantage of the developing nations. The present state of affairs with its traditional concept of freedom of the high seas reflects an unequal relationship between the developing and the developed countries. On the other hand, the extension of maritime jurisdiction will definitely help increase the politico-economic bargaining power of the developing nations viz-a-viz the developed ones.

In our efforts to show this, we must first of all justify the change that will take place in the LOS. Specialists have argued that the present waves of change in the LOS, whether in the form of creating a universal sea-bed authority for administering the resources of the oceans or in the form of extension of coastal jurisdiction, can play and must play a positive role in creating the proposed New International Economic Order (NIEO). Inaugurating the fourth session of the UNCLOS, the former UN Secretary General Kurt Waldheim said, "We will have lost a unique opportunity if the uses made of the sea are not subjected to orderly development for the benefit of all and if the LOS does not succeed in contributing to a more equitable global economic system. There is a broad and growing public understanding and appreciation of the issues involved, and the successful outcome of your work would also have a major impact on the establishment and implementation of the new international economie order. It is not only the LOS that is at stake ; the whole structure of the international cooperation will be affected, for good or ill, by the success or failure of this conference". Developing nations increasingly perceive their needs and values differently from the nations of the developed world and see in the Law of the Sea, an opportunity to realise some of their aspirations and to work toward a different IEO.[5]

The main economic argument in favour of creating the EEZ is that it will give many developing coastal nations sovereignty over

5. W. C. Lynch, "The Law of the Sea and the Developing Countries : Cornucopia or Catastrophe ?" in D. Walsh (ed.) *The Law of the Sea—Issues in Ocean Resource Management* (New York, 1977), p. 118.

resources in their coastal regions and thus defend them against their being freely exploited by the developed maritime nations. Before we examine this point in more detail, let us see what the opponents of the Exclusive Economic Zone concept have to say :

(1) One of the strongest arguments against EEZ has been that not many developing countries would be benefitted by the EEZ because nearly half of the ocean area enclosed by EEZ will go to high income countries (Canada, U. S. A., Australia, New Zealand, Japan, some European countries, USSR and South Africa) which contain less than a quarter of the world population[6]. Besides, most of the landlocked and geographically disadvantaged states that will get almost nothing from the EEZ, are developing countries. The opponents argue that more than 50 developing coastal states can be regarded as geographically disadvantaged and 19 developing nations are landlocked. Granting unconditional rights in major fishing grounds to coastal states would mean giving geographically privileged states additional privileges under international law.

The above line of argument has found support in a number of studies. For example, the State Department Geographer who analyzed the 200-mile Economic Zone using the principle of equidistance to draw the zones, found that 14 countries with the largest Exclusive Economic Zones in the world would be the U. S. A., Australia, Indonesia, New Zealand, Canada, USSR, Japan, Brazil, Mexico, Chile, Philippines, Portugal and the Malagasy Republic. Using the principle of equidistance in drawing the 200-mile zone, those 14 countries obtain 42 percent of all the ocean tnat would be subjected to coastal state control. Since more than half of the above mentioned states do not fall in the category of developing nations and since they also cover more than half of this 42 per cent, the facts should speak for themselves, it is argued[7]. A Soviet researcher F. Kovalev has tried to make a qualitative estimate of the situation. He says, "200-mile economic zones can give very little to overcome the

6. A. K. Zouhair, op. cit., p. 478.
7. W. C. Lynch, op. cit., pp. 123-124.

economic backwardness of the developing countries of the world in general, because the most resource-rich maritime zones are mainly located around the developed capitalist countries like USA, England, Canada, France, Australia and Norway. So, as a result of the reorganisation of the international sea law demanded by developing countries, rich will have become richer, the economic gap between them and the developing nations will, at least, would not be lessened".[8]

(2) A second argument against the EEZ is that it will reduce the area under control of the ISA, thus diminishing the role of the "common heritage of mankind" in the creation of the NIEO. For all practical purposes, it removes oil from international management. Oil royalties will continue to accrue to nations, not to the international community. But to international community royalties would have meant a redistribution of income, a sharing by the poorer nations in the common heritage of mankind, and cooperation instead of confrontation in the energy crisis. On the other hand, nation-state royalties mean money will continue to go where money is. Moreover, it is argued that a weak ISA with relatively little resources to handle, can not provide much help to the developing nations which do not have sufficient technological skill to exploit their own resources. In the absence of proper institutions or agencies within the organisation of ISA, a developing country, even if it has nationalised its resources and established a national company, will have to fall back on the services of private multinational companies. Thus the revenues accruing from the exploitation of such natural resources are shared between the country that owns the resources and the private sector of a rich country, thus further enriching the rich.

