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THE LAW OF THE SEA:

SOME RECENT DEVELOPMENTS

(With Particular Reference to the United Nations Conference of 1958)

Carl M. Franklin (Author)

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
CHAPTER III

THE 1958 GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

A. INTRODUCTION

The Convention on the Territorial Sea and the Contiguous Zone, signed by 44 of the 86 participating states attending the United Nations Conference on the Law of the Sea at Geneva, Switzerland, from February 24 to April 28, 1958, represents little more than a half-loaf of accomplishment. A full loaf would have included agreement on the most important aspect of the territorial sea, its breadth; a more realistic concept of contiguous zones; and a solution of the coastal fisheries problem, or at least a separation of that problem from the question of the territorial sea.

In 23 substantive articles the Convention summarizes the law of the territorial sea without ever specifying its exact breadth. Although Section II of the Convention is entitled "Limits of the Territorial Sea," those limits are expressed in terms so vague and indecisive as to be almost meaningless:

"The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea." 2

The Geneva Conference of 1958 actually lost some ground on this matter as compared with the agreement reached by the International Law Commission in its final articles (1956). 3 The Commission

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3 U.N. Doc. A/3159, 4 (1956). Article 3 of the I.L.C. final draft provided in part, (1) "The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea. (2) The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles. (3) The Commission, without taking any decision as to the
had concluded that "international law does not permit an extension of the territorial sea beyond twelve miles," and by implication at least had recognized the minimum breadth of three miles. But the Convention as adopted in 1958 contains no reference either to a suggested maximum or minimum, although the record of the Conference leaves little doubt that the claims of a few states to a territorial sea beyond 12 miles find no support by the vast majority of states.

Committee I of the Geneva Conference became hopelessly deadlocked in trying to delimit the territorial sea, even on some compromise proposals by the United Kingdom, Canada, the United States, and other states which would have increased the breadth of the territorial sea up to that limit, notes on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less. . . ."

4 Despite her long adherence to the three-mile limit, the United Kingdom introduced a proposal to extend the territorial sea to six miles. However, it was a tempered proposal which would not have recognized sovereignity of the coastal state over the outer three miles since it preserved "existing rights of passage for aircraft and vessels, including warships, outside three miles." U.N. Doc. A/CONF. 13/C. 1/L. 134 (1 April 1958).


6 U.N. Doc. A/CONF. 13/C. 1/L. 159/Rev. 2 (1958 and U.N. Doc. A/CONF. 13/39, (Annexes) 253 (1958). The essence of the revised U.S. proposal which came closer than any other to being adopted provided for a territorial sea of six miles plus a conditional exclusive right to fish in the outer six miles of a twelve mile zone. The condition gave other nations who had fished in the outer six miles for a period of five years immediately preceding the signature of this convention (the first proposal of the United States specified a ten-year period) the right to continue fishing in said area.

7 Canada, India and Mexico entered a joint proposal which provided for a maximum breadth of territorial sea up to six nautical miles, except that if prior to 24 February 1958 (i.e. the start of the Conference) a state had declared its territorial sea to be in excess of six miles the breadth was to be so fixed but not exceeding twelve miles. U.N. Doc. A/CONF. 13/C. 1/77/Rev. 2 (1958) and U.N. Doc. A/CONF. 13/39/SR. 232 (1958). Previously India and Mexico had joined in proposing a 12 mile territorial sea (A/CONF. 13/C. 1/L. 79). Colombia also proposed 12 miles (A/CONF. 13/C. 1/L. 82 & Corr. 1), as did Yugoslavia with the additional provision that the minimum could not be less than three miles (A/CONF. 13/C. 1/L. 135). In addition to Canada, the United States, and the joint proposal of Canada India and Mexico, the following also proposed six miles for the territorial sea: United Kingdom (A/CONF. 13/C. 1/L. 134), Italy (A/CONF. 13/C. 1/L. 137), Ceylon (A/CONF. 13/C. 1/L. 118) and Sweden (A/CONF. 13/C. 1/L. 4). Peru proposed that no limit be specified other than "reasonable limits" and that the breadth be fixed "preferably by regional agreements" (A/CONF. 13/C. 1/L. 133/Add. 1 & 2).
from three miles, universally recognized as the minimum and presently supported by the greatest number of large maritime states in the world, to six miles.

Although the United States proposal of a six-mile territorial sea failed by a mere seven votes to get the necessary two-thirds majority in the plenary session, which was the closest that any proposal on the breadth of the territorial sea came to passing, it became apparent at the end of the Conference that further discussions on this crucial matter would achieve nothing and that the most judicious procedure would be to adopt the half-loaf as provided in the Convention. On the final day the Conference passed a resolution requesting the General Assembly of the United Nations to consider the advisability of convening another conference at a later date for the purpose of attempting to reach agreement on a specific breadth for the territorial sea. This second conference on the law of the sea has been called for March, 1960. (See addendum to this chapter regarding the 1960 Conference which failed to reach agreement on a delimitation of the territorial sea.) Actually it is the third world-wide conference relating to the territorial sea if one counts the ill-fated Hague Conference of 1930 at which the 47 states participating were in such heated disagreement that the conference ended without adopting any articles on the territorial sea and without a single proposal as to a specified breadth even being put to a vote.

It is unfortunate, and somewhat ironical, that although the 1958 Conference did not specify a breadth for the territorial sea, which it should have done, it did specify a breadth (12 miles) for the contiguous zone, which it should not have done. It would have been wiser to have concluded that a coastal state has the right to exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations, within reasonable distances from the coast in contiguous zones beyond the territorial sea.  

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12 Jessup supports this view; Jessup, op. cit., footnote 2 (at 234, 244). The I.L.C., however, seems to have felt bound (without giving reasons) to the figure of 12 miles for the contiguous zone as adopted by the Preparatory Committee of The Hague Codification Conference of 1930. U.N. Doc. A/3159, 40 (1956). Poland introduced a desirable proposal which eliminated reference to a precise width of the contiguous zone and also included reference to security, but it failed. "In a zone of the high seas contiguous to its territorial sea, the coastal
When considering the limited rights of control which a coastal state may exercise in the high seas beyond a territorial sea in order to prevent violations of certain of its regulations, the test of reasonableness as to area of control is more appropriate than a fixed limit. On the other hand, when a coastal state is exercising sovereignty, as in the case of its territorial sea, under which it has exclusive and unlimited rights over the waters and airspace above, except for the right of an overseas state to "innocent passage" on the sea, but not in the airspace, then the limit of that sovereignty should be both fixed and narrow. It should be fixed so that all states may know the exact border separating the sovereign area of the territorial sea from the free area of the high seas to inclusive use by all states. It should be narrow in order that the coastal state will encroach as little as possible on the free and unfettered use by all states of the world's greatest common resource—the high seas.

It would have been more in conformity with state practice and far more realistic to have framed the article in terms of contiguous zones because a state's area of control over adjacent high seas may need to vary depending upon the purpose of the control and upon local and world conditions at any given time. States do in fact claim the right to exercise limited control over contiguous zones of high seas of varying widths adjacent to their coasts.

A more basic fault of the Conference was the inclusion of the article on the contiguous zone in the Convention on the Territorial Sea. Since the waters of the contiguous zone are high seas it would have been more appropriate to have put the contents of this article in the Convention on the High Seas rather than tacking it on to the 23 substantive articles on the territorial sea. Its inclusion in the Convention on the Territorial Sea creates the danger that the rights of coastal states in the contiguous zone will be considered more nearly related to the sovereignty which the state has over its territorial sea than to the minimum, limited rights of control which actually exist.

State may take the measures necessary to prevent and punish infringements of its customs, fiscal or sanitary regulations, and violations of its security.
over, for the states now claiming a territorial sea of 12 miles, the limits of said sea and the contiguous zone of 12 miles as provided in the convention are coextensive, making the contiguous zone meaningless and unnecessary.

An analysis of the Conference record suggests that if the concept of contiguous zones had not only been separated from the Convention on the Territorial Sea, but also had been enlarged to include preferential (or in special cases, exclusive) fishing rights in said zones, quite apart from the proposals to extend the territorial sea primarily for the purpose of achieving exclusive fishing rights, it might have been possible to have retained the three-mile limit for the territorial sea, or at least to have secured agreement on a six-mile limit as proposed by the United States, Canada and other participants.

In view of the failure of the Conference to agree upon a fixed breadth of the territorial sea, what is the present law? The simplest answer, although not an entirely satisfactory one, is that the law is what it was before the Geneva Conference: uncertain.

On the one hand, a greater number of states, including most of the major maritime powers, adhere to the three-mile limit than to any other single limit. The three-mile limit is recognized by nations responsible for about two-thirds of the world's maritime traffic. On the other hand, if the customary international law on this matter is to be determined by mere numbers of states which claim more than a three-mile territorial sea (i.e., 4, 6, 9, 10, 12, and even 200 miles) then it may be argued that the three-mile limit is not the law and one is left with the not-too-helpful conclusion of the International Law Commission that

"The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, (i.e., twelve miles) notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less."

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18 In the meetings of the First Committee the Canadian delegate said that the three-mile limit had been recognized by nations responsible for some 80% of the world's maritime traffic. 3 Official Records (A/CONF. 13/39, 90 (1958)). This same percentage was used by the British delegate to the Hague Conference in 1930 when he said that the limit of three miles was recognized "and adopted by maritime nations which possess nearly 80% of the effective tonnage of the world." Reeves, "The Codification of the Law of Territorial Waters," 24 A.J.I.L. 494 (1930). As of December 31, 1958, sixty-five per cent is a more accurate figure. "Merchant Fleets of the World," 2-3, U.S. Dept. of Commerce, Maritime Administration (1958).

After the United States compromise proposal to extend the territorial sea to six miles failed in plenary session to get the necessary two-thirds vote, Arthur Dean, Chairman of the Delegation, emphasized that the three-mile rule was still the established law which could only be changed by agreement. Similarly, the United Kingdom delegation made a statement confirming the continued existence of the three-mile limit as the only breadth recognized under international law. By contrast, Professor Tunkin, Chairman of the Soviet Delegation, was equally convinced that "the three-mile limit is not and never has been a generally recognized rule in the law of the sea." While it is true that in recent years the world has witnessed an increasing number of claims by coastal states to a wider territorial sea, the long history of state practice by the principal maritime states supports the conclusion that the three-mile limit still more nearly represents customary international law than any other figure. Certainly this minimum breadth of territorial sea represents the most rational preference viewed from the perspective of the world community for achieving the maximum utilization of the high seas.

What are the prospects for reaching agreement on a specific breadth of territorial sea at a future United Nations Conference? The answer to this important question depends upon a number of factors, some of which are unrelated to the basic question of the

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20 Dean “U.N. Conference on the Law of the Sea,” op cit., footnote 8 (at 574). Dean, “The Geneva Conference on the Law of the Sea: What Was Accomplished,” op. cit., footnote 8 (at 607, 616). Said Mr. Dean, “The fact that a two-thirds vote could not be obtained in favor of the three-mile limit shows merely a desire on the part of many nations to extend their territorial sea, not that such an extension in international law has been accomplished.” (Ibid., at 616.)


