

Book Reviews

The Three-Mile Limit of Territorial Seas

Sayre A. Swarztrauber, Captain, U.S. Navy, Naval Institute Press, Annapolis, Maryland. 1972 xii, 316 pp., \$12.50.

Reviewed by Myres S. McDougal, Sterling Professor of Law, Yale Law School.

In this distinguished little book, dedicated "with hope" to "the sailors and statesmen of all flags engaged in the search for a workable and equitable international law of the sea," a senior United States naval officer offers a definitive history of, and obituary for, the once generally accepted "three-mile limit" of the territorial sea.

The author states his purpose as being "to produce a history of the three-mile limit as a rule of international law" (p. 2), and in prefatory reflection finds nothing to alter "the thesis that the three-mile limit has passed into history" (p. xi). The promise of the book, quite ambitiously, is to "ascertain and document the conditions under which the rule came into existence, the course of, and reasons for, its rise to paramountcy, and the circumstances that led to its demise" (p. 2).

In organization, the book "follows a simple chronological narrative" and "within each major topical or chronological subdivision," in documentation of its thesis and supporting arguments, it collates and considers "the actual practice of states—court decisions, laws, treaties and the like," and "the work of publicists and learned societies" (p. 8).

The general problem which underlies the technical legal materials with which Captain Swarztrauber is concerned is that of how a boundary is to be drawn between the comprehensive, exclusive competence of coastal states and the inclusive, shared competence of the general community of states with respect to the use and enjoyment of the oceans of the world.

In appraisal we must, accordingly, inquire how comprehensively and accurately he describes past practice in relation to this problem, how realistically he accounts for the factors affecting decision, and how comprehensively and rationally he clarifies general community policies for the guidance of future decision.

The author's description of past practice is, within the limits he sets for his study, superlative. The survey he offers of the rise and demise of the three-mile limit is both minutely detailed and masterly.

In depicting the rise of the three-mile rule, the author first sketches in the background of the Roman notion of the sea, as *communis omnium naturali jure* and of the later claims by different communities to territorial sovereignty over vast reaches of waters, concluding with the famous controversy between Grotius and Selden over *mare liberum* and *mare clausum*.

The origins of the three-mile limit in more modest claim to coastal waters are then traced, most meticulously, through the cannon-shot rule designed to protect neutrality, the line-of-sight doctrine whose "primary function was to provide a protective or security-belt around the littoral state" (p. 42), and several conceptions of "marine leagues" whose purpose was to secure coastal monopolies in fishing.

The earliest explicit references to "three miles" are found in British "hovering acts" (for protection against smuggling), Scandinavian decrees against privateering, French Foreign Office equations of the range of cannon-shot with three miles, and a 1782 monograph by the Italian jurist, Galiani, popularizing the same equation as made by the French Foreign Office.

An important official imprimatur is seen in the 1793 assertion, and incorporation into its domestic laws, by the United States, of a three-mile limit for the purpose of protecting its neutrality. It was, however, Great Britain with her immense sea power and the Pax Britannica she imposed for a hundred years, the author finds, who by her claims and practices, concurred in and emulated by most of the other great powers, brought the three-mile limit to its "zenith" as an established rule of international law in the first quarter of the twentieth century.

The demise of the three-mile limit, precipitous as it has been, the author traces through several chronological stages. A "Pandora's Box" was opened at The Hague Conference of 1930, when many states gave different answers to the question of what the width of the territorial sea should be, and it became apparent that "the great powers were no longer committed to the enforcement of the three-mile limit" (pp. 133, 140). During the interwar period states began to make demands for zones of different widths for different particular purposes, such as for protection against smuggling or the monopolization of fish, and the "contiguous zone" became established doctrine.

During World War II, the American states claimed an enormous contiguous zone, extending out as much as 1,200 miles, for protecting their

neutrality; and shortly after the war, in 1945, President Truman made his influential proclamations about the continental shelf and coastal fisheries which, however much they may have been misunderstood or deliberately misinterpreted, "dealt a crippling blow to the three-mile limit" (162). The Soviet Union continued to press for its 12-mile limit, and some newly independent states made claims of varying widths. In the *Anglo-Norwegian Fisheries* case (1951 I.C.J. Rep. 116) the International Court of Justice, surprisingly, authorized an extraordinary expansion of internal waters, at the expense of the high seas, for coasts of irregular formation.