(3) Another argument has been that most of the developing coastal states would not be able to catch the entire permissible fish and so they must allow other countries to take the surplus. It has

8. F. Kovalev, "Ekonomichiskaya Zona ei io Pravavoi Status", *Mezdunarodnaya Zizn* (Economic Zone and its legal status, *International life*), (No. 1, Moscow, 1979), p. 62.

been said that millions of tons of fish have been spoiled due to the fact that foreign fishing vessels have been prohibited by many Latin American states to fish in their 200-mile coastal water while they themselves could not catch the entire available fish on time. And this is done at a time when millions of people around the globe go hungry!

Using strictly economic criterion, it has been argued that if the Exclusive 200-mile Zone is adopted, less efficient fishermen will be substituted for more efficient ones and there will be a global decrease in world fish production and an inefficient use of labour and capital. Moreover, most coastal countries do not enjoy long coastlines like those of USA, Canada, USSR, Chile, Argentina and others; hence in many areas such as the West Coast of Africa or Mediterranean Sea, numerous countries would have to agree on the collective management of the species; consequently the bargaining and transaction cost would be appreciably higher.[9]

(4) Too much power and jurisdiction of the coastal states in the Economic Zone are feared to lead to possible detentions of foreign vessels and frequent interference by the coastal states in their navigations, and this in turn is supposed to increase navigational and commercial risks of sea-faring. All these will automatically lead to the increase of freight rate and insurance premium, and this will increase the prices of transported goods and commodities. Under such circumstances, worst sufferers will be the developing countries most of which are poor in commercial shipping and have to depend on the foreign shipping companies. Stiffening of the regime of EEZ will have negative effects upon the countries who are developing their own independent shipping fleet, and among them many are developing countries.

Most of the above arguments are put forward from the viewpoint of immediate gains or losses. Little care is taken to make long-

9. David B. Johnson and Dennis E., Logue, "US Economic Interests in Law of the Sea Issues" in R.C. Amacher and Richard Sweeny (eds.), *The Law of the Sea: US Interests and Alternatives*, (Washington, 1978), p. 75.

term judgements. Many of these arguments may be seen from a different perspective and it may be shown that EEZ will have more points in favour of the developing countries than against. Let us consider some of them:

(1) As long as we are considering resources, whether in the sea or on land, everything has to be seen or judged through the mirror of sovereignty and ownership over these resources. This is of very basic importance for the economic development of developing countries. The well-known and universally accepted doctrine of the permanent sovereignty of nations over their natural resources, including the resources in their seas, is the economic corollary of the right of self-determination of peoples. Economic Zone will give just this sovereignty to many coastal developing countries over their sea-resources. On the basis of mutual benefits, they can always get technological and financial help from the developed countries to make proper uses of these resources. As for the landlocked and geographically disadvantaged developing countries, provisions should be made so that they could participate in the exploitation of at least the living resources in the Economic Zone of the neighbouring countries.

(2) Even if the developed countries get a marginal share of Economic Zone, a clear-cut delimitation of coastal limits is desirable to prevent unlawful fishing and indiscriminate expropriation of fish resources that would fall within the jurisdiction of the developing countries. Besides, the assertion that the most resource-rich seas are located around the coasts of the developed capitalist countries is not entirely true. Apparently that might seem so, but one has to admit that the coasts of the developing countries had been least studied.

(3) The arguments that the Economic Zones will drastically reduce the area under international control might seem strong enough. The resources which would otherwise have served all the countries, under Economic Zone concept will go to the hands of a limited few. But one of the reasons why developing coastal coun-

tries did not show much enthusiasm in sacrificing their Zone to the international control was the ambiguity about the future development of "the common heritage of mankind". Judged from another side, even without Economic Zones going under the international control, ISA will be left with more than 60% of the world oceans and though these are relatively resource-poor regions, their importance will rise with further technological advancement. So, they can still play a major role in the making of a New International Economic Order.

