Territorial Seas - 3000 Year Old Question

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CURRENT LEGISLATION
AND DECISIONS

COMMENTS

Territorial Seas — 3000 Year Old Question

I. INTRODUCTION

In 1967, Egypt closed the Straits of Tiran to shipping to and from Israel, an action which helped precipitate a war;\(^1\) in 1968, the U.S.S. Pueblo, a United States Naval vessel, was seized by the naval forces of North Korea;\(^2\) in 1969, a Peruvian gunboat seized one United States flag fishing vessel and fired on others;\(^3\) again in 1969, a Soviet fishing fleet was warned to remain more than twelve miles off the east coast of the United States.\(^4\) These four seemingly unrelated incidents, and others like them, all have at least one factor in common—all involve questions of claims to territorial jurisdiction over coastal waters. The concept of territorial waters is one of the most well established in international law today, and yet no other concept is so widely disputed or has so many conflicting interpretations applied to it. Despite many attempts at settlement, no really acceptable definition or limit to national claims over coastal waters has ever been reached. It is the purpose of this comment to explore the various facets of the problem thus presented, including the history and background of the problem, the theories relating to freedom of the seas and national claims to portions of those seas, and the attempts in this century to reach a settlement. Finally an attempt will be made to present a possible solution to the problem, if indeed there is such a solution.

Before proceeding further, it is necessary to define and understand the terms which will be used throughout this comment. International law today generally recognizes three broad divisions of the waters of the earth, i.e., inland waters, territorial waters, and the high seas.\(^5\) The inland waters

\(^1\) The question of Israeli rights to use the Strait of Tiran is one of the central questions which must be settled before there can be any satisfactory peace in the Middle East. For a general discussion of the problems, see, e.g., Salans, *Gulf of Aqaba and Strait of Tiran: Troubled Waters*, 94 U.S. NAV. INST. PROC. 54 (1968); Barrett, *United Nations Peacekeeping*, 91 U.S. NAV. INST. PROC. 37 (1965); Cagle, *The Gulf of Aqaba—Trigger for Conflict*, 85 U.S. NAV. INST. PROC. 75 (1919).

\(^2\) *Newsweek*, Mar. 22, 1968, at 13. The United States did not attempt to refute the North Korean claim to a twelve mile limit, but based its protest of the seizure of the vessel on the fact that there had been no violation of such waters. See, e.g., *Newsweek*, Dec. 30, 1968, at 30; *Newsweek*, Jan. 6, 1969, at 28.

\(^3\) *Newsweek*, Feb. 24, 1969, at 50.

\(^4\) Id.

of a nation "comprise all the water areas, salt and fresh, which lie within the base line of territorial waters." The main feature of all inland waters is that, legally, the nation owning them has the same sovereignty over them that it has over land areas within its borders. The only limits on the rights of the "owning" nation are those that it voluntarily surrenders by treaty or other agreement, and these treaty limits are in fact manifestations of sovereign rights.

The territorial waters of a state extend outward from the limits of the inland water/shore line of a coastal state. As will be seen in later sections, the extent of the territorial waters vary from nation to nation, but no nation claims less than three nautical miles. Generally, a coastal nation possesses the same sovereign rights in territorial waters that it has in its inland waters, the main difference being that territorial waters are subject to a right of free and innocent passage by merchant vessels of other nations. Ships passing through this belt must conform to the laws and regulations of the state claiming the waters and are within that nation's jurisdiction, but nevertheless they do have the right to pass.

The term high seas comprises all the waters of the earth beyond the limits of territorial waters. With the exception of certain rules and laws established by international agreement, the high seas are completely free of any form of control, and international law recognizes no rights of any particular nation in the high seas. All vessels, both commercial and military, have a right to use the high seas and are subject only to the jurisdiction and laws of the nation of that vessel's nationality.

In recent years, what may be considered a fourth classification of the seas, commonly known as the "contiguous zone," has arisen. These zones lie outside a belt normally claimed as territorial waters in what is normally part of the high seas, but comprise areas in which a nation claims certain rights and privileges less than those of territorial rights. Such claims usually relate to such activities as fishing controls and rights, customs enforcement, and defense interests. Many of the more recent problems relating to territorial seas have arisen in this field of the law and will be discussed at a later point.

II. BACKGROUND: GENERAL DEVELOPMENT OF THE LAW OF THE SEA

A. Sources Of The Law Of The Sea

The law of the sea, like virtually all other intersectional law, has two

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8 H. Smith, supra note 5, at 6.
9 Id.
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main sources—custom and treaty. Customary international law has been defined as follows:

Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law.

