The Law(lessness) of the Sea

The first important step towards a law of the seas was taken by Hugo Grotius (1583-1645), now regarded as the father of international law of the sea. If his proposals had been put into practice at the time, it is arguable that the law of the seas in the seventeenth century would have been more than adequate. However, time does not stand still. In Grotius's time the right to sail in international waters was threatened mainly by pirates, though in the course of time that particular danger was virtually eliminated. (In recent years, however, it has begun to reappear.) More serious have been the problems of pollution and overfishing and the discovery of important mineral resources such as oil, gas and so-called manganese or polymetallic nodules. This has raised the extremely topical question of the ownership of resources that in law belong to nobody or, rather, belong to the whole of humanity. Overfishing and pollution are issues that nobody wants but that nevertheless occur. Their causes were discussed in 1968 by G. Hardin in a now famous article in *Science* entitled 'The tragedy of the commons'. By the *commons* he meant all those resources which everyone may use, but no-one has a legal right or any claim of ownership to. International waters are a prime example. Hardin called the underlying principle of the over- or misuse of the *commons* the 'free riders principle'. The chief cause of problems at sea is that there is no owner who is responsible for the sea and liable for its responsible use. No country has any *a priori* administrative, controlling or sovereign rights over it. That has tempted some states to make use of the sea in ways that they know are irresponsible but for which others, and not they themselves, have to pay the price. Overfishing is an obvious example, as is pollution.

These abuses have led to the drawing up of a treaty, *The Law of the Sea*, under the auspices of the United Nations. This is an important step forward which cannot be praised highly enough. But even here the drawback can be seen of not having a treaty which is universal, worldwide, and automatically binding if it is to achieve its ends. Every sovereign state may decide whether to abide by it or not, and the sanctions are weak. Moreover, several useful institutions which the treaty envisages have not yet been set up.

Hugo Grotius
by Michiel Jansz. Van Mierevelt

What are international waters?

We shall confine ourselves to the sea beyond territorial waters. It falls outside the jurisdiction or sovereignty of any national state. National territory extends 12 nautical miles (1 nautical mile is 1852 meters) out from the coastline while its jurisdiction extends a further 12 nautical miles. Beyond that, up to 200 sea miles from the coast, the state only has rights to the fishing and the mineral resources. These distances are all *maxima*; a state can always agree to less.

This demarcation of the legal rights of national states does not cause problems so long as three conditions are satisfied:

1. all other states must agree
2. when a coastline runs through onto the territory of a neighbouring state it must be straight
3. the coastlines of states that face each other must be separated by at least 400 nautical miles to prevent overlapping

These conditions are often not met. It is a potential source of conflict which is usually resolved through bilateral treaties.

Beyond territorial waters the freedom of the sea obtains, limited only by treaties against piracy, the slave trade, and off-shore transmitters. It should be pointed out that the weakest aspect of this regulation of international affairs by treaty is that the treaty is only binding on a sovereign state if it ratifies it. This is not normally a problem though there are unfortunate exceptions, especially where mineral resources are concerned. The United States, for instance, has not ratified the Law of the Sea because it cannot agree to the terms covering this subject. This leads to the possibility of *free riders* behaviour, the moral misuse of power mentioned above. Recently there has been conflict over mineral resources in the South China Sea between China on the one side and Japan, Vietnam, Taiwan and the Philippines on the other (*The Economist*, 16/8/2014).

Mare Liberum (The Freedom of the Seas)

Hugo Grotius was a many-sided man. He had a range of administrative responsibilities, even outside the Dutch Republic, and his interests extended beyond the law to literature and theological subjects on which he published a number of important books. His most famous work is *De iure belli ac pacis* (On the Law of War and Peace), published in 1625, which became the basis for modern international law. He is also known for his argument for the free use of the seas in *Mare Liberum*. In general, he is considered to be one of the greatest jurists and he has had an enormous influence on international public law. His ideas about the law of the sea still form an important basis for the law that applies nowadays. Grotius argued that the sea was free for all to use and that nobody owned it. If this were not so, it would be to everyone's disadvantage. In modern times that last statement might be challenged. It depends on who the owner is, what form the attached rights actually take, and also whether all other states can really be bound to accept and observe those rights. As we shall see, the treaty structure which has been used until now has been unable to achieve this.

A few treaties

In international waters there is unfortunately no law that applies automatically and is binding on all countries in the way that it is within national states. The most important treaty that regulates the law of the sea is the *United Nations Convention on the Law of the Sea*, abbreviated to UNCLOS (1982).

The treaty was necessary because of the weakness of Grotius's concept of *Mare Liberum*, dating from the 17th century, which limited national rights to an area around the shoreline, normally up to a distance of three nautical miles (5.5 km). That distance was based by Cornelis van Bijnkershoek in the early 18th century on the firing range of contemporary coastal defences.