24 See generally, Jessup, The Law of Territorial Waters and Maritime Jurisdiction 76 (1927). The Sovereignty of the Sea (1911); Crocker, Extent of the Marginal Sea (1919); Riesenfeld, Protection of Coastal Fisheries Under International Law (1942); Higgins and Colombo, International Law of the Sea (2d Ed. 1951). For a recent statement which confirms the validity of the three-mile rule until the present century, but suggests that state claims to a wider territorial sea have caused the rule to "melt away," see Garcia-Amador, The Exploitation and Conservation of the Resources of the Sea 26-28 (1959).

values at stake in reconciling the competing claims to inclusive and exclusive uses of the total resources of the sea.

One of the most striking illustrations of the burdens which an extension of the territorial sea from three to six miles (or to twelve miles) would place upon the freedom of the seas is the fact that of more than 100 important international straits which are now high seas, more than fifty would be reduced to territorial seas if the six-mile rule replaced the three-mile rule, and all would become territorial waters under a twelve-mile rule. For example, it has been pointed out in the case of

The terms “inclusive and exclusive uses” are used here in the same sense as used by McDougal & Burke to whom an indebtedness is acknowledged. They have written:

"By an exclusive claim is meant a claim to authority over an area or over specified activities which other states cannot share with the claimant state (the category of authority state A gets, state B cannot get). By such a claim, the claimant state commonly asserts a competence to apply its authority to all persons in an area or engaged in certain specified activities, irrespective of the nationality of the person. Examples may be noted in the claims coastal states make for control over ‘internal waters’ and ‘territorial sea’.

"By an inclusive claim is meant a claim to authority over an area or over specified activities which the claimant state can, by some accommodation to avoid physical interference in use, share with another (the category of authority state A gets, state B can also get). By such a claim, the claimant state commonly asserts a competence to apply its authority only to its own nationals. Concedes a comparable authority with respect to the area or activities to other states with respect to their nationals and demands that other states reciprocally refrain from the exercise of authority over its nationals and their activities in the area. Examples may be noted in the claims states make to navigation and fishing on the high seas."

McDougal and Burke, Ibid. It should be emphasized, of course, that even so-called exclusive uses are subject to accommodation with other uses. For example, a coastal state’s sovereignty (i.e., the right of exclusive use) over its territorial sea is subject to the right of innocent passage (i.e., overseas states must be accommodated by permitting them to navigate through the territorial sea under certain conditions such as innocent passage). But the duty of accommodation in the case of the exclusive use is different from the less than in the case of inclusive uses. For example, the right of innocent passage may be limited by reasonable rules, and in some cases suspended if the coastal state, in a sense the dominant user, feels its security is jeopardized. By contrast, in the case of inclusive uses, the duty of accommodation is equally strong among all parties since no one user is dominant per se. Hence, an inclusive user must accommodate all other users on the high seas. Each has equal access to the high seas for navigation, fishing, scientific investigation, cable laying, etc. Despite these refinements, and others which come into play in connection with safety zones around continental shelf installations, fisheries conservation zones, and “limited-exclusive-use” areas of the high seas for special purposes such as weapons testing in restricted zones normally open for inclusive use by all states, the simple formulation of exclusive use and inclusive use by McDougal and Burke is adequate to describe the two major types of competing claimants to the resources of the seas.
the Straits of Gibraltar that if the territorial sea is extended to six miles, the entire strait will become a territorial sea with no area of high seas remaining. 27

While it can be argued that all states will still have the right of innocent passage through such international straits from one part of the high seas to another under the Corfu Channel Case, 28 and under provisions of the Convention on the Territorial Sea and the Contiguous Zone, 29 the fact remains that the right of innocent passage is often viewed as a limited right subject to the "laws and regulations enacted by the coastal state" 30 and subject in special circumstances to temporary suspension. 31 Moreover, one of the greatest burdens which the transformation of high seas into territorial seas in more than 100 international straits would impose upon all states of the world, coastal and non-coastal, is to preclude the right to fly over the areas. Airspace over the territorial sea does not afford the right of "innocent passage," meaning that states which now fly over the high seas of these international straits would be burdened by having to request permission of the coastal states to do so, or fly more circuitous, and therefore more costly, routes. 32

B. COASTAL FISHERIES AND THE TERRITORIAL SEA

Basically the coastal fisheries problem is an economic struggle between two sets of competing claimant states: those which may be described generally as "coastal fishing states" such as Canada, Iceland, and a number of Latin American states, and the "overseas fishing states" such as the United States, the United Kingdom, Japan, and the Netherlands.

The coastal fishing states want exclusive fishing off their coasts for a distance of 12 miles or more. By contrast, the overseas fishing states want a narrow exclusive fishing belt of only three miles, or at most six miles, in order that their fishing fleets may fish near the coasts of other states. Of course, some states such as the United States, the United Kingdom, Japan, and the Netherlands are both coastal fishing and overseas fishing states. Yet, despite this dual

29 U.N. Doc. A/CONF.13/L. 52, Art. 16(4) (1958). It should be noted that the Convention goes beyond the decision in the Corfu Channel Case in that the Convention provides for passage from one part of the high seas to another part of the high seas or the territorial sea of a foreign State. (Emphasis added.) The decision was limited to passage between two parts of the high seas.
30 Ibid., Art. 17.
31 Ibid., Art. 18.
32 See the cogent arguments of the United Kingdom delegate in the First Committee. 3 Official Records (A/CONF.13/39, 104 (1958)).
fishing interest, these states are primarily overseas fishing states. They are also important maritime powers and therefore have long championed a narrow territorial sea of three miles in the over-all interest of the maximum freedom of the high seas.

It should be emphasized that not all coastal fishing states necessarily want a twelve-mile (or wider) territorial sea; indeed some would prefer not to have it if there were another way to achieve an extended area of exclusive coastal fisheries. For example, Canada has favored a three-mile territorial sea for a number of years even though she is a coastal fishing state. In one of her early proposals in the First Committee of the 1958 Conference, Canada advocated a three-mile territorial sea, accompanied by a provision for exclusive fishing rights in the outer nine miles of a twelve-mile contiguous zone. In a subsequent revision Canada proposed a six-mile territorial sea plus exclusive fishing rights in the outer six miles of the contiguous zone.

The Canadian proposals, as well as those of the United States and other countries, indicate rather clearly the extent to which the coastal fisheries problem dominated the discussions on the territorial sea. In a report on the Geneva Conference to the Canadian House of Commons, Hamilton indicated the ambivalent attitude of the Canadian delegation,

"... our dilemma was, how could we reconcile the defense interests, freedom of the seas and the freedom of the air, which really requires a very narrow territorial sea, and the needs of our people on our coasts for some priority in harvesting fish off their shores?"

The willingness of some states at the Conference to sacrifice the larger, more important values of security, freedom of the seas and freedom of the air, in order to gain exclusive fishing rights in an expanded territorial sea, was not only highly questionable but unnecessary.

It was questionable in terms of values: from the perspective of the world community of states the value of exclusive rights to a few million tons of fish are not worth the burdens to security and maximum freedom of the seas and the air which would result from an extension of the territorial sea.

It was unnecessary because the quintessence of the solution, which seems to have been buried at the Conference under a multitude of irrelevant arguments, is that it is not essential to extend the territorial

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sea beyond the present three-mile limit in order to grant the coastal state preferential, or, in exceptional cases, exclusive fishing rights within limited areas beyond the territorial sea, whenever it is decided that this is desirable.

The coastal fisheries problem could have been solved quite apart from a blanket extension of the coastal state’s sovereignty over the territorial sea by expanding the concept of the contiguous zones to include not only the limited rights of protection of a coastal state against violations of its customs, fiscal, immigration or sanitary regulations, and security, but also to provide varying degrees of preferential fishing rights, and, in a few cases exclusive fishing rights where the special circumstances seem to justify them.

It is true, of course, that the First Committee of the Conference did attempt to solve the coastal fisheries problem, but it did so in a manner which kept fisheries tied to the breadth of the territorial sea with the result that the proposal was defeated in plenary session.

The First Committee adopted a special article (Art. 3) as part of the articles on the Territorial Sea which provided exclusive fishing rights to the coastal state in a 12-mile zone. The proposed article read,

“A State has a fishing zone contiguous to its territorial sea extending to a limit twelve nautical miles from the baseline from which the breadth of its territorial sea is measured in which it has the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea.”

Ostensibly this proposal has no bearing upon the breadth of the territorial sea which, presumably, could have been kept at the present three miles or could have been increased to six miles or to some other figure. However, the discussions leading up to the adoption of the proposal in the First Committee, and to its defeat in the plenary meetings, make it clear that it was bound inextricably with the question of the breadth of the territorial sea. In fact, it was voted upon in the fourteenth plenary meeting just prior to the vote on the United States compromise proposal for a six-mile territorial sea with exclusive fishing rights in the outer six miles except for historic rights, and similar proposals relating to the breadth of the territorial sea.

The 12-mile exclusive fishing zone article failed to get the necessary two-thirds vote in plenary meetings, with 35 votes in favor, 30 against,

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26 3 Official Records (A/CONF. 13/38, 39 (1958)).
and 20 abstentions. From an analysis of the vote one may conclude as follows: First, the states in favor of the 12-mile exclusive fishing zone were, for the most part, coastal fishing states, such as Canada, Iceland, the Philippines, Korea, and a number of Latin American states, including all of those which have claimed 200-mile exclusive fishing rights off their coasts.

Second, the states opposing the 12-mile exclusive fishing zone were predominantly the overseas fishing states, such as the United States, the United Kingdom, Japan, and the Netherlands. As supporters of the three-mile limit for the territorial sea, these states were no doubt apprehensive that this was a strong entering wedge for the outright extension of the territorial sea to 12 miles, as well as being an unwarranted deprivation of their long-standing fishing rights.

Third, the states abstaining were predominantly the Soviet bloc. Since Russia and her maritime satellites now claim a 12-mile territorial sea, which, of course, includes the right of exclusive fishing, they apparently saw no reason to vote on the proposal. One could speculate as to other possible reasons why the Soviet bloc abstained. A vote against the proposal would have put them uncomfortably on the side of the United States, the United Kingdom, and other states in the Free World bloc. On the other hand, a vote in favor of the 12-mile exclusive fishing zone proposal could have been used against them in their claims that customary international law supports a 12-mile territorial sea because the wording of the fishing zone article clearly implies that the breadth of the territorial sea is something less than 12 miles.38

37 Ibid. The vote in plenary meetings on the 12-mile exclusive fishing zone article was as follows:

For: Afghanistan, Argentina, Burma, Cambodia, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Ghana, Guatemala, Iceland, India, Indonesia, Iran, Iraq, Ireland, Jordan, Republic of Korea, Libya, Mexico, Morocco, Nepal, Panama, Paraguay, Peru, Philippines, Saudi Arabia, Tunisia, Turkey, United Arab Republic, Uruguay, Venezuela, Yugoslavia.