Customary law has from the dawn of history proven to be by far the greatest source of the law of the sea. However, whenever a sufficient body of customary international law has developed, it is often formalized by treaty or convention, a process that has become increasingly frequent in recent years. The importance of the treaty developed law is its more binding nature.

There have, of course, been other sources of the law of the sea, such as decisions of national or international courts and arbitrators, the opinions of publicists, and even the consequences of war. Yet even these sources are generally rooted in custom or prior agreement.

While it is clear that the law of the sea has developed from a number of sources, it should be remembered in considering the following sections that whatever the source of the rules, it is the interests of the maritime nations that ultimately controls. Freedom of the seas, for example, is a natural result of the interest in the free flow of commerce between nations with a minimum of friction and danger. At the same time, the concept of territorial waters, a concept in direct opposition to freedom of the seas, is an outgrowth of national interests in military security and other commercial interests. Therefore, the law of the sea contains two diametrically opposed but coexisting concepts. Both have the same ultimate source—the interests of coastal and maritime nations—and those interests are at the bottom of the points presented below. But whatever its source, the law of the sea is far from settled; it remains an active and dynamic field, changing and growing as the interests of nations change.

B. THE BEGINNINGS OF THE LAW OF THE SEA—THE MEDITERRANEAN

The origins of the first rules of the law of the sea are lost in history, except as those rules have been adopted by later civilizations as customary law. It is reasonably clear that many ancient Mediterranean peoples and nations considered the sea free and open to any legal and legitimate use.
There is some evidence that the maritime nations of antiquity had at least a limited concept of territorial jurisdiction over coastal waters.\(^{19}\)

The earliest comprehensive code of the law of the sea that has survived is known as the *Rhodian Maritime Code*.\(^{21}\) Rhodes conducted some of the most widespread and comprehensive maritime commerce in the ancient world, and, thus it is to be expected that they would have developed a successful code of sea law. The general consensus is that the greater part of our modern admiralty law has descended from that code.\(^{22}\) The *Rhodian Code* passed on to us through Roman law, the basis of modern international law of the sea and private admiralty law.\(^{23}\)

The important factor of the *Rhodian Code* is that it recognized the right of all nations to use the seas for legitimate commerce, and this right was made a part of Roman law.\(^{24}\) Rome exercised a broad measure of control over the Mediterranean and adjacent seas, but *did not claim exclusive ownership thereof*. As stated by one author:

[Rome's] claim was not expanded into a claim involving any sort of property right in the sea itself; the claim to *imperium* was not developed into a claim of *dominium*. Beyond this, positive evidence exists that . . . at least during the period of Roman greatness . . . the sea, and the fish in it, were open or common to all men, for their use. . . .\(^{25}\)

While it is true that during this period there was no serious challenge to Rome's power over the seas, this does not detract from the importance of the influence of Roman concepts on our modern law. The significant point is that even while one power reigned supreme, there was no claim on the seas beyond the right to police them "for the public good,"\(^{26}\) and this is to a large extent the main feature of maritime law today. It is also important to note that while Rome did not claim ownership of the seas, national interests did not require such a claim, nor was there a need to claim any rights in specific territorial waters as distinct from the high seas.

With the collapse of the Roman empire, law, both national and international, virtually ceased to exist. From this time until about the mid-Fifteenth Century, there was no law of the sea beyond survival of the fittest.\(^{27}\) Thus, a highly developed and established body of law relating to the seas was lost for almost a thousand years, until necessity required its resurrection.

\(^{19}\) Id. at 567. Carthage, for example, is known to have restricted severely the use of her port by foreign vessels, while the city-state of Rhodes encouraged the use of what she considered her own waters.

\(^{21}\) Id. at 565.

\(^{22}\) Id. at 566-68.

\(^{23}\) Id.

\(^{24}\) Id. at 562.


\(^{26}\) Gornley, *supra* note 21, at 572.