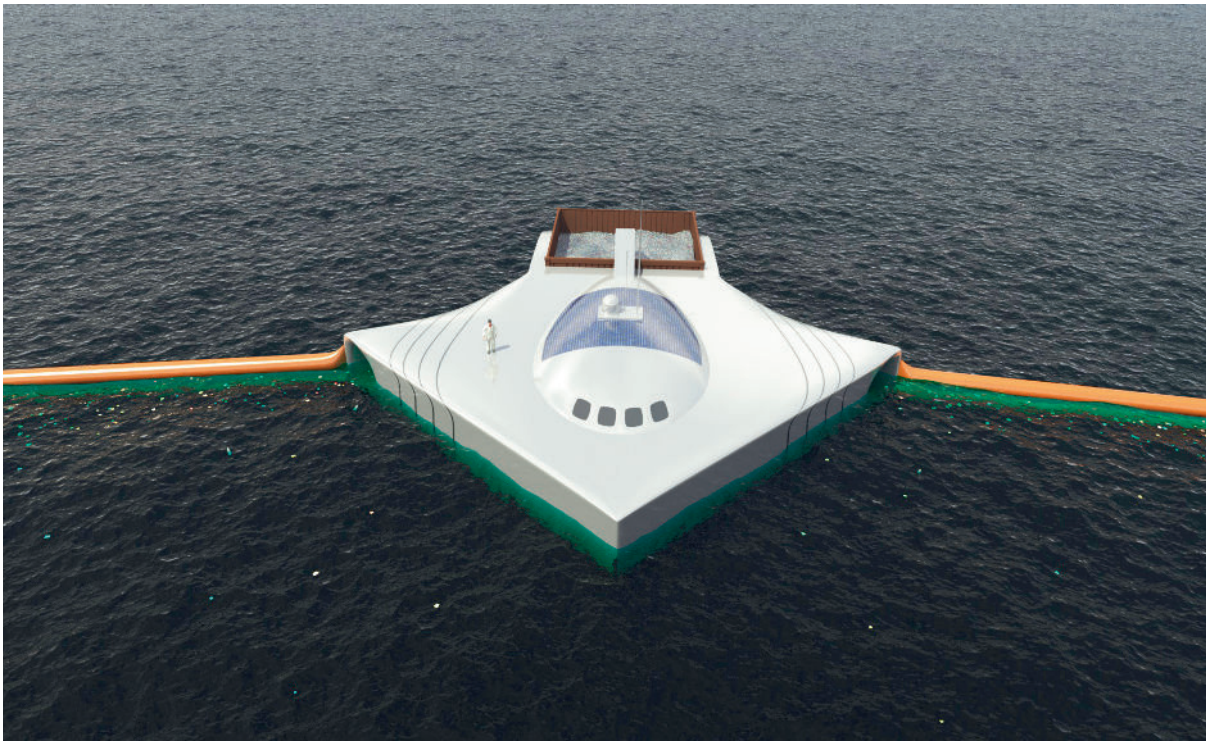
In the course of the 20th century, many countries wanted to extend these limits because of the presence of natural resources such as minerals and fisheries, and in order to impose measures to protect the environment. The principle of the Free Sea was broken by the United States in 1945 when President Truman unilaterally laid claim to all the natural resources of the continental shelf. Other countries quickly followed suit. Between 1946 and 1950, Argentina, Chile, Peru and Ecuador extended their sovereign rights to 200 nautical miles in order to protect their fisheries. Other states extended their territorial waters to 12 nautical miles. By 1967, only 25 states still accepted the original territorial limit of three sea miles, 66 states had a 12 mile limit and 8 extended for 200 sea miles. In spite of the weaknesses inherent in all treaties, UNCLOS represents an enormous step forward. 158 states are signatories to it while 12 countries including the United States have signed up but have not yet ratified it. This forces us to face the fact that national states are free to sign up to or simply ignore international treaties. If powerful states make use of that, then the intentions of the treaty will not be achieved and the efforts and sacrifices of those states that do take part will have been completely or at least partially in vain.

The London Convention of 1972 is administered under the aegis of the International Maritime Organisation (IMO). It consists of a large number of agree-

ments on the dumping of waste at sea. In the autumn of 1996, 43 states agreed that the dumping of waste at sea should in principle be forbidden. Before that, in 1993, there had already been an agreement to ban the dumping and burning at sea of radioactive materials and industrial waste.

It is, of course, excellent that action should be taken against such abuses. But that such action should be necessary speaks volumes about the lack of adequate regulation of international waters. It is also worth noting that nothing is said about waste being dumped on land and making its way into international waters via rivers, lakes and off the beach.