Against: Australia, Belgium, Bolivia, Brazil, China, Cuba, Dominican Republic, France, Federal Republic of Germany, Greece, Haiti, Honduras, Israel, Italy, Japan, Luxembourg, Monaco, Netherlands, New Zealand, Nicaragua, Pakistan, Poland, Portugal, San Marino, Spain, Sweden, Thailand, Union of South Africa, United Kingdom, United States.


38 The fishing zone article adopted by the First Committee provides: “A State has a fishing zone contiguous to its territorial sea extending to a limit twelve nautical miles from the baseline from which the breadth of its territorial sea is measured in which it has the same rights in respect of fishing and the ex-
C. THE UNITED STATES COMPROMISE PROPOSAL

Immediately after the defeat of the 12-mile exclusive fishing zone proposal, the United States compromise proposal for a six-mile territorial sea with an additional six-mile zone for exclusive fishing except for “historic rights” based upon prior fishing in the area for five years was put to a vote.

Since it came closest (within 7 votes) to adoption of any of the compromise proposals, it is desirable to examine it and to analyze the vote thereon.

The United States compromise proposal provided:

1. The maximum breadth of the territorial sea of any state shall be six miles.

2. The coastal state shall in a zone having a maximum breadth of twelve miles, measured from the applicable baseline, determined as provided in these rules, have the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea; provided that such rights shall be subject to the right of the vessels of any state whose vessels have fished regularly in that portion of the zone having a continuous baseline and located in the same major body of water for the period of five years immediately preceding the signature of this Convention, to fish in the outer six miles of that portion of the zone, under obligation to observe therein such conservation regulations as are consistent with rules on fisheries adopted by this Conference and other rules of international law.

3. Any dispute with respect to the interpretation or application of this article shall, at the request of any party to the dispute, be submitted to arbitration unless the parties agree to another method of peaceful solution.

4. For the purposes of this Convention the term ‘mile’ means a nautical mile (which is 1,852 meters), reckoned at sixty to one degree of latitude.

5. As respects the parties thereto, the provisions of paragraph 2 of this article shall be subject to such bilateral or multilateral arrangements, if any, as may exist or be entered into.

exploitation of the living resources of the sea as it has in its territorial sea” (A/CONF. 13/C. 1/L. 168/Add. 1, Annex (Emphasis added)). If the territorial sea, which includes the right of exclusive fishing, were not to be considered less than twelve miles, then there would be no need to provide for an exclusive fishing zone of 12 miles. Hence, the article clearly implies that the territorial sea is considered to be somewhat less than the 12-mile fishing zone.
Note: It is proposed that this article be entered into with the express understanding that each party to the Convention undertakes to consider sympathetically the request of another party to consult on the question of whether the rights granted by this article are being exercised in such manner as to work an inequity upon one or more of the other parties and, if so, what measures should and can be taken to remedy the situation. 39

The proposal received the following votes:

For (45):

Australia, Austria, Belgium, Bolivia, Brazil, Cambodia, Ceylon, China, Cuba, Denmark, Dominican Republic, France, Germany, Ghana, Greece, Haiti, Holy See, Honduras, India, Iran, Ireland, Israel, Italy, Laos, Liberia, Luxembourg, Malaya, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Paraguay, Portugal, San Marino, Spain, Sweden, Switzerland, Thailand, Turkey, Union of South Africa, United Kingdom, United States, Viet-Nam.

Against (33):

Albania, Argentina, Bulgaria, Burma, Byelorussia, Canada, Chile, Colombia, Czechoslovakia, Ecuador, El Salvador, Guatemala, Hungary, Iceland, Indonesia, Jordan, Korea, Lebanon, Libya, Mexico, Morocco, Panama, Peru, Poland, Rumania, Saudi Arabia, Tunisia, Ukraine, U.S.S.R., U.A.R., Uruguay, Venezuela, Yugoslavia.

Abstain (7):

Afghanistan, Costa Rica, Finland, Iraq, Japan, Nepal, Philippines.

States voting against the United States compromise proposal may be divided into five general categories. The figure or information in parentheses indicates the claim to territorial sea and in some cases the special limits claimed for fishing. 40

SOVIET BLOC. (10 votes):

Albania (10)
Bulgaria (12)
Byelorussia (none specified but a Soviet Union republic)
Czechoslovakia (not specified but dominated by U.S.S.R. even though technically an independent state)
Hungary (12)

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40 This information is based upon the U.N. Synoptical Table (APPENDIX K) and the summary prepared by Professor Sorensen in Sorensen, op. cit., footnote 17 (at 244).
Poland (3 in 1940, but dominated by U.S.S.R. even though technically an independent state)
Romania (12)
Ukraine (none specified but a Soviet Union republic)
U.S.S.R. (12)
Yugoslavia (6, plus 10 miles for fishing)
This so-called Soviet bloc includes a variety of bedfellows. On the one hand, Byelorussia and Ukraine are Soviet Union republics and hence actual parts of the U.S.S.R. The Soviet Constitution requires that their foreign policy be coordinated by Moscow. The others are technically independent states, but their foreign policy and internal affairs are dominated in varying degrees by the U.S.S.R.

LATIN AMERICAN STATES (11 votes):
Argentina (sea above continental shelf, limit unspecified)
Chile (200)
Colombia (6 in 1980)
Ecuador (36) (claim is only 12 miles but reckoned at 20-to-1, which is three times usual nautical mile)
El Salvador (200)
Guatemala (12)
Mexico (9)
Panama (sea above continental shelf, limit unspecified)
Peru (200)
Uruguay (6)
Venezuela (12)

ARAB STATES (7 votes):
Jordan (3 in 1956)
Lebanon (6, fishing only)
Libya (12)
Morocco (6, fishing only)
Saudi Arabia (12)
Tunisia (3, but special limit for fishing to depth of 50 meters)
United Arab Republic (12)

ASIATIC STATES (3 votes):
Burma (none specified)
Indonesia (12)
Korea (50–60 for fishing)

OTHERS (2 votes):
Canada (3, with special limit of 12 claimed for fishing)
Iceland (4 in 1935 for fishing only, now claims 12)

If one attempts to analyze the votes of these five groups of states against the United States compromise proposal in order to appraise
the prospects of achieving a favorable two-thirds vote on the same or a similar proposal at a future Conference the results are far from encouraging.

With respect to the Russian bloc of 10 votes, since all of these states except Yugoslavia are either committed to a 12-mile territorial sea or so dominated by the U.S.S.R. that they dare not vote for anything else, it is not likely that any of these votes will change.

It is true that Yugoslavia under Marshal Tito has shown considerable independence from Soviet domination. However, while she claims a territorial sea of only six miles as compared with the 12-mile claim of most of the Soviet bloc, she has claimed an exclusive fishing zone of 10 miles since 1950 primarily to exclude Italians from fishing near the Yugoslav shores in the upper Adriatic Sea where the fishery resources close to the Yugoslav coast are much richer than those on the Italian side. Of course, if the question of the breadth of the territorial sea could be divorced from the question of coastal fisheries, it is barely possible that Yugoslavia might vote for a six-mile territorial sea, which she herself now proclaims.

Of the eleven Latin American States voting against the United States compromise proposal for a six-mile territorial sea, only two—Colombia and Uruguay—claim as little as six miles. All of the others claim twelve to two hundred miles except Mexico, which claims nine miles. Colombia's claim to a six-mile territorial sea goes back to 1930, but she has also claimed a 12-mile fishing zone for much longer (since 1923).

Eleven Latin American States voted for the 12-mile fishing zone in the plenary meetings, even though the proposal failed to get the requisite two-thirds majority, indicating their strong desire for a minimum exclusive fishing zone of at least that distance. In addition three of these Latin American States—Colombia, Mexico and Venezuela—joined with five other states in what came to be known as the eight-power proposal which would have permitted a coastal state to fix the territorial sea up to twelve miles and which would have granted exclusive fishing rights of twelve miles even though the territorial sea might be proclaimed at less than that distance. This proposal lost in plenary meetings by a vote of 39 in favor, 38 against, with 8 abstentions.

42 Ibid.
43 Ibid.
44 Official Records (A/CONF. 13/38, 39 (1958)).
45 Ibid., at 128
46 Ibid., at 40.
It should be emphasized that, although these eleven Latin American States voted against the United States compromise proposal, as did the Soviet bloc, they were not in any sense subservient to or dominated by the Soviet bloc. On the contrary, when the Soviet proposal, which would have granted each state the right to establish a territorial sea “within the limits, as a rule, of three to twelve miles” with no reference to exclusive fisheries rights, was voted on in the plenary meeting shortly after the defeat of the United States compromise proposal, all but three of these eleven Latin American states voted in the negative. Chile, Ecuador and Peru, principal claimants of a 200-mile territorial sea, voted in favor of the Soviet proposal which was resoundingly defeated by 21 in favor, 47 against with 17 abstentions. However, the vote of these three Latin American states was not so much a vote in favor of the Soviet proposal as it was an affirmation of the position which they have maintained for several years and which they enunciated again in a three-party declaration near the end of the conference for “the establishment and extension of a more just regime of the sea that will safeguard effectively the recognized special right of the coastal States to defend their economy and the livelihood of their populations.”

With one or two possible exceptions, it is doubtful that any of these eleven Latin American States will change their 1958 votes and in the future either abstain from voting or vote in favor of a territorial sea of six miles or less. Again, however, it should be emphasized that if the coastal fisheries question could be settled separately from the territorial sea question, it might be possible that several of these states would vote for a narrow territorial sea of six miles or less. For example, the Argentine delegate indicated that his country had voted in First Committee for a six-mile territorial sea in the hope that a uniform international rule would result, but that Argentina felt compelled to vote against the United States proposal because of its provisions reserving historic fishing rights in the outer six miles.

In the case of the seven Arab States which voted against the United States proposal, the previous tabulation indicates that three now claim a territorial sea of 12 miles, two claim six miles (for fishing only), and two claim three miles. While there were undoubtedly a number of reasons why these seven states voted as they did, it seems safe to say that one of the principal reasons was to prevent Israel from having an outlet to the “high seas” of the Gulf of Aqaba. Since the Gulf is only about fifteen miles at its widest point, a claim by the littoral Arab states

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47 Ibid., at 126.
48 Ibid., at 40.
49 Ibid., at 132.
50 Ibid., at 42.
to territorial seas of 12 miles (or even to nine miles) would mean that Israel, located at the narrow head of the Bay, would have to traverse the territorial seas of Arab states for more than 100 miles from her own port of Elath to reach the high seas of the Red Sea.\(^{51}\)

While it is true that Israel would have the right of innocent passage from her port through the territorial seas of the Arab States under Article 14 of the Convention on the Territorial Sea and the Contiguous Zone,\(^{52}\) it would be possible for the Arab States to hinder or even deny such passage to Israeli ships on the ground that such passage was not innocent but “prejudicial to the peace, good order or security of the coastal State.”\(^{53}\)

Because of the particular interests of these Arab states in relation to Israel, coupled with the desire of most of them to extend their territorial seas in order to achieve additional exclusive fishing rights at least up to twelve miles,\(^{54}\) it is difficult to imagine that more than one or possibly two will soon change their votes from negative to affirmative on a proposal calling for a territorial sea of six miles or less.