(4) The much advertised argument put forward by the developed fishing powers like Japan and USSR that inability of developing countries to make efficient catch of fish results in mass spoilage, seems to be not founded on logic and reasons. Developing countries can always invite interested foreign fishermen to catch fish on the basis of mutual agreement. All that developing countries want is not waste or hoarding of resources, but fair distribution and rational utilization of the living resources of the sea to satisfy the needs of mankind rather than to swell the pockets of a few. The fact that millions of tons of fishes had been spoiled due to the unwillingness of the developing countries to allow other countries to fish in their coastal seas can be well understood, if we consider the absence of universally recognised rules and regulations for the foreign fishermen to fish in these areas. Coastal countries wanted to act under a broad legal framework where they could create new rights and defend them, independent of immediate consequences like loss of species.

Though subject to many conditions favourable to them, coastal states are required, according to article 62 (2) of the Convention, to permit the foreign vessels to fish in their Economic Zones, if there is surplus, so that living resources are not wasted. The American researcher Sidney Holt suggests that the idea of waste is false and that it derives from a partial view of the dynamics of the living resources. He points out that something less than full use would be to the benefit of the developing countries.

Accordingly, to him, the developing countries on the whole are the late-comers to modern fishing. They can develop best when stock levels are higher rather than lower. They can't afford to waste resources like energy, metals, fibres and other natural resources used up in fishing, through investment in excessive capacity. Their enlightened self-interests are, therefore, on the side of ecological sense and of economic sense in the long-term. They will not lose food potential in this way, because the resources which would otherwise have gone into excess hunting capacity could be used for improving their culture systems for food whether they are on land or in the coastal zone[10]. Thus the optimum yield would have to be determined not only by ecological factors and their interdependence but also by economic and social factors.

Moreover, if the technologically developed countries are not made dependent upon the developing ones to fish in the coastal seas and if they are always free to take the surplus, it might make the task of technology transfer all the more difficult.

(5) Relating to the fourth criticism it can be argued that the establishment of EEZ will not seriously affect navigation, for this freedom of the seas will be properly guaranteed in the EEZ. Under the circumstances of rising pollution problems in the seas, strict rules and regulations for navigation would, all the same, have been necessary under international regime and there would have been need for international control. Given clear-cut treaty provisions, there is no reason why the usual shipping should be disturbed by the coastal states unless their economic interests are hampered.

II

The above discussions convince us of necessary legal changes in the direction of extending coastal states' jurisdiction. They are dictated by the economic, political and social imperatives of our time. Ensuing changes definitely come in conflict with the traditional approach to the principle of freedom of the high seas. But the inten-

10. Don Walsh (ed), op. cit., p. 99.

sity of the conflict should not be exaggerated, rather adapted to the new objective needs or otherwise we would fall victim to dogmatism. 'Law exists for society, not society for Law'.

The principle of freedom of high seas was crystalised at a time when European maritime expansion was at its zenith. The great powers of the day needed unrestricted freedom for their navy and marchant ships.[11] They were the sole makers of international law. So the principle of freedom of the high seas came to be accepted as '*Jus Cogens*', imperative norm of international law.

After the second World War, things changed radically. Within 20 years, a great number of nations of Asia and Africa, which were for centuries groaning under the colonial shackles, came to establish themselves as independent states and started gaining weight in international politics. They started reevaluating the existing norms and principles of the international community, and not seldom found them contrary to their interests. Norms of the Sea Law were one such major area. These new nations did not participate in their making and hence were not bound by them, if these norms did not serve their interests. Only a few of these nations could participate even in the Geneva Conferences that adopted four Conventions on Sea Law. The thesis that *lex ferenda* (future law) should be based on *lex lata* (present law) and in no way violating the fundamentals of *lex lata*,[12] did not always please the new nations and they were too many to accept an unpleasant thesis.