\(^{27}\) It can be said that there was something of a freedom of the seas by default. There were no national navies in Europe during this period and a merchant ship would become a temporary pirate if profitable at the moment. There actually was little need for any body of sea law since trade was irregular at best, and of no real importance for several centuries.
C. After The Middle Ages: Again A Free Sea

Before proceeding with a detailed analysis of the development of the legal position of the territorial sea in modern times, a brief background of the basic concept of freedom of the seas is necessary. A number of early ideas relating to territorial waters, and many of the conflicts relating thereto, arise from theories of the law of the sea as developed in earlier periods. As one author states the problem:

Much of the confusion concerning the breadth of the territorial sea and its role can be attributed to an incomplete understanding of the high seas as *res communis* and of the relation of that concept to the various claims to limited jurisdiction which were asserted during the two or three centuries prior to the establishment of the modern territorial sea.²⁸

Any knowledge of the history of the period of time covered in this section will show clearly the tremendous influence of self interest of nations on international law. The various theories adopted by the maritime nations and the changes in those theories are a result of the following major factors, among others:

1) The relative naval power of the nations involved and their abilities to assert their influence at sea.

2) The importance of seaborne commerce to the economy of the nations involved.

3) The alterations in the "balance of power" on the European continent and changes in the various alliances.²⁹

Among other factors which played a part were the religious relations and disputes during the period of the Reformation, the growth of international law in general, the tremendous growth in seaborne trade and exploration, and the increasing importance of the "new world" and colonial growth.³⁰

General practice in the late Fifteenth and early Sixteenth Centuries was based largely on the theory that the seas were *res nullius* and subject to unilateral appropriation by any nation.³¹ For example, Spain and Portugal, the great seapowers of that time period, bitterly disputed which of the two "owned" the Atlantic Ocean.³² At this time, the nations who asserted "ownership" were well able to enforce their claims.

It was not until the mid-Sixteenth Century that serious opposition to the above claims arose. First, the King of Poland was able to effectively dispute the Danish-Norwegian claims to the North Atlantic.³³ In 1580, a

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²⁸ Heizen, *supra* note 12, at 598.
²⁹ Id. at 7-8.
³¹ As between these two nations, the argument was settled when Pope Alexander VI set a line of demarcation in 1493, dividing the world and its oceans between the two great Catholic Powers. In order to prevent, or at least lessen, friction between the two great Catholic powers of the age, the Pope issued a Bull on 4 May 1493 dividing the oceans of the world and all "new lands" between the two. The dividing line was later altered by the Treaty of Tordesillas of 7 June 1494. The Papal Bull and the treaty later became the basis for many Spanish and Portuguese claims and disputes in the East Indies. Needless to say, other nations paid no attention to such claims. See W. Schurz, *The Manila Galleon* 287-302 (1939).
³² Id. See also Heizen, *supra* note 12, at 598. The King of Poland was able to establish an alliance of interested nations, notably with the Hanseatic League, which gave the power to dispute the claim.
more widespread and lasting event took place. Spain, stung by the "privateering" activities of Sir Francis Drake and other English captains, demanded of Elizabeth I of England a cessation of all activities hostile to Spanish interests on the seas. Elizabeth reportedly answered the Spanish demands by stating that:

[T]he use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof. Thus was given one of the first clear statements on freedom of the seas since the end of Roman power in the Mediterraean.

A few years later, in 1602, England refuted the Danish-Norwegian theory of dominium based on the idea "that for the property of a whole sea it is sufficient to have the banks on both sides, as in rivers." In refuting the Danish claim, England declared:

[T]hat through property of sea, in some small distance from the coast, may yield some oversight and jurisdiction, yet use not princes to forbid passing or fishing . . . the which by Law of Nations cannot be forbidden ordinarily; neither is it to be allowed that property of sea in whatsoever distance is consequent to the banks, as it happeneth in small rivers. For then, by like reason, the half of every sea should be appropriated to the next bank, . . . where the banks are proper to divers men; whereby it would follow that no sea were common, the banks on every side being in the property of one or other; wherefore there remaineth no colour that Denmark may claim any property in those seas. . . .

It should be noted that the above statement briefly referred to the idea that nations could claim some property rights in coastal waters. The statement also indicates recognition of a legal theory that will be expanded in the following section—that national claims to navigable waters can be divided into three main groups—inland waters, coastal waters, and the high seas.

In 1609, the first legal treatise concerning the law of the sea of any consequence, Mare Librum, was written and published by Hugo Grotius. Clearly advancing the interests of his native Holland, Grotius fully supported the Elizabethan theory that the seas are res communis and not subject to unilateral appropriation by any nation. In preparing this work of tremendous importance, long used as a standard source of sea law, Grotius drew heavily on the Rhodian/Roman law and current Mediter-

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34 These various captains were both privateers and pirates, depending on the circumstances and whoever was making the claim at the time. England's government officially denied any connection, but protected the individuals concerned and often issued letters of marque to attack Spanish shipping even though England and Spain were not at war at the time.