One slender reed of encouragement in the case of Lebanon, which claims a six-mile territorial sea for fishing only, is the fact that after voting against the United States compromise proposal, she also voted against the Soviet proposal\(^ {55}\) which in effect approved the unilateral establishment of a 12-mile territorial sea. Moreover, Lebanon abstained when it came to voting on the 12-mile exclusive fishing zone article. These facts suggest the possibility that Lebanon might be

\(^{51}\) Of course, Saudi Arabia has taken the position that the Gulf of Aqaba is a national inland waterway, subject to absolute Arab sovereignty. General Assembly, 12th Sess. Official Records, 697 Plenary Meeting (A/P.V. 697, 233) (Oct. 2, 1957). If this position were to prevail, which seems unlikely in view of the substantial views to the contrary, it would be possible for the Arab States to prevent Israel’s access to the high seas of the Red Sea without extending their territorial seas. See Selak, “A Consideration of the Legal Status of the Gulf of Aqaba,” 52 A.J.I.L. 660 (1958).

\(^{52}\) U.N. Doc. A/CONF. 13/L. 52, Art. 14(2) (1958). This article provides: “Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.”

\(^{53}\) Ibid., Art 14(4).

\(^{54}\) Six of the seven Arab States voted in favor of the 12-mile exclusive fishing zone, and the seventh (Lebanon) abstained. 2 Official Records (A/CONF. 13/38, 39 (1958)).

\(^{55}\) 2 Official Records (A/CONF. 13/38, 40 (1958)). The exact language of the Soviet proposal relative to Article 3 was: “Each State shall determine the breadth of its territorial waters in accordance with established practice within the limits, as a rule, of three to twelve miles, having regard to historical and geographical conditions, economic interests, the interests of the security of the coastal State and the interests of international navigation.” U.N. Doc. A/CONF. 13/L. 30 (1958).
persuaded to vote for a 6-mile territorial sea which, of course, would include exclusive fishing in said area, consistent with her present unilateral claim of that distance, if proposals relative to exclusive fishing rights beyond a six-mile territorial sea were treated separately.

The three Asiatic States voting against the United States compromise proposal—Burma, Indonesia, and Korea—all appear to favor a territorial sea of 12 miles or more, primarily because of strong interests in securing exclusive fishing rights up to this distance or beyond. All three voted in favor of the 12-mile exclusive fishing zone article which was adopted by the First Committee. Moreover, two of the three (Burma and Indonesia) voted in favor of the Soviet proposal which, as previously indicated, would have approved unilateral claims to a territorial sea up to twelve miles, thus establishing this figure as the breadth.

Korea voted against the Soviet proposal, as might have been predicted in view of her claim in 1952 to broad exclusive fisheries zones off her coasts and sovereignty over the continental shelf and adjacent waters to a distance of fifty to sixty miles from shore, despite assertions that the claim did not effect an extension of the territorial sea. Since Japan, with one of the largest fishing fleets in the world, has long maintained that the three-mile territorial sea is a firmly established principle of international law, the claims of Korea to exclusive fishing for the distances claimed have put the two states in direct conflict.

Here again, if Burma, Indonesia and Korea are to be persuaded to vote for a territorial sea of six miles or less, the coastal fisheries problem will have to be resolved.

With respect to Iceland, again we find a close linkage of the territorial sea breadth and the coastal fisheries problem. Although for approximately two centuries (from 1662 to 1859) Iceland claimed exclusive fishery limits of 16 miles, in 1901 the Danish and British Governments entered into an agreement specifying three miles for fisheries and 10 miles for bays. At the Hague Conference in 1930 the delegate from Iceland in an informal expression of views as to the proper breadth of the territorial sea supported four miles. In 1952 Iceland formally extended her territorial sea for exclusive fishing to four miles, although she has argued in favor of the right to

57 MacChesney, op. cit., footnote 23 at 466.
58 Ibid., at 466. Also see comments of Iceland to the International Law Commission, U.N. Doc. A/CN. 4/99/Add. 2, S.
60 MacChesney, op. cit., footnote 23 (at 466).
much greater exclusive fishing in the superjacent waters of her continental shelf. The 1952 claim to four miles brought a prompt protest from the United Kingdom, including the closing of British ports to the landing of fish from Icelandic trawlers.

Shortly after the Geneva Conference of 1958 failed to reach agreement on the breadth of the territorial sea, Iceland extended her claim of exclusive fishing rights to twelve miles, without extending her territorial sea as such. This claim met with widespread protest, including that of the United Kingdom which began protecting her trawlers with naval ships between the four and twelve-mile limits.

The coastal fisheries problem of Iceland is unique in that fishing is such an important part of her economy, more so than in any other state. Fish constitutes 14% of her total domestic production and 96% of her total exports. These facts, together with the evidence of overfishing off Iceland’s coasts, suggest not only the need for conservation measures as provided in the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, but also the possible need to grant Iceland preferential, or perhaps even exclusive, fishing rights in a limited area of high seas adjacent to her coasts.

At the 1958 Conference Iceland introduced the following proposal to take care of her special circumstances:

“In exceptional circumstances, where a people is primarily dependent on its coastal fisheries for its livelihood and/or economic development, the State concerned has the right to exercise exclusive jurisdiction over the fisheries up to the necessary distance from the coast in view of relevant local considerations.”

In the comment which followed this proposal it was suggested by Iceland that a zone of twelve miles would go a long way toward taking care of her requirements but that it might be necessary to have an

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61 II Verbatim Record (A/CONF. 13/19, 301–303 (1957)). In 1948 Iceland passed a law providing for the scientific conservation of her continental shelf fisheries. 1 U.N. Leg. Series 12 (1951).
62 Sorensen, op. cit., footnote 17 (at 251).
63 For the exchange of notes between the Icelandic and British Governments regarding the 12-mile claim of Iceland, see Lauterpacht, “The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment,” 3 International and Comparative Law Quarterly 175–181 (1959).
65 For a recent comment see New York Times, Nov. 8, 1959, p. 12, col. 1.
67 3 Official Records (A/CONF. 13/39, 246 (1958)).
additional zone beyond twelve miles in which Iceland would have priority rights.\textsuperscript{68}

Although the Iceland proposal has considerable merit because of the importance of fishing to her total economy, it failed to win approval at the Conference. However, the Convention on Fishing and Conservation of the Living Resources of the High Seas did recognize that the coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea,\textsuperscript{69} and may adopt unilateral measures of conservation under certain circumstances.\textsuperscript{70} The Convention also provides for compulsory settlement of disputes which arise over fishing and conservation.\textsuperscript{71}

Although Iceland voted against the United States compromise proposal of a six-mile territorial sea,\textsuperscript{72} she did so primarily because of her objection to the provision for “historic fishing rights” in the outer six miles of a twelve-mile zone. Iceland wants a 12-mile zone of exclusive fisheries, nothing less. She voted in favor of the 12-mile exclusive fishing provision (Art. 3) of the First Committee,\textsuperscript{73} and also for the Soviet compromise proposal granting approval of a territorial sea up to 12 miles.\textsuperscript{74}

Yet, Iceland has indicated that she would not press for an extension of the territorial sea beyond three miles, provided she could secure exclusive fishing rights in a twelve-mile zone.\textsuperscript{75} Hence, it may be possible to win Iceland’s vote for a narrow territorial sea of six miles or less if the coastal fisheries problem can be resolved separately.

The same is true of Canada whose interest in as narrow a territorial sea as possible, preferably three miles, has been referred to above. But Canada, like Iceland, wants a 12-mile exclusive fishing zone,\textsuperscript{76} even though the relative importance of fisheries to Canada’s total economy is far less than in the case of Iceland. Canada’s sea fishery landings

\textsuperscript{68} Ibid.
\textsuperscript{69} U.N. Doc. A/CONF. 13/L. 54 and Add 1, Art. 6 (1958).
\textsuperscript{70} Ibid., at Art. 7.
\textsuperscript{71} Ibid., at Art. 9.
\textsuperscript{72} 2 Official Records (A/CONF. 13/38, 39 (1958)).
\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid., at 40.
\textsuperscript{75} 3 Official Records (A/CONF. 13/39, 185 (1958)).
\textsuperscript{76} Hamilton, “Report on Law of the Sea Conference” (Statement in the Canadian House of Commons, July 25, 1958), External Affairs, No. 8, 195 (August 1958). Hamilton said in part, “... [I]n the final analysis the central issue before the Conference was not whether there should be a fishing zone but whether it should be subject to existing traditional rights as proposed by the United States or whether it should be exclusive and without impediment as proposed by Canada.”
are less than one per cent of her aggregate domestic product, and only three per cent of her total exports.  

Here again it seems safe to assert that if the coastal fisheries question could be resolved separately from the question of the territorial sea breadth, Canada would favor a three-mile limit or be willing to compromise on a six-mile limit.

Having analyzed briefly the vote of the 33 states which opposed the United States proposal to see whether and under what circumstances some of these states might be persuaded to vote at the 1960 Conference for a narrow territorial sea of six miles or less, we turn now to a summary consideration of the seven states which abstained from voting—Afghanistan, Costa Rica, Finland, Iraq, Japan, Nepal, and the Philippines.

It will be observed that two of these states are land-locked—Afghanistan and Nepal. Notwithstanding this fact, they have as great an interest in the maximum freedom of the seas as do coastal states, an interest which was recognized in a number of ways at the Conference. For example, a separate committee was established to study the question of free access to the sea of land-locked countries, and in the Convention on the High Seas the list of freedoms is explicitly made applicable both for coastal and non-coastal States.

Although the immediate and paramount interest of land-locked states tends to center on the matter of overland access through neighboring states to the sea, the representative of Afghanistan appropriately formulated the broad perspective when he said,

“Our life today is interdependent, and all nations whether maritime or land-locked have built their economic life in such a way that through the sea they obtain their urgent needs and requirements. No land-locked country can live alone and be self-sufficient without relying on sea transportation.”

Because of the interest of Afghanistan and Nepal as land-locked states in the maximum freedom of the seas, if other considerations such as the fear of offending dominant neighboring states which were opposed to the United States proposal could be neutralized, it seems likely that such states could be persuaded to vote for a narrow territorial sea, despite the fact that some of these states have indicated a “cautious attitude” toward the question.

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77 U.N. Prep. Doc. No. 13 (A/CONF. 13/16, 2, 6 (1958)).
78 7 Official Records (A/CONF. 13/43 (1958)).
80 I Verbatim Record (A/CONF. 13/19, 513 (1957)).
81 See statement of the delegate from Nepal in the First Committee 3 Official Records (A/CONF. 13/39, 186 (1958)).
Of the five other abstaining states, Japan has long been an advocate of a three-mile territorial sea because of her overriding interest in the maximum freedom of the high seas both for navigation and fishing. Although Japan abstained from voting on the United States proposal, she did show her willingness to compromise her long-standing adherence to the three-mile limit by voting in the First Committee for the first half of the Canadian proposal to establish a six-mile limit. 82 But, she voted against the second half of the Canadian proposal which would have provided exclusive fishing rights in the outer six miles of a 12-mile zone. Despite her desire to support the United States in her efforts to achieve agreement on the narrowest possible territorial sea, Japan abstained on the United States proposal because she could not vote for that part which provided exclusive fishing to the coastal state in the outer six miles of a 12-mile zone except for “historic rights” based upon five years of prior fishing. This provision meant that Japan, and other overseas fishing states, would be forever precluded from fishing in these exclusive, outer-six-mile zones if they had not fished there recently (i.e., within the past five years), a crippling prohibition to Japan’s large and vital fishing interests.