The Latin American countries, though they got their independence much earlier, were on the same platform with Asian-African countries to defend their maritime interests against the developed industrialised nations. In fact, it is they who started the maritime revolution and later found staunch support amongst the states in Asia and Africa. National legislations of these countries in the past 30 years carry evidence to this. They have presently demon-

11. M.K. Nawaz, "The Emergence of Exclusive Economic Zone", *The Indian Journal of International Law*, Vol-XVI, No-4. (Oct-Dec. 1976) p. 472.
12. A.M. Kopodkin, *Mirovoi Akean* (World Oceans), (Moscow: 1973), pp. 41-42.

strated their united force in the 3rd UNCLOS which had been working for about a decade to adopt an all-embracing Convention on the Law of the sea. The arguments of the developing countries have found one of the best expressions in the words of a well-known Indian author on International law, Mr. R.P. Anand "they (developing countries) were convinced that the so-called freedom of the seas would have to be regulated in accordance with, and balanced against the needs of all the nations to safeguard their economic interests as well as their national security and sovereignty. Nobody could remain unaware of the dangers of continuing *Lassez-faire* on the high seas. It had ceased to serve the interests of international justice. Freedom at the seas could no longer be permitted to impair the even more fundamental principle of national sovereignty and the inherent right of self-preservation. It had become a catch word and an excuse for a few countries to exploit the resources of the sea ruthlessly, to terrorize the world and to destroy the marine environment. That type of freedom belonged to the old order and had outlived its time. True liberty struck a balance between rights and obligations. The developing countries would be seeking in establishing a new law, not charity, but justice based on the equality of rights of sovereign couutries in respect to the sea. Only a new inernational law could establish this because they know that between strong and the weak, it is freedom which oppresses and law which protects".[13]

When many authors, specially from developing countries, stress the necessity of adapting the principle of freedom of the seas to the new situation, they in no way deny it in toto ; they are only against the absolute character of this principle. It must concede to the doctrines and principles which are more in compliance with the real circumstances of the world. This principle is only required not to become a barrier for the oceans to carry out their new important functions as the source of resources.[14]

13. R.P. Anand, "Winds of change in the Law of the Sea," *International Studies*, Vol-16, No-2, (April-June 1977) p. 215.

14. Jepes, "Les Nouvelles Tendances du droit international de la mer et le droit internationale", *Revue General de droit public*, XXVIII, (Paris 1956), p. 30.

With this end in view, the Third World countries always pressed forward their legitimate demand in international fora. If the UN General Assembly resolutions are of any international legal significance, the developing countries can often refer to these documents as supporting the laws favourable to them. Since the resolutions are not international treaties, their importance and weight would depend upon several factors, including the size of the majority, negative votes and abstentions, clarity of commands in the provisions of the resolutions and consensus of states that might be expected after the resolutions are adopted. GA resolutions express the will and practices of the states which are part of the process of customary law-making. That is why resolutions adopted by consensus or near-consensus have special legal significance. There are many such resolutions which, stressing the need for material development of the poor countries, call for the implementation of the NIEO. This must make one of the material foundations to provide for international peace, stability and justice—the noble aims set before the world community. So ignoring the developing countries' demands of material benefit would seem a legal incompatibility with the letter and spirit of UN charter. Many of the GA resolutions, besides having their independent legal significance, are described to have the value of progressive interpretation of the UN charter.

UNGA resolution on Permanent Sovereignty over Natural Resources (GA resolution 3171-XXVIII) is often quoted as an example having great legal significance. It carries weight both from the view point of greater consensus among the nations in adopting it (adopted in its latest form on 17th Dec. 1973 by 108 votes, 1 against, and 16 abstentions) and from the view point of realisation of the goals set by the world community in the Preamble and Article I of the UN charter. Among others, the resolution in its Preamble reiterates "that an intrinsic condition of the exercise of the sovereignty of every state is that it be exercised fully and effectively over all its natural resources whether found on land or in the Sea." It "strongly reaffirms the inalienable rights to permanent sovereignty over all

their natural resources, on land within their international boundaries, as well as those in sed-bed, in the subsoil thereof, within their national jurisdiction and in the superjacent waters" (article-1). Article 5 reemphasizes that "actions, measures or legislative regulations by states aimed at coercing, directly or indirectly, other states or peoples engaged in the reorganisation of their internal structure or in the exercise of their sovereign rights over their natural resources, both on land and in their coastal waters, are in violation of the Charter of the United Nations and of the Declaration contained in resolution 2625 (XXV)".

