Chapter 11

The Contributions of Latin America to the Implementation of the UNCLOS

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The So-called Classic Law of the Sea

The development of the Law of the Sea is related in its origins to the consideration and establishment of the concepts of the liberty of the seas and the breadth of the territorial sea, whose name was also ‘maritime belt’, ‘marginal sea’, or ‘territorial waters’, that the States claimed to exercise sovereignty over a belt of sea adjacent to their coastlines, especially to protect their territories.

For the Roman Cayo, the sea was res nullius, while another Roman Celso maintained that it was res communis, and these two schools of thought led to consider that the waters of the sea ought to be free, as free as the air, to facilitate the contacts of peoples. Later, the Spaniard Francisco de Vitoria proclaimed that the sea had to be a means for communication among different peoples. And other Spaniard Vasquez de Menchaca y Castro maintained that the use of the seas could not harm anybody, and consequently it was not necessary to establish limitations. The problem arose when politicians and jurists tried to determine the measurement of the belt adjacent to the territory of the State. During the XIV and XV centuries, the idea of the ‘reach of sight’ was proposed by some jurists, but it was impossible to fix a distant of the sight reaching. The Dutch jurist Cornelis van Bynkershoek, in a work published in 1702 (De Dominio Maris) propounded the doctrine that the power of the territorial sovereignty extended to vessels within the range of cannon mounted on the shore. This proposal had a basis on the maxim: Imperium terrae finiri ubi finitur armorum potestas. The doctrine rested on the control of the actual guns of ports and fortresses over adjacent waters. However, in the latter half of the eighteenth century several States laid down limits of belts for purposes of customs or fishery control in legislation and treaties. Accordingly, many States extended their sovereignty up to four miles and even more. As the ‘cannon-shot’ was by no means a definite criterion, suggestions for setting up a convenient standard, or rather a substitute, began to appear. In 1782, the Italian writer Galiani proposed three miles, or one marine league, and so
the three-mile limit began to be adopted by most States. A significant aspect of the development of the law was the intimate relation between claims to jurisdiction for particular purposes over the high seas, and the extension of sovereignty to a maritime belt. In spite that the three-mile rule had at that time general acceptance, fairly soon developed pronouncements of assertions of sovereignty associated, among other things, to neutrality and fishery activities.

At the beginning of XVII century, the Dutch Company of Eastern Indies, seriously concerned by the expansion of English vessels in the sea that affected its commercial interests, charged to Hugo Grotio (Hugo de Groot, Grotius), a subject of the maritime power at that time who also was at the service of the Dutch Company, to prepare a theory or a text to defend the Company against those dangers. Grotio published then in 1609 the chapter called *De mare liberum*, a part of his treatise *De Jure Praedae*, in which he proclaimed the principle of the liberty of the seas, being considered from the navigation point of view or from fisheries. But he did not advanced any proposal on precise limits for the maritime belt belonging to the coastal State. But now the principle defended by Grotio affected the British interests, and John Selden, a well-known jurist published in 1635 his treatise *Mare Clausum*, proposing the theory aiming at the territorialization of the sea, proposal that was enthusiastically adopted by the King Charles I. But when the British vessels began to expand the British supremacy in the sea, the theory of Selden was gradually disregarded. The antagonism between the principle of the liberty of the seas, promoted by Grotio, and the theory of the closed sea, defended by Selden, was forgotten, and new basic notions appeared: high sea, territorial sea, internal waters and adjacent zones.

The United States was one of the first States to adopt the three-mile rule in a diplomatic note addressed by the then Secretary of State Jefferson to his colleagues of Great Britain and France. During the XIX century some bilateral agreements adopted this rule. But other States established different distances. In 1889 in a treaty signed by Bolivia, Paraguay and Uruguay the distance of 5 miles was adopted. But in other instruments of the same period, the distances adopted were between 9 and 20 miles.

Wolfgang Friedman summarizes this situation as follows:

As a general principle of international law, the liberty of the seas has less than three and a half centuries. It was logical that this doctrine appeared during the exploration era, when Columbus, Cabot, Vasco da Gama, Raleigh, Drake, Magalhaes and others began to unite Continents of America, Asia, Australia and later the interior of Africa, with Europe.