Most importantly, several Latin-American states, in alleged emulation of President Truman, vigorously asserted claims of ambiguous content extending to widths of as much as 200 miles. A host of controversies about fisheries and security in widely scattered areas of the globe, continued to exacerbate expectations and to undermine agreement about the "extent and nature of territorial waters" (p. 203). The failure of the 1958 and 1960 United Nations Conferences On the Law of the Sea demonstrated again that "the representatives of the states of the world had been unable to reach agreement," and, after a "cumulative debilitating effect," ultimately "did mortal damage to the three-mile limit" (pp. 217, 228).

The final demise of the three-mile limit came, the author finds, in the practices and irresolution of the United States which, having succeeded Great Britain as the world's foremost naval power and potential champion of a narrow territorial sea, chose itself to demand a large number of special purpose zones in excess of three miles and failed in its determination to oppose the Russian claim of 12 miles and the Latin-American claims of 200 miles for more comprehensive purposes.

The principal omission in all this excellent survey of past practice is that the author is, within his stated scope and purpose, more concerned with describing the exclusive claims and interests of states in extending their own particular territorial seas, than with outlining the inclusive interests of all states in the maintenance of the narrowest possible territorial seas, by whomsoever claimed.

It may be that these latter inclusive interests are not as often explicitly expressed as direct community claims against the expansionist, exclusive claims as they should be, but the inclusive interests are always present, though the claims be left unstated, and are of no less importance to the whole global community than are the exclusive interests and claims.

It is possible, further, that in his presentation of the factors that have affected the rise and demise of the three-mile limit Captain Swarztrauber, with pardonable professional bias, somewhat exaggerates the role played by the rise and decline of British and United States naval power (pp. 65,

126, 244). Law must in any community of course in the long run, in measure reflect the dispositions of effective power within that community. There are, however, forms of power other than naval power, and within any community, national or international, authority, in the sense of peoples' demands and expectations about how power should be exercised, is itself a most important form of power.

It could be that one of the significant variables in the general community's insistence upon a narrow territorial sea, with the contraction of coastal monopoly, for so many decades was in the perception by the peoples of the world of their tremendous inclusive benefits from the shared enjoyment of a great shareable resource. The decline of the three-mile limit could, complementarily, be attributed to a failure in peoples' understanding—brought on by lack of appropriate organization, ideological dissension, rapidity in technological change, and so on—of the conditions under which they can secure the potential multiplier benefits in the enjoyment of such a resource.

It is possible, again, that in his mode of presentation of the basic community policies at stake, Captain Swarztrauber may somewhat underemphasize the inclusive interests of all peoples in keeping territorial seas as narrow as possible. In his concluding chapter on "Prospects and Recommendations" he strongly urges that the "high seas," apparently including the seabed and subsoil, beyond a twelve-mile limit of territorial waters, which he regards as the narrowest negotiable, should be "treated as res communes, available for the use and common welfare of all states and peoples." (pp. 256, 257) He adds that for "international regulation of exploitation and conservation," the "narrower the territorial sea, the larger and more effective the conservation areas" (p. 257).

In earlier passages in his book, however, he appears to suggest that with the development of contiguous zones for fisheries and security the width of the territorial sea has become largely irrelevant (pp. 235, 252). Thus, he finds that for "many states, particularly less-developed states, and those which rely heavily on the living resources of the sea, virtually the sole significance of the legal régime of littoral waters—whether they are termed the territorial sea, the contiguous zone, or the maritime belt—is the extent to which they provide exclusive fishing rights" (235). Similarly, with respect to the United States he adds that, because of the many contiguous zones it claims of greater width than three miles, "the importance that the United States attaches to its "residual" three-mile limit now focuses solely around the right of innocent passage of warships" (p. 240).

The significance and importance of the width of the territorial sea for the United States and other states, is not of course confined to the exclusive

interests that a claiming state can secure for itself in a particular width, but rather extends to the inclusive interests which all states share in restricting claims to extravagant widths which interfere with both historic freedoms, as in transportation and communication, and emerging new uses, as in scientific inquiry, in the enjoyment of the oceans. From this perspective, it makes, further, a tremendous difference whether a coastal state is claiming the comprehensive competence of the "territorial sea" or the more selective competence of the "contiguous zone"; the former affords a monopolistic control over resources and activities, save for the right of "innocent passage," while the latter may be tailored to protect unique coastal interests with the least possible damage to the inclusive interests of others.