The phrases "in their coastal waters" and specially "in the superjacent waters" have special importance for the international Sea Law. They have the legal consequences of recognizing the rights of the coastal states in the 200-mile Economic Zone. When the resolution speaks of the sea-bed and the subsoil thereof within the national jurisdiction, it simply refers to the positive rights of the coastal states according to 1958 Geneva Convention on the Continental Shelf. And this national jurisdiction in the sea-bed usually comes within the 200-mile limit. Addition of the phrase "in the superjacent waters" seems to complete the Economic Zone notion.

Rights in a vast area of the superjacent water do not merely exist in resolutions and creative conceptual imaginations of their upholders; their rights had long been in existence practically and defended successfully by some Latin American states, specially by Peru, and thereby contributing to their actual manifestations. Peruvian Representative in the Caracas session of the UNCLOS observed that "his delegation had come to the conference with the intention of assisting in the formulation of a new Law of the Sea which would correct past inequities and bring to end the privileges of a handful of powers. Although it was prepared to participate constructively in the quest for reasonable solutions, there were limits to its tolerance. Peru had exercised its sovereignty over a 200-mile Zone off its coast for almost 30 years. It had punished law-breakers, faced up to threats and coer. cive measures and successfully developed its fishing and related indus-

tries. It was not therefore prepared now to renounce its rights (acquired) or its achievements or to accept the conversion of its national waters into an essentially international Zone in which foreign fishing fleets could exploit the resources for the benefit of wealthier and more powerful nations". Peru claims and seems to have successfully withstood the complex process of customary law making.

III

We have so far dealt with the principle of freedom of the seas in its general aspects and have stressed that traditional understanding of this concept has to be changed in order to meet the objective necessities and that such change is a legal possibility. Let us now study the concrete points of conflicts between the old and the new, and try to find out the true nature of the principle of freedom of the high seas and give it a meaning best suited to the modern world.

Firstly, as can be made out from the new Convention, the traditional concept of freedom of the high seas which includes freedom of navigation, freedom of overflight, freedom to lay submarine cables & pipelines and freedom of fishing, will not exist in full as before throughout the oceans excepting the territorial waters whose width varied from 3 to 12 miles. Now under the concept of EEZ, in an area of 188 miles measured from the outer limit of a 12-mile Territorial Zone towards open sea, fishing and other economic activities are to be in control of the coastal states. Scientific research and control measures for pollution of oceans which are relatively new spheres of ocean activities, are also to be placed to a great extent under coastal state control. Secondly, in view of the creation of an International Sea-bed Authority with power to exploit resources and other regulatory activities, absolute freedom of the high seas even in the areas beyond the EEZ, has to be limited.

Famous English lawyer Oppenheim giving voice to the Grotius ideas, mentioned two facts as providing the rationale for freedom of the high sea. First, it is suggested that a part of the open sea could not be effectively occupied by a navy and could not therefore be brought

under the actual sway of any state; that nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible and, therefore, sufficient for all. He suggests that the second argument can now-a-days hardly be accepted by those who deny the validity of the law of nature.[15]

In view of the latest technological development in exploiting sea-resources, theories of inexhaustibility of biological resources of the seas and their inoffensive uses have been rejected. And the first argument is now without basis in the face of the development of modern navies.

The real reason for the freedom of the open sea is represented in the motive which led to the attack against the maritime sovereignty during the past days of closed seas and in the purpose for which such attack was made—namely, the freedom of communication and specially commerce between the states separated by the sea. The sea being an international highway which connects distant lands, it was the common conviction that it should not be under the sway of any state whatever. It is in the interest of free intercourse between the states that the principle of freedom of the open sea has become universally recognised and will always be upheld.[16]

Developing countries, so it seems, in their demand for change in the concept of freedom of the high seas do not, in reality, propose any reversal of its purposes. Theirs is for the optimal use of the sea. Conflicts that had been too much dramatised by the Western and European socialist countries are found to be strictly 'academic' and 'conservatively theoretical'. The crisis of freedom of the seas is, in reality, a crisis in the conceptions, not in the practical values.