Finland has a territorial sea of four miles, a limit which she has favored for many years. 83 It is not easy to account for her abstention on the United States proposal although one may note her consistency in abstaining on most of the proposals regarding breadth of the territorial sea. She did so in the First Committee on both parts of the Canadian proposal, 84 and in the plenary meetings on the 12-mile exclusive fishing zone, 85 the eight-power proposal 86 and the Soviet proposal. 87 The Scylla and Charybdis for Finland may well be her friendship for the United States on the one hand and her physical proximity to the Soviet Union on the other. Under these circumstances, the safest prediction as to her vote on this issue is another abstention, with an outside chance for a vote in favor of a narrow territorial sea of six miles or less.

Costa Rica, also abstaining on the United States proposal, has followed the lead of Chile, Ecuador and Peru in claiming a maritime zone

82 3 Official Records (A/CONF. 13/39, 176 (1958)).
83 Finland indicated a preference for a four-mile limit at the Hague Conference of 1930 but expressed a willingness to vote for three with the recognition of a contiguous zone. Reeves, op. cit., footnote 11 (at 486, 499).
84 3 Official Records (A/CONF. 13/39, 176, 177 (1958)).
85 2 Official Records (A/CONF. 13/38, 39 (1958)).
86 Ibid., at 40.
87 Ibid.
of 200 miles, but has emphasized that this claim in no way implies an assertion of a territorial sea of that distance. Moreover, during the Conference she did not vote consistently with those three countries. For example, although she voted with them in favor of the 12-mile exclusive fishing zone, she was opposed to them in voting against the Soviet proposal authorizing coastal states to establish a territorial sea at any distance between three and twelve miles.

Costa Rica has described a territorial sea of three miles as an "anachronism consistent neither with the advances of modern technique nor with methods of exploiting marine resources which have been employed in the modern world." That the control of coastal fisheries resources is one of the major concerns of Costa Rica, rather than the breadth of the territorial sea as such, is indicated by the following assertion:

"What the Government of Costa Rica wants is to secure the recognition of its competence and jurisdiction to regulate and control the manner in which the living resources of the sea are exploited in the maritime zones adjacent to its coasts, lest the abusive exploitation of these resources lead to their depletion or exhaustion. We consider that Costa Rica, as a coastal State, has a prior interest in these resources . . . ."

Thus, the Costa Rica position suggests that if the coastal fisheries problem can be resolved separately, she might be persuaded to vote for a territorial sea of six miles or less.

Iraq has claimed a territorial sea in accordance with international law without specifying a breadth. Since she voted against the first part of the Canadian proposal to establish a territorial sea of six miles, and voted for the eight-power proposal, as well as the Soviet proposal, both of which would have permitted the establishment of a 12-mile territorial sea, perhaps the most that can be hoped for in a future conference is her abstention on the establishment of a territorial sea of six miles or less, with the remote possibility of a vote for such a proposal.

The Philippines, the last of the seven states abstaining on the United States compromise proposal for a six-mile territorial sea, claims that

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88 For a summary statement of the developments in Costa Rica which indicate that the situation with respect to her exact claims in regard to territorial sea and fishing zones is not at all clear, see MacChesney, op. cit., footnote 23. (at 451).
89 1 Verbatim Record (A/CONF. 13/19, 468 (1957)).
90 2 Official Records (A/CONF. 13/38, 39 (1958)).
91 Ibid., at 40
92 2 Verbatim Record (A/CONF. 13/19, 469 (1957)).
93 Ibid., at 470.
94 2 Official Records (A/CONF. 13/39, 176 (1958)).
95 2 Official Records (A/CONF. 13/38, 39 (1958)).
the position of archipelagic nations calls for special treatment. She introduced a proposal in the First Committee which would have applied the method of straight baselines to archipelagos, as well as to coasts which are deeply indented, by permitting the drawing of baselines along the coast of the outermost islands, following the general configuration of the group, where the islands are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit.

The general statements of the Philippine representative in the General Assembly prior to the Conference to the effect that security and economic reasons warrant an extension of the territorial sea, and her vote against the first part of the Canadian proposal to establish a six-mile territorial sea and in favor of the 12-mile exclusive fishing zone proposal, all seem to suggest that the Philippines cannot be persuaded to vote for a narrow territorial sea of six miles or less unless the coastal fishing problem is settled separately.

D. SEPARATION OF DELIMITATION OF TERRITORIAL SEA FROM COASTAL FISHERIES PROBLEM

Suppose the question of the delimitation of the territorial sea were separated from the question of coastal fisheries, is it likely that the necessary two-thirds vote could be secured in a future conference on a six-mile or narrower limit?

This is a difficult question to answer. One might hastily conclude that agreement on as narrow a limit as six miles, quite apart from the coastal fisheries question, is doubtful on the basis of the vote in the First Committee of the 1958 Conference when the first part of the revised Canadian proposal calling for a six-mile territorial sea was resoundingly defeated with only 11 votes in favor, 48 against, with 23 abstentions.

Yet it should be stressed that the vote on this part of the Canadian proposal in 1958 was not at all indicative of the general sentiment of a majority of the states towards compromising on a six-mile territorial sea as demonstrated later in the Conference when the United States proposal which, like the Canadian proposal, also embodied a six-mile territorial sea, came within seven votes of achieving the necessary two-thirds majority. Nor is the vote on the first part of the

98 U.N. Doc. A/CONF. 13/C. 1/L. 98 (1958). This proposal was withdrawn without being voted upon. 3 Official Records (A/CONF. 13/39, 148 (1958)).
99 1 Verbatim Record (A/CONF. 13/19, 218 (1958)).
100 3 Official Records (A/CONF. 13/39, 176 (1958)).
101 2 Official Records (A/CONF. 13/38, 39 (1958)).
102 3 Official Records (A/CONF. 13/39, 177 (1958)).
Canadian proposal in 1958 necessarily indicative of what a future Conference might vote on a similar delimitation of the territorial sea, especially if the states can be persuaded to treat the matter of delimitation separately from the coastal fisheries problem.

The problem is really two-fold: (1) whether the states will be disposed to decide the question of the breadth of the territorial sea separately from the question of coastal fisheries; and (2) whether they will agree on a territorial sea of six miles, or less, without first having arrived at an agreement on the extent of preferential and/or exclusive fishing rights to be granted to the coastal state in a contiguous zone beyond the territorial sea.

With respect to the second problem, which is the more difficult, the delegate from Iceland probably expressed the views of a number of states when he indicated that his delegation had voted against the first part of the Canadian proposal to establish a six-mile territorial sea because at that stage in the Conference the coastal state’s exclusive fishing rights up to twelve miles had not yet been voted upon, indicating an insistence on the settlement of the coastal fisheries problem first.

Since it is felt by many states that the easiest way to get additional exclusive fishing rights is to claim an extension of the territorial sea, notwithstanding a general recognition of the validity of the pronouncement in the Anglo-Norwegian Fisheries Case that “the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law,” there is a reluctance to agree upon a narrow territorial sea of six miles or less without first knowing at least what the general pattern of agreement is likely to be with respect to preferential or exclusive coastal fishing rights. Some states, such as Iceland, appear to demand a specific agreement guaranteeing exclusive fishing to the coastal state, prior to a determination of the delimitation of the territorial sea.

Relative to the first problem above of separating the question of the breadth of the territorial sea from the question of coastal fisheries, Mr. Dean, head of the United States delegation, vigorously opposed a Canadian motion that the United States proposal be voted on in two parts, as had been done with the Canadian proposal. He said that the United States delegation was not prepared to support any proposal establishing the breadth of the territorial sea at six miles unless it

103 Ibid., at 185.
104 I.C.J. Reports, 132 (1951). The Court went on to say, “Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.”
included the other essential elements of the proposal (i.e., inclusion of the "historic rights" provision to insure that the United States and other overseas fishing states could continue to fish in the outer six-mile "exclusive" zone). Dean's position undoubtedly reflected the pressures of certain influential fishing interests, both in the United States and in other states.

Thus, the voting on the separate question of a six-mile territorial sea was taken on the Canadian proposal in the First Committee at a time when the United States, one of the leading exponents later in the Conference of a compromise at six miles, and several other states were unwilling to consider the breadth of the territorial sea apart from the coastal fisheries question. In the interest of achieving the narrowest possible territorial sea it is hoped that the United States and other states may change their views on this matter. Therein lies the only hope of avoiding another deadlock such as the one which developed in the 1958 Conference.

Assuming that a significant number of states will be unwilling to commit themselves to a narrow territorial sea of six miles or less without first having some assurance that their demands for preferential and/or exclusive fishing rights in an area beyond a narrow territorial sea will be recognized, (an assumption which seems warranted in light of the 1958 Conference record), what form might this assurance take without the danger of reaching an impasse over specific details?

E. SUGGESTED PRINCIPLES FOR HIGH SEAS AND COASTAL FISHERIES

It is suggested that agreement might be had upon a general statement of three complementary principles with respect to high seas and coastal fisheries, prior to and quite apart from any discussion of the delimitation of the territorial sea. These principles are as follows:

1. Principle I: Basic Right to Fish on the High Seas

All states have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations and (b) to principles which have as their purpose the recognition of the special rights of coastal states to preferential or exclusive fishing rights in limited areas of the high seas adjacent to their coasts beyond the territorial sea.

Commentary

This first principle recognizes the freedom of high seas fishing as a basic, traditional right. It has been incorporated in the provisions of

105 Official Records (A/CONF. 13/39, 179 (1958)).
Article 2 of the Convention on the High Seas\textsuperscript{106} and Article 1 of the Convention on Fishing and Conservation of the Living Resources of the High Seas\textsuperscript{107}

In the principles which follow, it will be seen that this basic, first principle, long-recognized in International Law, is not absolute but is subject to certain limitations in order to recognize the desirability of providing coastal states with (a) preferential fishing rights in limited areas of the high seas adjacent to their coasts and (b) exclusive fishing rights in still narrower areas in those exceptional cases in which the coastal state is primarily dependent upon its coastal fisheries for its economic livelihood.

2. Principle II: Preferential Fishing Rights for Coastal States in Limited Areas

All coastal states have the right for their nationals to engage in fishing in limited areas of the high seas adjacent to their coasts on a preferential basis subject to the "historic rights" of overseas states which have fished in such areas during a designated period immediately preceding the effective date of a Convention on Coastal Fisheries.