The *International Convention for the Prevention of Pollution from Ships* (1973), as modified by the Protocol of 1978, in short MARPOL, also came about within the IMO. It is one of the most important treaties relating to the pollution of seawater. The treaty consists of six annexes. They were signed at different times and not every country is a signatory to all the annexes. They comprise regulations designed to prevent pollution of the sea by oil and other harmful substances that are transported in bulk across the seas, by sanitary discharge and by the dumping of rubbish by ships and, finally, to prevent pollution of the air by ships.



The Ocean Cleanup. This concept for cleaning up the plastic pollution in the seas was developed by a young Dutch student, Boyan Slat. The pilot phase began after a crowd funding campaign in 2014.

The Convention was signed on 17 February 1973 but only came into effect after the addition of the Protocol of 1978. Once a sufficient number of states had ratified it, it finally came into force on 2 October 1983. By 31 December 2005, 136 countries had signed the convention. These countries represent 98% of the world's shipping measured by tonnage.

The OSPAR Convention (1992) is the instrument regulating international cooperation in protecting the maritime environment in the north-east Atlantic (including the North Sea). The most important goals of the Convention are:

1. the prevention and ending of the pollution of the maritime environment;
2. the protection of the sea against the harmful effects of human activity to safeguard human health and maintain the maritime ecosystem, and where practicable restore maritime areas which have already been adversely affected.

Furthermore, the convention is aimed at sustainable management of the areas concerned. This involves managing human activities so that the marine ecosystem can sustain the present level of legitimate use and can continue to meet the needs of future generations. To achieve this the signatories have agreed, jointly and severally, to take appropriate measures and harmonise their policies. In this a number of principles must be applied:

1. the principle of precaution: take preventive measures if there is reasonable suspicion that harm to the environment is likely, even where there is no proof;
2. the principle that the polluter pays;
3. the principle of best practice: the best environmental practices and the cleanest technology will be employed.

Critique of current international law

So, for the resolution of international problems, there are treaties and international law courts which can make binding pronouncements on conflict situations so long as the parties have given their assent. It is an illogical and, in fact,

idiotic situation that national states should decide whether or not to participate in the resolution of problems which affect all states. The law of the seas falls into that category. That freedom, which is used and indeed abused on a wide scale, leads us to conclude that at the international level there is a high degree of anarchy. Many international issues are inadequately or not at all resolved or even tackled. The governments responsible, and below them the inhabitants of their states, must realise that great damage is being done to the common interest that they are deemed to serve. Nevertheless, it is certainly not the case that every state will gain an exclusive or even a partial advantage in the resolution of every international or transnational problem.

Compliance

International treaties, except for the European Union, do not bind their signatories directly. Normally their content has to be laid down in national legislation to which all ships registered in the country are also subject. Every country is free to do this in its own way. It is highly doubtful whether this always takes place entirely according to the letter and spirit of the treaty and all too often there is no check on it. This can lead to the actual application of the treaty being neglected. Moreover, the tendency in international treaties to include phrases like 'so far as possible' further contributes to such non-compliance.

Sometimes treaties include clauses which are impossible to fulfil. In Europe, for instance, it is often possible to dump the leftovers from tankers in a type of

French marines capture Somali pirates

giant skip. In Africa, however, harbours are not equipped to deal with that kind of waste. If such failures were to occur in national legislation, the legislature would soon end up in trouble with the judiciary. But when regulation is by treaty these weaknesses are easily overlooked.

In reality, global issues involve more states and lead to more problems. To resolve them a world authority is needed or, put more bluntly, a world government with everything that implies: a budget and a steady income, expert and adequate staffing, a strong arm for situations where coercion is needed, and naturally democratic composition and supervision. Only then will it be possible to solve the problem of inadequate international law, including the law of the sea.

In game theory, the preceding example simply illustrates the advantages of cooperation. One might wonder why everyone does not see this and wholeheartedly support the idea of a world government. There are three reasons. The first is that for the average individual world government is a very distant prospect and there are very few who are (at all) ready for it. The politicians who would need to bring it about would have to jump the gun, as it were, and take the initiative. And that is not something that politicians are, to put it mildly, usually very good at. Even if they were, it is not at all certain that effective world government would result because of two other relevant principles of game theory.

The first is the *free riders* problem. This takes effect when one can clearly see the advantages of global measures but hopes that others will pay for them; in other words, there is the prospect of a free ride. This is a worldwide phenomenon. At the national level, it was what caused the collapse of communism. There were many who felt it was a good idea, but hoped that everyone else would put in the extra effort to achieve the ideal community so that they could proceed a little more slowly. When others noticed this, they also thought it a

good idea and hoped, or believed, that they would be the only ones. But it did not take long for them to become the majority. People also try to get a free ride on public transport and the solution is well-known: effective checks. Precisely the same applies at the global level.