IV

The whole spectrum of the problems—better utilisation of overall sea resources, protection of interests of the coastal coun-

15. L. Oppenheim, *International Law*, H. Lauter (ed.) 8th Edition (London 1955), pp. 592-94.
16. Ibid. pp. 593-94.

tries, coexistence of their rights with the rights of other states in the Economic Zone, readjustment of the concept of freedom of the seas without doing harm to its spirit can be better understood, simplified and resolved if we look at it through the mirror of the recently much talked-about concept of the 'functional sovereignty'. Functional sovereignty assumes not full, but limited state sovereignty; it is not supposed to give its holder all the powers and functions of sovereignty, but some of them depending upon the purposes for which they are given. Coastal seas, where for centuries the question of national sovereignty had been one of controversy seem to be the ideal sphere for application of functional sovereignty. Even the use of all of the ocean space can be defined in terms of the functional aspect of sovereignty.

On broader analysis functional sovereignty is found to mean the following: (a) it is not sovereignty itself, but its derivative, (b) rights and obligations that it gives are over particular objects with particular objectives, (c) it gives its holders that much jurisdiction over the area of location of the objects as are necessary for the realisation of their rights, (d) rights of other states in the same area must not be disturbed, (e) the principles of functional sovereignty must be subjected to broader, more imperative principles whatever, and (f) though, like sovereignty, it is a means to an end, its scope is much narrower.

The works at the 3rd UNCLOS and results attained there show that, consciously or unconsciously, all have surrendered to a functional solution of the problem. Article 56(1) of the Convention recognises the sovereign rights of the coastal states in the Economic Zone for the purpose of exploring and exploiting, conserving and managing the natural resources, both living and non-living, of the Zone. It also recognises their rights with regard to activities for the economic exploration and exploitation of the Zone, such as production of energy from water, currents and winds. Paragraph 2 of the same article obliges the coastal states to show proper respect for the rights of other states in the Zone while exercising

their own. Article 58, paragraph 1, recognises for all other states' freedom of navigation and overflight and of laying of submarine cables and pipelines and of other uses of the sea, while paragraph 3 requires them to exercise their rights without encroaching upon the rights of the coastal states and abide by the rules and regulations of the coastal states, adopted in accordance with the norms of international law. This is a typical functional approach. It may avoid the dilemma of which of the two traditional legal status—high sea or territorial water, is to ascribe to the Economic Zone. Economic Zone may acquire its own specific status *Sui generis* with functional peculiarities. In such approach to the problem, the question whether the principle of freedom of the seas should be the 'residual' rule for doubtful cases or whether the residual rule should be the principle of territoriality, that is, making the Economic Zone equivalent to that of territorial waters, does not arise.

Well-known Italian functionalist Conforti Benedetto maintains that "the crisis of the seas should not be dramatised. If the use of ocean spaces increases, if exploitation of ocean resources assumes a place of primary importance on an international scale of economic values, the principle of freedom will be of little help. It is better if international law begins to rely increasingly on the recognition of functional rights. In the Economic Zone also the rights of the coastal states are, after all, functional rights, in the sense that the coastal state remains precluded from doing whatever is not indispensable for the total, exclusive and rational exploitation of economic resources. Thus the conclusion to be drawn is that in the relations between the coastal and other states, the principle of free use of the sea, in case of doubt does not prevail; instead, the prevalent principle is that all states including the coastal one, must strictly keep themselves within the limits of their rights. Such a principle constitutes the equitable and intermediate solution between those favouring the residual rule calling for territoriality and those favouring the residual rule for freedom of the seas. Obviously it must be applied in good faith like any other general principle of

international law. The problem of repressing abuses must be carefully screened, and this is just the eternal problem of international law. For an important sector such as maritime law it would be difficult for any new codes to be successful without guarantees of jurisdictional nature which would assure impartial application".[17]