Commentary

The purpose of this second principle is to accord to the coastal state a preference to fish in a limited area of the high seas adjacent to its coast while at the same time balancing this preferential treatment with Principle I which recognizes the traditional rights of all states to fish in the high seas. The preferential fishing zone contemplated under this principle would accord overseas fishing states the right to continue fishing for the same classes of fish up to an amount not exceeding the average annual catch over a designated prior period of, say, five or ten years.

In the formulation of the principle of preferential fishing rights for the coastal state, with due provision for the "historic rights" of overseas states, it is unnecessary to incorporate within the principle itself an exact period of time (i.e., 5 years, 10 years, etc.) as the basis for determining which states have fished in an area sufficiently long to have established an "historic right" to continue fishing there, and for calculating the average annual catch which the overseas state may not exceed in the future. The details of the time period can be resolved by agreement later; the first and most important step is to establish the broad principle.


However, three comments may be of some help in the future in determining what the time period should be, assuming that a time period is used as the basis for establishing “historic rights.”

First, it is felt that the period should not be shorter than five years because a state which has fished in a given area for less than that length of time can hardly be said to have established “historic fishing rights” therein. Secondly, since the facts may show that overseas states do not fish regularly each year in a given area, it may be that the following type of formula would be fairer: “historic fishing rights” shall be accorded to any state which has fished in a given coastal area for a certain stock, or stocks, of fish during any five (or seven or eight) years out of the past ten (or twelve or fifteen). Thirdly, it may be somewhat indicative of the favorable attitude of many states toward the five-year criterion on this question of “historic rights” to remember that the United States compromise proposal at the Geneva Conference in 1958, which came within seven votes of adoption, contained a five-year period as the basis for determining “historic rights.” In an earlier proposal at the Conference, the United States had suggested a ten-year period.

Whereas in the high seas beyond the preferential fishing zone adjacent to the coasts all states would have equal fishing rights, except to the extent that they may have agreed otherwise under conservation treaties, within the preferential fishing zone the overseas states would have more limited rights and yet would not be subject to complete exclusion by the coastal state as would be the case under Principle III below.

The principle of preferential fishing rights would make it possible for the coastal state to increase its catch over the years as the fishing stocks increased, but the overseas fishing state would be restricted to a maximum tonnage based upon the annual average catch over the designated period.

It will be noted under this principle that the coastal state is granted preferential rights in three important ways: (1) preference as to an area, (2) preference as to time, and (3) preference as to total catch.

(1) Preference as to an area. Admittedly the granting of preferential fishing rights to the coastal state in an area of the high seas is a derogation from the basic, traditional principle of freedom of fishing

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108 Volume of catch of a particular stock in relation to the total catch of all states in a given area would be another basis which might, after careful study, be considered superior to the time period for determining “historic rights” to fish and for calculating the average annual catch. However, the time period suggested here has the decided advantage of simplicity.
on the high seas now more than three centuries old. However, this derogation recognizes the emerging demands of coastal states for somewhat greater fishing rights in their coastal waters founded upon economic and other considerations, without going so far as to destroy a part of the basic principle of freedom of high seas fishing entirely. It should be emphasized that most of the recent demands of coastal states have been for exclusive fishing rights beyond the territorial sea. Many of these claims to exclusive fishing rights, particularly the ones of the South American States claiming sovereignty up to the incredible 200 miles from shore, have no legal, economic, social or moral justification.

Also, the formulation of the principle of preferential fishing rights in a limited area of the high seas adjacent to the coastal state is an attempt to break the impasse which has developed, and which gives an unfortunate promise of continuing, between the coastal states which demand broad zones of exclusive fishing rights, and the overseas fishing states which insist upon the absolute freedom of fishing outside of a three mile territorial sea. Regrettably and yet necessarily the overseas states sometimes feel compelled to enforce such insistence by having warships accompany fishing vessels.

This principle which recognizes preferential fishing rights for the coastal state is a middle ground which, it is hoped, will make it possible for coastal fishing states and overseas fishing states to reach an equitable compromise of their extreme positions.

(2) Preference as to time. The coastal state is granted a preference as to time in that its nationals may fish in the preferential zone for any class of fish even though they may not have fished there before, or at least not within the designated base period which is required for overseas states in order for them to establish their "historic fishing rights." This time preference may be of great importance to (a) long-established coastal states which have done little or no fishing in the preferential zone for particular stocks of fish, and (b) for the

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110 McDougal and Burke, *op. cit.*, footnote 25 (at 539).

111 For an account of a recent incident involving Iceland and the United Kingdom, see Lauterpacht, *op. cit.*, footnote 63 (at 146, 177).
host of emerging new coastal states which will be assured of prior rights for their limited, but emerging fisheries industries.\textsuperscript{112}

(3) \textit{Preference as to total catch}. Perhaps the most important feature of the preferential principle for the coastal state is the opportunity afforded to increase its catch within the preferential zone in the future, no matter what its catch has been in the past. By contrast, overseas states would have their future catches limited both as to amount and as to a particular class or stock of fish, the limit being determined by the average annual catch over the designated base period.

In addition, the principle of the preferential fishing zone for coastal states suggested above would include a recognition of the right of the coastal state to adopt unilateral conservation measures, pending an agreement between the various states fishing in the preferential zone, along the lines provided in Article 7 of the Convention on Fishing and Conservation of the Living Resources of the High Seas.\textsuperscript{113}

It is not proposed that the coastal state would be accorded preferential treatment in the sense of being able to dictate or dominate the establishment of conservation measures. But the coastal state would be able to act, in case an impasse developed, to conserve stocks of fish until the matter could be settled by negotiation, arbitration or some other peaceful means.

Also, it should be noted that the coastal state’s preferential rights might, in exceptional cases, develop into exclusive rights under the principle enunciated below, although it is not expected that this would occur in many instances.

3. \textbf{Principle III: In Exceptional Cases, Exclusive Fishing Rights for Coastal States}

A coastal state shall have the right for their nationals to engage in fishing in limited areas of the high seas adjacent to their coasts on an exclusive basis in the exceptional case in which that state is primarily dependent upon its coastal fisheries for its economic livelihood.

\textbf{Commentary}

This principle is the antithesis of Principle I which recognizes the basic right of all states to fish in the high seas. It is based upon a recognition that in a few unusual and exceptional cases, the total economy of the coastal state is so overwhelmingly dependent upon its coastal fisheries as to justify this extreme departure from the three-

\textsuperscript{112} For a list of the more than forty independent, or semi-independent, states established since World War II, many of which are maritime states, see Appendix M.

century old principle of freedom of the high seas for fishing. This
dependence may be reflected in various ways, such as (a) the high
monetary value of the coastal fisheries catch in relation to the total
domestic production of the state, and (b) the high percentage of ex-
ports of fish products to total exports. Other tests could be devised to
determine whether the coastal state should be entitled to exclusive fish-
ing rights in limited areas of the high seas adjacent to its coasts.

These exclusive fishing areas for a few states in most, if not all, cases
ought to be narrower than those in which all other coastal states would
enjoy preferential fishing rights in order to provide for the minimum
encroachment on the basic principle (No. 1) of freedom of fishing for
all states beyond a narrow territorial sea.

It will be noted that specific breadths for the preferential zone and,
in exceptional cases, the exclusive zone, have not been suggested. This
omission was not inadvertent. Too often in the past attention has been
narrowly focused on the details of proposals to solve the coastal
fisheries problem (as well as the problem of delimiting the territorial
sea and other international law problems) without first formulating a
broad theoretical concept which takes full, objective account of (a) the
world community values at stake, (b) the conditions in the world
which suggest possible alternative courses of action in order to max-
imize those values for the greatest number of states, and (c) the pos-
sible effects of alternative courses of action.

For the above reason, the emphasis here has been upon the formul-
ation of a set of principles, wide-spread adoption of which it is sub-
mitted would constitute a long step toward underwriting an equitable
and just solution of the coastal fisheries problem.

(1) Summary and Conclusion

Under the three complementary principles set forth above, the two
providing for (a) preferential, and (b) in exceptional cases, exclusive
fishing rights in limited areas of the high seas adjacent to coastal
states would now fully recognize the economic and social conditions
which underlie the emerging demands of states with respect to their
coastal fisheries. Admittedly these two new principles constitute a
significant departure from the traditional, universally-recognized
principle of freedom of fishing in the high seas which was most re-
It is worthy of special note here that, by contrast with the other three
Conventions drafted at the same time, the Convention on the High
Seas boldly begins by saying, “The States parties to this Convention,
desiring to codify the rules of international law relating to the high
seas . . . have agreed as follows . . . ” 114 Thereafter, in Article 2, the Convention enumerates some of the freedoms of the high seas, the second of which is “freedom of fishing.” Thus, this Convention reaffirms the universal recognition of the basic principle of freedom of the seas for fishing as well as for other purposes.

Not only would the two new principles recognize preferential and exclusive fishing rights in limited areas of the high seas for the first time, but, perhaps more importantly, such rights would be recognized apart from the question of the delimitation of the territorial sea.

It will be remembered from the previous discussion that the First Committee of the Conference proposed the incorporation into the Convention on the Territorial Sea and Contiguous Zone of an article providing for an exclusive fishing zone. This recent action by an international conference on the law of the sea in attempting to keep the coastal fisheries problem inextricably linked with the question of delimiting the territorial sea followed the customary but, thus far, unsuccessful joint (and muddled) approach to the solution of two diverse problems. It is now proposed that these two problems be separated and that the coastal fisheries problem be resolved under the three complementary principles which would balance the equities between coastal and overseas fishing states.

Many years ago Professor Riesenfeld, a distinguished scholar, recognized that “rightly or wrongly, the question of coastal fisheries is closely bound up with the international law of territorial waters. . . .” 115 Our analysis leads to the firm conviction that the two questions have been wrongly bound for too long a time.

It is hoped that the establishment of the three complementary principles enunciated above, detailed articles for which could be hammered out in an international conference dealing with coastal fisheries alone, will make it possible to solve two of the most important problems of the law of the sea in our time: (a) the problem of the precise delimitation of the territorial sea with its overriding maritime and security aspects, and (b) the problem of fishing rights of coastal states.

F. THE NEED FOR A NARROW TERRITORIAL SEA: THE UNITED STATES AND FREE WORLD PERSPECTIVE

We turn now to a more detailed examination of the reasons why it is imperative from the perspective of the United States and the rest of the Free World to have as narrow a territorial sea as possible and hence the maximum freedom of the high seas for utilization by all inclusive users.

115 Riesenfeld, op. cit., footnote 109 (at 3).
But first it will be helpful to review briefly the four principal reasons why many states favor an extension of the territorial sea from the present three miles to as much as 200 miles.

1. Principal Reasons Why Many States Favor An Extension of The Territorial Sea

(a) First and foremost is the desire on the part of several coastal fishing states to achieve an extension of their exclusive fishing rights through the blanket device of extending the territorial sea. It will be remembered that in some instances, particularly in the case of certain South American countries which claim that their only purpose is conservation of fisheries, it has been asserted that the territorial sea is not being extended. Yet this puzzling disavowal hardly coincides either with the language of the decrees which have claimed sovereignty over a wide belt of high seas, or with the actual practice of excluding overseas fishing vessels or fining them for fishing within 200 miles of the coast, and even beyond that distance.