It is not quite realistic, finally, to equate exclusive claims to the mineral resources of the continental shelf with "200-mile fishing claims" (p. 255); the one claim relates to exhaustible stock resources, requiring very specific strategies in exploitation with attendant dangers to the coast, the other claim relates to flow resources, which may or may not be exhaustible and require very different strategies in exploitation, and certainly are not controllable or amenable to conservation within the indicated geographic limit.

In his more specific recommendations Captain Swarztrauber rightly stresses the importance of continued cooperation between the United States and the Soviet Union, in the clarification of common interest in the enjoyment of the oceans. The suggestion that the two states "spearhead a plan to renounce all exclusive claims to the sea, the seabed, the subsoil beyond the limit of territorial waters, contingent upon the conclusion of an international convention regulating the exploitation of the living and mineral resources of the sea" (p. 256) would appear, however, to go beyond what is practicable or necessary.

The device of limited exclusive competences—whether labelled "contiguous zones," "continental shelves," or some other equivalent—may, as indicated above, be made in particular instances to serve the common interest in achieving an appropriate balance between exclusive coastal interests and the more inclusive general community interests; properly understood, the device of limited competences sets no precedent for extravagant, comprehensive, exclusive claims.

In other specific recommendations Captain Swarztrauber emphasizes the importance of an accommodation between the developed and developing states. He notes that many of the developing states "seem reluctant to restrict voluntarily their sovereign rights and options to within a narrow twelve-mile maritime belt, without some sort of assurance that theirs will be a fair share of the great natural wealth in and under the deep, high seas beyond" (p. 81). He might have added that the developing states are not

likely to be able to increase their share in world economy and world society, by promoting the coastal monopolization of the great storehouse of potential values in the oceans.

It is the fact that the oceans are shareable—that by a few simple rules of the road, the resources, the initiatives and the skills of all can be brought to bear upon communication, transportation, fishing, scientific inquiry, and so on, in the multiplied production of values—that has enabled the oceans to contribute so greatly to world economy and world society.

It is not the historic freedoms of access to the oceans that have precluded some states from engaging in the productive enjoyment of that resource, but rather many variables in organization upon the land masses. The developing states can win, should anybody win, by policies of unilateral grab, only if the developed states do not engage in the same practices. If all states grab, and few can be expected to abstain if others do grab, the shareability of the resource and the multiplied production of values are destroyed.

Devoutly as it might be wished, it is perhaps too much to hope that Captain Swarztrauber is wrong and that the demise of the three-mile limit is, as Mark Twain remarked of his reputed death, exaggerated. Even if, however, this particular rule is dead, in a world increasingly interdependent and increasingly hungry for all values, the interests and policies that have so long underlain the rule, can be expected to survive and even intensify.

It is to be hoped that the peoples of the world will continue to make a deliberate and reasoned search for the common interest, in a productive and equitable balancing of both inclusive and exclusive claims to the oceans. For all who do engage in such search Captain Swarztrauber's book must, as he hoped in its dedication, offer eminent and invaluable contribution.

Peace In The Balance: The Future of U.S. Foreign Policy

Eugene V. Rostow, Simon and Schuster, 1972, 352 pages \$8.95.

Reviewed by L. J. Theberge

At a time when passions engendered by the Vietnam War have largely subsided, "Peace in the Balance: The Future of U.S. Foreign Policy" presents a careful exposition of the major antiwar positions, an analysis of

their likely impact on U.S. foreign policy, and a justification of the foreign policy decisions made during the Johnson Administration.

It is an excellent and refreshing book, excellent because it puts the war in its proper perspective as part of the larger foreign policy issue, and refreshing because the author does not suffer from "mea culpism," that rare disease many officials in both the Kennedy and Johnson Administrations contracted as soon as they left government.

Mr. Rostow returned to the academic world as Professor of Law and Public Affairs at Yale University, after serving as Undersecretary of State for Political Affairs during the Johnson Administration, without either a sense of guilt or a selective memory designed to minimize his involvement in the policies of the administration he served.