The second factor is known as the *prisoner's dilemma*. Roughly speaking, this amounts to showing rather less willingness during negotiations (in this case about treaties) to contribute to the solution than one's actual desire to find a solution. One does that to avoid having to bear a disproportionate share of the cost when others do the same. The result is that too little ends up being regulated. In this, trust is an important factor, the trust that one's fellow negotiators are showing their true preferences. Trust will come about if it is clear that a party is not playing games in order to reduce his share of the costs. But that takes time.

Naturally, it is necessary to keep a check on whether treaties are actually carried out. At present, when this is done it is almost always carried out by the national states themselves, which carries the risk that it will not always happen objectively. After all, charity usually begins at home. We shall not dwell on the dangers of corruption but they are certainly present, as they are at the national level.

Monitoring

International waters form the largest part of the earth's surface. In every hundred square kilometres of sea there are few if any ships, which means that any external monitoring of dumping from the air is virtually impossible. Monitoring from the ship itself is a more obvious solution and, subject to a couple of conditions, it would be more effective. We shall return to those conditions shortly. Effective monitoring is no small matter. In general, the state where the ship was registered has legal authority over it and is therefore entitled and, indeed, obliged to check that the ship abides by the regulations. But there are a number of problems which all too often make this kind of monitoring illusory. Firstly, there is no guarantee that the state concerned will carry out the checks. There are innumerable examples of this. But even if checks are carried out, the problem is still not resolved. In the first place the checks may be made by an employee of the company that owns the ship. In which case, one has every reason to question his or her independence. But even if the checks are carried out by a government official there is still a danger of bribery and it is certainly not unthinkable that a ship of his own state would receive favourable treatment, the problem of the *free* rider. Further on, we shall sketch out how the task of monitoring should actually be performed.

The damage

It is difficult to describe briefly how much harm is done by these shortcomings in the law of the sea but we shall attempt to do so in the case of overfishing as an example. Worldwide, 350 million people make their living from the sea. If the overfishing ceases to be profitable, they will have no income and most fishermen live in poor countries. We may assume an average income of €10,000 per annum and the same figure again per fisherman for the investments which

are lost when their ships lose their value, as also the fish processing factories, means of transport and other capital goods used in the fishing industry. In total the capital losses would amount to a one-off total of 3.5 trillion Euros. A similar sum, but then *annually*, would also be lost in income. We are not talking of a situation where not a single fish is left in the sea, for that would be biological nonsense. These gigantic losses occur as soon as the fish harvest is no longer profitable, which will be long before the stocks of fish are exhausted - something which in fact will never happen. The moment when losses occur is therefore much closer than we might imagine at first sight. There is already talk of serious overfishing of certain species and in certain areas. Sometimes it is possible to switch to a different species, but the threat of overfishing would simply be transferred to that species.

The remaining damage to the environment, apart from the overfishing itself, is more difficult to quantify since it consists of the reduction in the number of species which is not recorded by the market. There is no price paid in money. Nevertheless, the loss of species is occurring, and on a large scale.

We must hope that we can prevent a time arising when fish are no longer affordable or available to our children and grandchildren and when the last elements

of biodiversity at sea will only be found in a few reserves which they must pay to visit. If we allow that to happen, we shall be endangering our own descendants.

What must happen

The treatment and solution of these problems, which are now manifesting themselves on a global scale, require a worldwide system of law. Unfortunately this does not yet exist and the well-being of the world's inhabitants is paying for it. There are, of course, innumerable treaties between states and a useful institutional start has been made in the form of the United Nations. But except for a few security issues, the decisions which it takes are binding on nobody. And it is there of all places that a number of larger states have been given a right of veto, which is crippling. We need to make this point because the most important underlying reason for the lack of a worldwide system of law is the refusal of a number of largely powerful countries to give up any part of their sovereignty. We should be aware that this not only harms the well-being of their own citizens but also that of the rest of the world's inhabitants. Nobody wants it, but it happens nonetheless. The solution lies in what J. Tinbergen called 'thinking far and wide'. Unfortunately, there are too few leading politicians capable of it. It would be much better if the world's inhabitants were to exert pressure to bring about a world order. 'Charity begins at home' may be a familiar proverb but it is all too often short-sighted. Everybody can profit from cooperation.

The law of the sea, like all international legislation, should satisfy the following conditions:

1. all countries should be obliged to participate;
2. it should be based on democratic principles;
3. its management should have sufficient powers to resolve issues adequately;
4. there must be proper monitoring of its observance, which is only possible if there are powers of enforcement and, if necessary, powers of coercion;
5. its management must dispose of sufficient financial means to carry out its task.

The present management of international affairs, including the law of the sea, does not satisfy any of these conditions.They would be considered completely normal at a national, regional or local level, so why not at the international level? The problems are serious enough to deserve it. ■

Translated by Chris Emery

Left: Somali pirates captured by Dutch commandos