The device of a blanket extension of the territorial sea as a means of achieving an increase in the area of exclusive fishing rights is understandable from the limited perspective of the coastal fishing interests and as a manifestation of an unfortunate and narrow national egoism. However, as shown above, it is possible for the needs of all fishing states, coastal as well as overseas, to be fulfilled on an equitable basis by the separation of the coastal fisheries problem from the question

\[116\] See discussion of tripartite claims of Chile-Ecuador-Peru, supra Ch. I, pp. 51-58.

\[117\] The most flagrant case involved the November 1954 seizure by Peru of five whaling vessels owned by Onassis, under a Panamanian flag. Two of the vessels were captured 160 miles off the Peruvian coast, two were attacked 300 miles off the coast, and the fifth, a factory ship, was 364 miles off the coast, according to information furnished by Panama to the Organization of American States. Peru refused to release the vessels until fines of $3 million were paid, 90% by Lloyd's of London and 10% by United States insurance companies. Phleger, "Some Recent Developments Affecting the Regime of the High Seas," 32 State Dept Bull. 934, 937 (1955) ; MacChesney, op. cit., footnote 23 (at 289). A somewhat less flagrant violation of the freedom of the high seas, although still serious, was a later incident (March 1955) involving the seizure by Ecuador of two American flag fishing vessels 14 to 25 miles off the Ecuadorian coast. An American seaman was seriously wounded by gunfire and fines of nearly $50,000 were imposed on the two vessels. (Ibid.)

Prior to the two incidents, the United States had passed legislation protecting vessels on the high seas and in territorial waters of foreign countries the purpose of which was to provide a means of reimbursing the owner out of the United States Treasury for any fine which he had to pay to secure release of the vessel and crew. (Public Law 680, 27 August 1954, Chapter 25) ; MacChesney, op. cit., footnote 23 (at 436).
of the breadth of the territorial sea and the concurrent establishment of three broad complementary principles: (1) freedom of fishing on the high seas, (2) preferential fishing rights of the coastal state in limited areas adjacent to the coast, and (3) exclusive fishing rights of the coastal state in limited areas adjacent to the coast in a few exceptional cases.\footnote{See discussion supra, pp. 109-115.}

(b) Second is the desire on the part of some states, particularly many newly independent states, to reject the three-mile limit because of the association of that limit with the large western maritime powers who, in some cases, were the former colonial masters of the new states. Several of these states constituted an Afro-Asian group at the Conference. An equally strong psychological reason for rejecting the three-mile limit in favor of a wider breadth, which also lacks justification from a rational, long-run perspective, is what might be described as “keeping up with one’s neighbors.” Early evidence of this reason for favoring an extension of the territorial sea was indicated in the forthright statement of Mr. Spiropoulos, the distinguished delegate from Greece, in the debate in the Sixth Committee of the General Assembly prior to the opening of the Geneva Conference,

“The breadth of Greece’s territorial sea at present is six miles. I am going to tell you a secret, which I hope you will forget when you leave this room. We did not want a six-mile limit; we felt no need for it; but we were surrounded by States which, even at the time of The Hague Conference, were insisting on a six-mile limit. Obviously, Greece could not retain the three-mile rule when neighbouring States were claiming six miles. I repeat, my Government is ready to accept any solution which will promote the freedom of the high seas. We are prepared to waive our present six-mile limit and accept a lower limit. Nevertheless, if neighbouring States extend their territorial sea to a breadth of twelve miles, Greece will have no choice but to follow suit.”\footnote{I Verbatim Record (A/CONF. 13/19, 58 (1957)).}

(c) Third is the desire of the Soviet bloc to extend the territorial sea to twelve miles ostensibly for “security” reasons but actually to advance their belligerent interests\footnote{Heinzen, “The Three-Mile Limit: Preserving the Freedom of the Seas,” 11 \textit{Stanford Law Review} 597, 653 (1959).} and to increase the effectiveness of their submarines, particularly during wartime. In this regard, Mr. Dean, head of the United States delegation to the Geneva Conference, has written, in line with arguments he presented at the Conference, of the unjustifiable advantages a belligerent could gain from a widespread extension of the territorial sea.
"An extension of the territorial sea of neutral nations would dramatically increase the striking power of enemy submarines. Submarines normally operate with considerable difficulty and with much risk under water within three miles from shore but their freedom of movement is greatly increased between three and twelve miles. If the territorial sea were extended to twelve miles, an enemy submarine, particularly one with atomic power which might operate for long periods without surfacing, could operate possibly undetected under waters in a neutral state's territorial sea. But our surface ships could not operate on the surface of these waters within the territorial sea without risking charges of violating such state's neutrality. An extension of the territorial sea to twelve miles might thus make an enemy fleet of submarines, capable of discharging missiles from near the coast, practically inviolable while operating under water in the territorial seas." 121

That this rather obvious, though unstated, reason for the Soviet bloc's rejection of the Free World sponsored three-mile limit (and to a lesser extent the Afro-Asian group's similar rejection and advocacy of a twelve-mile limit), was for the purpose of seriously crippling the navies of the United States and her allies is borne out by the penetrating observation of Professor Sorensen, Chairman of the Danish delegation,

"The emphasis (by the United States) on military considerations naturally had the effect of strengthening opposition to the three-mile rule by those states, belonging to the Soviet as well as to the Afro-Asian group, which are antagonistic to the naval supremacy of the Western powers." 122

(d) Fourth is the desire of certain Arab states to support a twelve-mile limit primarily for the purpose of preventing Israel from having an outlet to the "high seas" of the Gulf of Aqaba.123

A complete list of the reasons why it is imperative to have as narrow a territorial sea as possible, at least from the perspective of the United States and her allies would include an enumeration of all major objectives of the Free World such as power, wealth, enlightenment, well-being and so forth, achieved through democratic proc-

122 Sorensen, op. cit., footnote 17 (at 245).
123 See discussion supra, p. 99.
For our purposes, however, it may be well to focus attention on what might be categorized as military and economic reasons for a narrow territorial sea.

McDougal and Burke, op. cit., footnote 25 (at 549-550). The general objectives enumerated by McDougal and Burke are worth listing here:

"OBJECTIVES"

The objectives sought by claimant states embrace all the characteristic demands of the nation-state for the protection and enhancement of its bases of power as such demands are projected upon the oceans and include also the various particular demands which states habitually put forward on behalf of the other, nongovernmental participants. In brief summary, some of the more significant of these manifold changing objectives may be related to certain general value categories.

"Power is sought by states in advancing claims to control access to their own territorial base, to secure effective and economical access to the territorial bases of others and to share in the establishment and administration of a stable public order of the oceans. In time of war, of course, belligerent states seek to obtain command of the sea or to deny it to the enemy in order to interdict enemy commerce and to make his use of the sea for communication as costly as possible.

"Wealth may be seen as a goal in the great congeries of claims relating to transportation, navigation, fishing and mineral exploitation. One may observe demands both to limit access to territorial base resources and markets and to foster ease of access to distant resources and markets.

"Enlightenment is pursued as a major goal in attempts to preserve the sea as a locale for conducting scientific research and exploration and as a cheap and efficient means of transportation and communication, affording access not only to the homeland but to the whole globe for the acquisition of new knowledge.

"Well-being is a fundamental objective in the variety of claims directed toward prevention of plagues and preservation of health, and in certain claims to fishery exploitation.

"Respect is sought in the efforts of a claimant to secure access as an equal participant, free from discrimination, in all the power-enhancing and wealth-producing activities of the world which have special reference to the use of the oceans. The enormous importance attached to fleets, control of ports and the display of flags, as symbols of status, is commonplace.

"Skill has been a traditional objective of states in seeking to assure through use of the oceans and access to the experience of others a reservoir of trained maritime and other personnel for purposes of both war and peace.

"Solidarity—primary and large group attachments—is embodied in demands which emphasize the oceans as means of promoting broader identification of peoples by providing a focus for organization of transnational loyalties and common sentiment, as in the North Atlantic community.

"Rectitude appears as a goal in attempts to reconcile many varying conceptions of right and wrong from many different cultures, both in a law of the sea and in other standards, for the promotion of co-operative activity."

2. Military Reasons for a Narrow Territorial Sea

The United States and most of the other countries of the Free World comprise an oceanic confederation. Since a majority of the states of the Free World bloc, as well as some important neutral states, are maritime states, their security is dependent upon the mobility and flexibility of their own and United States naval forces and merchant fleets. It must be emphasized that the Free World bloc is interdependent; no one of the states—not even the United States as powerful as she is—can stand alone against either the hot or cold war designs, probings, and pressures of Communist states, particularly the Soviet Union.

Inasmuch as the Free World states, including not only coastal states but land-locked states as well, are so interdependent both for security and economic development, the lifelines which bind them together are the sea lanes through which effective military forces may be deployed and war materiel and economic goods transported whenever a Communist coup appears imminent.

At the present time the Free World countries as a group have a decided advantage both as naval and commercial maritime powers.

Since the United States Navy and merchant fleets and the navies and merchant fleets of the rest of the Free World are major instru-

127 Merchant Fleets of the World (as of Dec. 31, 1958), U.S. Maritime Administration. The rankings of the first twelve states at the end of 1958 were as follows (Ibid., 2) :

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>DEADWEIGHT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>United States</td>
<td>33,653,000</td>
</tr>
<tr>
<td>2</td>
<td>United Kingdom</td>
<td>24,372,000</td>
</tr>
<tr>
<td>3</td>
<td>Liberia</td>
<td>17,790,000</td>
</tr>
<tr>
<td>4</td>
<td>Norway</td>
<td>14,142,000</td>
</tr>
<tr>
<td>5</td>
<td>Japan</td>
<td>7,723,000</td>
</tr>
<tr>
<td>6</td>
<td>Panama</td>
<td>6,609,000</td>
</tr>
<tr>
<td>7</td>
<td>Italy</td>
<td>6,503,000</td>
</tr>
<tr>
<td>8</td>
<td>West Germany</td>
<td>5,660,000</td>
</tr>
<tr>
<td>9</td>
<td>The Netherlands</td>
<td>5,465,000</td>
</tr>
<tr>
<td>10</td>
<td>France</td>
<td>5,398,000</td>
</tr>
<tr>
<td>11</td>
<td>Sweden</td>
<td>4,751,000</td>
</tr>
<tr>
<td>12</td>
<td>U.S.S.R.</td>
<td>3,809,000</td>
</tr>
</tbody>
</table>

(Note: The above publication appears to be in error at 15 in saying that Denmark "ranked twelfth among the maritime nations of the world." At the end of 1958 Denmark had only 2,745,000 deadweight tons of merchant fleet which is less than that for the U.S.S.R. even if one deducts from the figure given above (3,809,000) the 785,000 deadweight tons of lend-lease vessels.)
ments in preserving world peace, and since the effectiveness of these navies and merchant fleets depends so much upon the maximum freedom of the high seas for unrestricted and unfettered navigation, it is imperative that the territorial seas of the world be kept to a minimum. It has already been noted that an extension of the territorial sea from three to six miles would mean that more than fifty international straits which are now high seas would become territorial seas, and an extension from three to twelve miles would mean that more than one hundred international straits which are now high seas would become territorial seas.\textsuperscript{128}

While it is true that under the Convention on the Territorial Sea and Contiguous Zone warships as well as merchant ships have the right of innocent passage, and while this right may not be suspended in international straits even temporarily by the coastal state either under provisions of the Convention,\textsuperscript{129} or under the decision of the International Court of Justice in the Corfu Channel case,\textsuperscript{130} "passage" as defined in the Convention is limited to the specific purpose of traversing the sea.\textsuperscript{131}

Moreover, the coastal state may impose regulations on navigation through its territorial sea and even suspend passage temporarily in such waters (other than in straits) if such suspension "is essential for the protection of its security."\textsuperscript{132} Therefore, the navies and merchant fleets of the Free World would have far less mobility and far fewer rights in the extended area of the territorial seas beyond three miles than they now have when those waters are high seas.