The heart of "Peace in the Balance: The Future of U.S. Foreign Policy" is the identification, exposition and analysis of seven schools of foreign policy that Mr. Rostow measures against his own Balance-of-Power thesis. Before reviewing these seven schools of thought it would be useful to understand the historical perspective in which the Balance-of-Power thesis developed.

Peace and security from foreign intervention are interrelated objectives of rulers and nations. It is Mr. Rostow's thesis that the Napoleonic Wars brought the realization to Europeans that uncoordinated responses on the part of individual nations was an unsatisfactory method for preserving peace. The Congress of Vienna established certain principles for maintaining a Balance-of-Power in Europe and preventing any one nation or group of nations from using force as an acceptable foreign policy device.

In essence a collective approach to peace evolved in the 19th century wherein the more powerful members of Europe attempted to maintain a balance-of-power through changing coalitions. It is in the context of the Balance-of-Power that Mr. Rostow justifies the use or threatened use of force by the U.S. in Vietnam, Korea, Cuba, Berlin and elsewhere, since it is in our national interest to oppose the international use of force where such force is likely to upset the Balance-of-Power.

It is within this historical framework and the developments since World War II, by which Russia assumed a dominant and imperialist role in world affairs, that Mr. Rostow contends our foreign policy in Korea, Cuba and Vietnam should be judged.

The first foreign policy school to be measured against Mr. Rostow's thesis is pacifism which has always found considerable support in American intellectual life, due in part to the important role the Quakers have played since the beginning of American history. Mr. Rostow seems to

accept the view that non-resistance is not an alternative or viable policy, but no policy at all, and he quickly dismisses pacifism.

The hard anti-communist or Dr. Strangelove school is the antithesis of pacifism. It is also quickly dismissed as not being a viable alternative policy, since it would lead directly to nuclear confrontation.

The third school is composed of the communists and fellow travelers of a myriad of persuasions but with one central concept which is that the United States does not have any legitimate national interest. Mr. Rostow examines the arguments of three proponents of this school, and carefully destroys their contentions that the United States is entirely to blame for the cold war, that economic imperialism dominates U.S. foreign policy and that only war in furtherance of world revolution is justified.

Isolationist sentiment has grown in the United States as a direct result of our disillusionment with the burdens of world leadership. The isolation school prefers the good old days when the English shouldered the burden of peace and the United States was able, in condemning the English, to assume a posture of moral superiority peculiar to disinterested parties.

If one accepts that there is something worth preserving in our political, economic and social institutions, it is difficult to imagine how long our civilization would survive without a countervailing power to communist expansion. Isolationism appears attractive on the surface because it offers the hope that one can cultivate his own garden without worrying about the neighborhood going to pot.

A fifth school of thought, which Mr. Rostow labels neo-Wilsonian, also adopts a moral tone. United States foreign policy should be directed toward supporting governments whose political, economic and social views are congenial to the political ideals of the particular neo-Wilsonian sub-school. Conversely, support of governments which do not meet their ideals, even if such support was in the national interest of the United States, would be immoral.

The real-politick school is composed of hard-nosed realists who are only interested in protecting our national interest. However, they tend to construe the United States national interest to lie in protecting only the industrial nations when it is clear that control by our adversaries would immediately endanger our national security and well-being. Our involvement in remote places such as Vietnam is symptomatic of an over-commitment which the hard-nosed realists abhor.

The last school is the world-government school dominated by eccentric Utopians, who believe that if the United Nations were a true world government, the problem of peace would be solved.

The one common thread uniting these diverse schools composed of a

multitude of subschools is their hatred of the Vietnam War. A brief survey of the literature reveals a vitriol and polemic that has made rational debate impossible. Yet, whether or not one agrees with the Balance-of-Power thesis, it is quite easy to dismiss the pacifists, fellow travelers, and world government schools because they are basically anti-American. They are not interested in an American national interest and they do not seek to promote the safety, security or well-being of the American nation in a world composed of hostile nations.

The Dr. Strangelove School, the neo-Wilsonians and the isolationists pose extremes which, while nationally oriented, are incapable of preserving peace. At least it is Mr. Rostow's analysis that peace can better be preserved by taking the complexities of international political life, and attempting to balance the competing forces rather than assuming a morally superior attitude. The real-politick school comes under particularly heavy attack from Mr. Rostow, because of his view of the implications of political and military retrenchment in such areas as the Middle East.