In controversial and doubtful cases where functional rights of different groups were hard to determine or when the rights may equally be attributed to both coastal and non-coastal states, the situation was tried to be solved by "a mutual reasonable regard-clause"[18]. Article 59 of the Convention says "in cases where the Convention does not attribute rights or jurisdiction to the coastal state or to other states within the Economic Zone, and a conflict arises between the interests of the coastal state and any other state or states, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance to the parties of the interests involved as well as to the international community as a whole". This equity clause containing 'reasonable regard' concept envisages detailed rules relating to the jurisdiction on the coastal state in respect of scientific research, protection of the marine environement and artificial islands within the Economic Zone as well as the substantive rules relating to scientific research and the laying of submarine cables and pipelines contained in the Convention itself.[19]

The concept of functional sovereignty is yet to get sufficient doctrinal treatment in the juridical literature. It is expected that practical application of it in the EEZ and its proper doctrinal development will give more precision and clarity to the concept in order that it can be a way out to some of the sharpest problems of maritime sovereignty of the states.

17. Benedetto Conforti "Does Freedom of the Sea still Exist?", *Italian Year book of International Law*, Vol-1 (Napoli, 1975) pp.12-13.
18. W. Riphagen, "Some Reflections on 'Functional Sovereignty", *Netherlands Yearbook of International Law*, Vol-VI (The Hague, 1975), p. 150.
19. Ibid., pp. 150-151.

V

From the above discussion, it should appear that the developing countries were not unjustified in their demands to extend the jurisdiction in the sea. In a world of poor and rich nations, the economic gap between which was further widening up, the poorer nations saw in the resources of the sea a way to shorten this gap. As the French lawyer J. P. Quenendec wrote, "From the view point of developing countries, EEZ will help provide for just distribution of the riches of the seas and thus give rise to new ethics of development according to which oceans are considered to be a sphere where different privileges as compensations given to the developing countries are legally recognised. And this is a means to liquidate injustice and economic inequality which have been established by history in favour of a few developed countries".[20]

Initially, the developing countries might not be able to realise the fullest benefit from their Zones, but that is only the beginning. Peru is a glaring example at how a developing country can use the resources of the sea to solve her underdevelopment. Fish products now account for about half of Peru's foreign exchange earnings and she can be compared with such super fishing powers like Japan and USSR. It is said she could never make such miracles without laying claims to 200-mile Zone and successfully defending it which is described as the "Fourth Nations Region". This fact points to the potentials the coastal states have for economic progress.

Though the economic gains from establishing the sovereignty over the resources are obvious, various criticisms of the Zone concept cannot be overlooked. They have their own merits. Developing countries well understand them. If the concrete visible economic gains would have been the only argument in favour of EEZ, it is doubtful whether this concept could have shaken the world community with such intensity as it is, and whether all the developing countries including landlocked and geographically

20. J.P. Quinendec, *La Zone economique*, No. 2, (Paris, 1975), p-382.

disadvantaged, the apparent losers of the EEZ—would have given such a strong support to this concept. Argument that proved to be stronger was one of politico-psychological character and as has already been mentioned earlier, one of relationship between the developing and the developed nations in general.

Though the arguments for Economic Zone are primarily economic, its political and legal values are obvious. It will place the developing countries in a better position in their relations with the developed world and make a basic change in the directions of overall development leading to greater ultimate economic gains for all the developing countries. Centuries of colonial exploitation, economic and political dependence, controlled and arrested growth—all have made the developing countries very weak psychologically and socially. Mere money and matter would be insufficient for their overall upliftment. The greater is the need for a structural change. The maritime jurisdictional extension with functional sovereignty will definitely be a help in this regard. This extension, besides others, will give the developing countries a broader sense of independence, will contribute to the redemption of their national self-assurance and inculcate in them a sense of feeling stronger in the family of nations.

Developing states' role in international politics during the last two decades and works of the 3rd UNCLOS have clearly proved these views. Building a New Economic Order is primarily a political issue and it reflects one of the most fundamental political problems of modern time. Only through political struggle and political gains, through making changes in the world community relations, can the goals of NIEO be achieved. In the conference, the developing countries, indepenedent of their degree of individual gains, demonstrated this consciousness in respect of the Law of the Sea so far as it concerned NIEO as part of a broader strategy.