It must be emphasized again and again that the right of freedom of navigation on the high seas is a greater right than the right of innocent passage through the territorial sea of a coastal state. The former right (i.e., freedom of navigation on the high seas) is the right to use a common resource subject only to (a) the general obligation to accommodate other inclusive users, and (b) any self-imposed specific obligation resulting from a treaty. The latter right (i.e., the right of innocent passage through the territorial sea) is a limited right to use an exclusive rather than a common resource over which the coastal state has sovereignty. In its exercise of sovereignty the

\textsuperscript{128} See discussion, \textit{supra}, p. 90. For a brief geographical and hydrographical study of some of the major straits which constitute routes for international traffic, see U.N. Preparatory Document No. 6 (A/CONF. 13/6 and Add. 1 (1957)), mimeographed, and also printed in \textit{I Official Records} (A/CONF. 13/37, 114–164 (1958)).

\textsuperscript{129} Art. 16(4).

\textsuperscript{130} Corfu Channel Case, \textit{I.C.J. Reports} 4 (1949); 43 A.J.I.L. 558 (1949).

\textsuperscript{131} Art. 14(2).

\textsuperscript{132} Art. 16(3).
coastal state may issue rules and regulations governing the “passage” through its territorial sea and may, under proper conditions, even suspend such passage (i.e., the right of innocent passage is subject to divestment). It follows that the right of innocent passage through the territorial sea, while by no means a second-class right, is not the equivalent of the right to navigate freely on the high seas. Therefore, it is imperative that the area of the high seas be kept to the maximum and the breadth of the territorial sea be kept as narrow as possible.

Moreover, it cannot be emphasized too strongly that the military air forces and the commercial air fleets of the Free World, which are also a vital deterrent to the spread of Communism, would be even more hampered by an extension of the territorial sea beyond the three-mile limit than would be true of the navies and merchant fleets of the Free World for the reason that the right of innocent passage does not apply to the airspace above the territorial sea. As Mr. Dean has said,

“There is no right for aircraft to overfly another nation’s territorial sea except under a treaty, with its consent, or pursuant to the Chicago Civil Aviation Convention of 1944 as to the contracting parties thereto.”

It is unfortunate that international law at present does not accord to aircraft the same right of innocent passage to overfly the territorial sea as warships and merchant vessels have to navigate thereon, except, of course, where control or exclusion of foreign aircraft is necessary for security reasons. The United Kingdom in its compromise proposal to extend the territorial sea to six miles inserted a provision which would have kept the airspace above the outward three miles free for aircraft to overfly as though it were airspace above high seas. While this provision was laudable as an effort to keep the airspace as free as possible for unrestricted flight, it failed to achieve much support.

It should be emphasized that the increased mobility and flexibility which a narrow territorial sea gives to the navies and the air forces of the Free World does not mean that the striking force of these defense components will have to be used to deter the spread of communism. Indeed, the deterrent effect often results from the mere presence and display of the navies and air forces. Witness, for example, the de-

134 U.N. Doc. A/CONF. 13/C. 1/L. 134 (1958); 3 Official Records 247-8 (1958). The United Kingdom proposal protected not only the existing rights of air passage in the outer three miles, but all vessels, including warships.
terrent effect of the presence of the United States Seventh Fleet in the
defense of the Nationalist Chinese islands of Quemoy and Matsu, and
the stabilizing influence of the United States Sixth Fleet in the
Mediterranean.

While it is true that the deterrent effect of a display of force in a
given area of the world is difficult to measure, largely because it is
psychological, the Free World should strive unceasingly to retain
whatever advantage is derived from such display. To do this, it
would be highly desirable to retain the present three-mile limit; it is \textit{imperative} that the Free World not agree to an extension of the
territorial sea beyond six miles. One reason is clear: ships and air-
craft may be identified visually, though not well, at six miles. How-
ever, at twelve miles it is not possible to see an aircraft with the
naked eye, nor to identify even large warships. Hence, the deterrent
effect and stabilizing influence of a display of naval force in a
trouble-area of the world where a three-mile territorial sea exists
would be reduced by at least 50\% if the limit were extended to six
miles; it would be reduced to nil with a 12-mile territorial sea.

Finally, one may include among the military reasons why the
territorial sea should be kept as narrow as possible—preferably a
three-mile limit but in all events not more than six miles—the fact
that as the territorial sea becomes wider the problems of neutral states
become greater. Far too often states tend to think of their \textit{rights}
in the territorial sea (i.e., sovereignty, exclusive fishing, etc.) and
forget their corollary duties. These duties involve both economic
considerations, such as the cost of installing and maintaining naviga-
tional aids, (see below) and military considerations.

From the military standpoint, if a neutral state is to maintain its
neutrality in order to avoid the cost in lives and property of becoming
embroiled in belligerency, it is necessary for it to patrol its territorial
sea. The wider the territorial sea, the larger the patrol fleet which
would be required. Conversely, the narrower the territorial sea the
smaller the patrol fleet and the less chance of inadvertent involvement
in the belligerency.

If the small maritime states of the world, particularly those with
strategic coastlines and strong desires to remain neutral in a possible
conflict between other states, would weigh carefully the added bur-
dens and risks which any extension of the territorial sea would im-
pose upon their neutrality, it is firmly believed that they would line
up solidly in favor of a retention of the three-mile limit. The ex-
ercise of sovereignty over the territorial sea is a responsibility and
a risk as well as a right. Minimization of the risk is not achieved,
nor withdrawal from risk enhanced, when the area of the risk is
enlarged.
3. Economic Reasons for a Narrow Territorial Sea

In addition to the increased cost of patrolling an extended territorial sea by a neutral state to insure conformance with the requirements of neutrality, the additional costs of installing and maintaining navigational aids if the territorial sea were extended from three to six or twelve miles would prove to be a serious financial burden for many states, particularly those which are relatively poor economically.

It is estimated that the United States would require an expenditure of several million dollars plus a substantial increase in annual operating costs of more than a million dollars for each 100 miles of coastline if the territorial sea were extended from three to twelve miles. In addition, burdensome expenditures would have to be made for navigational aids and to change the charts, maps, and manuals which mariners must use. Of course, the initial expenditures and added financial expense required per mile of coastline would vary throughout the world, depending upon the geomorphological conditions. But, it is clear that for all maritime states, especially for the small, economically underdeveloped ones, the additional cost of an extended territorial sea would prove financially burdensome.

In addition to the increased economic burdens on the coastal state as indicated above, an extension of the territorial sea would increase the cost of transporting goods and people. Landlocked states as well as coastal states would suffer from these increased costs.

Despite the recognized right of innocent passage of vessels through the territorial sea, the movement of goods and people both by surface vessels and aircraft would be adversely affected by an extension of the territorial sea. New, longer, and in many cases more hazardous routes would have to be developed in order to avoid the hampering regulations which some coastal states would undoubtedly impose upon vessels using their extended territorial seas.

As the chairman of the United States delegation to the United Nations Conference has said,

"The operation of commercial shipping on, or commercial aircraft over, water would also be greatly handicapped, slowed down and subjected to interminable delays. Indeed, it would seem to have been part of the Russian purpose in backing extensions of the territorial sea so to hamper the commerce of the free world as a part of its sand-in-the-gear-box technique... The right and ability of merchant ships carrying goods and passengers to schedule the most economical passage possible between ports, to enter and leave harbors
freely, and to move on the surface of the water without interruption or delay would be jeopardized.” 135

Inasmuch as the cost of all movement of goods and people by ships and aircraft must be borne eventually by the recipients of the goods and services, the impediments to such commerce and transportation and the added risks thereof resulting from an extension of the territorial sea would be reflected in higher costs. These increased costs would represent an unnecessary economic waste and result in a further shackling of international trade at a time when one of the great needs of the world is to facilitate the free flow of goods and people. It is seldom realized that the world’s ocean commerce accounts for more than three quarters of the total tonnage of goods exchanged among states. 136 To advocate an increase in the already heavy burdens on that commerce by extending the territorial sea from the present three-mile limit to, say, twelve miles, is to take temporary leave from one’s common sense.

It may be concluded that both for military and economic reasons it is imperative from the perspective of the United States and the rest of the Free World that the territorial sea be kept as narrow as possible, preferably at the present three-mile limit, or at most extended to not over a six-mile limit. 137

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136 Woytinsky and Woytinsky, World Commerce and Governments 429 (1955).
137 Were it not for the fact that the concept of a territorial sea is so firmly established in international law (albeit with widely disputed origin), and given an equitable solution to the coastal fisheries problem along the lines indicated above, it might be argued that the “territorial sea” be abolished entirely from international law.

Many readers may gasp at this suggestion, and perhaps even recoil from the thought of pulling a state’s boundaries back to the shoreline and abandoning a concept so venerable as the “territorial sea.” Yet, a little sober reflection will lead to the unassailable conclusion that one of the primary reasons for the development of the concept, particularly during the 19th century, no longer has any real validity. Security of a coastal state against attack from the sea has been one of the foremost reasons why a state needed to extend its boundaries from the shoreline to encompass a narrow band of waters. Shore batteries could keep an invading force away from the coasts, and foreign naval vessels beyond the three-mile limit could not bombard the ports and military installations with their limited-range naval guns. Today, in an era of intercontinental ballistic missiles and other advanced (and rapidly advancing) weaponry, which makes it possible for submarines to fire missiles while submerged several hundred miles at sea, the need for a territorial sea of three, six or even twelve miles as security against attack is meaningless.

While it is still true that a coastal state needs some way to control access to its shores and the ocean and air traffic in the area immediately adjacent
ADDENDUM

The above chapter was written prior to the convening of the second United Nations Conference on the Law of the Sea in Geneva, March 1960. For a discussion of the results of this Convention see Appendix N.

thereto for a variety of purposes, including security against attack and the prevention of infringement of its customs, fiscal, immigration, sanitary and other regulations, it is not necessary to have a territorial sea for this purpose. In fact, the inadequacy of the territorial sea for accomplishing such purposes is what led to the development of contiguous zones, some of which extend out several hundred miles (e.g., the Air Defense Identification Zone for aircraft-ADIZ).