Mr. Rostow's book is a first-rate effort to untangle and categorize the normative theories on U.S. foreign policy. It takes a very strong stand without being polemic. It is a candid report by a man who has recently participated in important decisions affecting our foreign policy.

1973 Survey of Foreign Tax Havens

Marshall J. Langer, Manacon Services Ltd. 1972. 85 pages, \$5.00.

Reviewed by L. J. Theberge

If you are not concerned about advising clients on foreign tax havens, you may still find this 85 page pamphlet fascinating as a guide to little known places. Only students of foreign tax havens or sophisticated world travelers will be familiar with the names Turks, Caicos, Montserrat, Anguilla, Sark, Sealand, Campione, Svalbard, Bahrain, Nauru and Minerva.

In a more serious vein, this pamphlet is a very useful guide to approximately forty foreign tax havens located in various regions of the globe from the Caribbean to the Pacific Ocean via Europe, the Middle East and the Far East. Two important parts of this publication are a brief description of advantages and disadvantages of the listed tax havens and a bibliography.

The use of tax havens by individuals and corporations seeking legitimate means to minimize tax burdens continues to grow. As industrial societies seek to impose more egalitarian programs, this trend will continue. In choosing a foreign tax haven Mr. Langer points out criteria which he considers of major importance in the selection process: political and economic stability, a positive attitude towards tax haven business, absence of exchange controls, favorable company and trust laws, low costs for incorporating and maintaining a corporation, good transportation and communications, good banking facilities, guaranty of tax exemption and no tax treaties so as to avoid disclosure of information by the tax haven to the tax authorities in the investor's country.

Out of this list one criterion seems meaningless and it is the one upon which the author places a great deal of emphasis, *viz.* the guaranty of tax exemption. Governments of even the most respectable nations are not known for keeping guarantees. It would appear that political stability is the real concern and only if a tax haven has a history of stability will its guaranty have any significance. It would seem that a politically stable tax haven with no guaranty of tax exemption would be a more reliable place in which to locate, than a tax haven with a guaranty but a history of instability.

Tax havens are classified according to the kinds of benefits offered to clients. Some tax havens have no taxation and others very low rates. There are tax havens that distinguish between the source of income, exempting foreign source income from taxation while taxing income derived from investments made in the tax haven. Finally, there are tax havens which offer special limited privileges which are nontaxable or taxed at a lower rate. Examples which the author provides of this type of special privilege country are Luxembourg and the Netherlands, which are generally not thought of as tax havens. However, they do offer special incentives to foreigners.

The Caribbean appears to be the leading area in the world for tax havens perhaps because it has been a favorite watering spot for the rich from Europe and America. The Bahamas, Bermuda—which is not exactly in the Caribbean, and Cayman Islands and Turks and Caicos have no direct taxation, no income tax and no capital gains taxes.

The author points out the difficulties of obtaining sound information about the advantages or disadvantages of foreign tax havens, since the sources of information are usually interested parties such as local officials, lawyers and bankers. (Mr. Langer is Director of Grand Cayman Trust Corporation Ltd., which is located in one of the major Caribbean tax havens.) Some of the tax havens discussed by the author are nonexistent.

Sealand, for example, is a World War II fortress located many miles off the coast of Great Britain in the Thames Estuary.

It once was a private commercial radio station that broadcast popular music and advertisements to residents of Great Britain before it was put out of business in 1968. The owner's attempt to turn an uninhabited concrete slab the size of a baseball diamond into a tax haven country seems to be more of a publicity stunt than a serious venture. Similarly, the viability of Minerva, a series of reefs located in the South Pacific, which the King of Tonga is seeking to annex, makes it doubtful that Minerva will have any success as a tax haven country.

The forty page bibliography, which takes up half the pamphlet, is an excellent reference guide for those lawyers interested in foreign tax havens. If you are seeking more than a survey, this section will have the most utility. As the author is careful to point out, the needs of each client must be carefully analyzed and matched with the tax haven most suitable to the client's needs. Tax havens can only be judged on the basis of how well they fit a particular requirement.

The publisher intends to publish a more complete reference book on foreign tax havens which Mr. Langer will write in 1973. In this new book there will be a chapter on each of the major tax havens.