35 Heizen, supra note 12, at 599 citing Fulton, supra note 31, at 107.

36 Elizabeth's words took on a more forceful meaning when, in 1588, the weather and English guns smashed the Spanish Armada and broke Spanish control of the seas.

37 Heizen, supra note 12, at 599 citing Fulton, supra note 31, at 111.

38 Id.

39 See section I, supra.

40 Grotius, On the Freedom of the Seas (Hogoffin, ed. & trans. 1916). For an analysis of this work, see Gormley, supra note 21, and sources cited therein.

41 Id.
ranian practice for his theories. Therefore, the Dutch, and later even the French, Spanish, and Portuguese, joined the ranks of maritime nations adhering to the legal principle of freedom of the seas.

Thus, by the middle of the Seventeenth Century the major maritime nations, in the interests of their fishermen, their seaborne commerce, and their naval power, had clearly settled on the most important retreat and conflict from time to time. Even at this time, however, there was clear evidence in diplomatic correspondence and other sources that certain areas of the sea were, and of necessity should be, subject to some measure of control and domination by individual nations.

D. The Early Territorial Sea

For nearly two centuries following the acceptance of freedom of the seas, the questions of what areas of the sea were in fact subject to national control and just what controls could be imposed continued to be debated. Ultimately, two general practices developed which later coalesced and developed into the modern territorial sea.

1. The Canon-Shot Rule

For many years the popularly accepted theory was that of the Dutch jurist Bynkershoek concerning the extent of territorial seas. Bynkershoek, in Den Domino Maris Dissertatio, reasoned that a state's dominion of the sea "ends where the power of arms ends." Thus, it was reasoned that, since the shore-based cannon of the period had a range of approximately one marine league (three nautical miles), this was the maximum breadth of the sea that could be claimed by any nation. It was long assumed, therefore, that this "cannon-shot rule" was the rule establishing the territorial sea.

Recent research, however, has revealed that the cannon-shot rule was practiced long before Bynkershoek wrote his dissertation, and in a much different and narrower sense than as a definitive measure of the territorial sea and territorial rights. As practiced by most nations, the cannon-shot rule was a matter of actual control as opposed to theoretical legal control.

The cannon-shot rule, as it existed in the seventeenth- and eighteenth-century practice... merely provided that, for the purpose of preserving the neutrality of the coastal state, the range of guns actually stationed on the shore were under the protection of the coastal state [Emphasis added].

Thus, a nation effectively claimed only those areas of the sea that could actually be "occupied" by gunfire of shore batteries. Further, the idea

42 Gormley, supra note 21, at 587.
43 For a discussion of some of these periods of conflict, see Fulton, supra note 31, at 145-50.
44 Supra notes 41-43.
45 Heizen, supra note 12, at 602.
46 See generally, Svarlien, The Territorial Sea: A Quest for Uniformity, 15 U. Fla. L. Rev. 333 (1962); Heizen, supra note 12; C. Colombos, supra note 7, at §§ 102-03.
47 C. Colombos, supra note 7, at § 102.
48 Heizen, supra note 12, at 602-06.
49 Id. at 603.
50 Id.
that the cannon-shot rule gave a definite measurement of a marine league cannot be supported when one considers the ballistics of Seventeenth and Eighteenth Century artillery. The maximum range of the most powerful gun of the age was barely half of that distance, and the effective range rarely exceeded more than half a mile under the best of conditions, a fact not improved upon until late in the Nineteenth Century. 51

In reality, the cannon-shot rule was much more limited in scope than being an attempt to exercise full jurisdiction over a portion of the sea as if it were within the territorial boundaries of a particular nation. Its use did not, at least formally, give rise to attempts to control navigation of either commercial or war vessels through coastal waters, but was applied to the limited purpose of protecting neutrality in time of war by providing areas of "protection" for the ships of all belligerents, and then only when that protection could be enforced by cannon situated on the shore. 52

The importance of the cannon-shot rule is that it helped establish in the body of international law the legal proposition that in order to preserve certain national rights and interests, nations could exercise a measure of control over certain areas of coastal waters. Further, its acceptance encouraged the development of more comprehensive rules and controls as time passed.

2. Scandinavian Practice

At the time that the cannon-shot rule was being developed and practiced in most maritime nations, the Scandinavian countries of Denmark-Norway and Sweden were announcing and practicing a much broader and more comprehensive claim of territorial sovereignty over the seas. These nations seem to have been the first to establish a uniform belt of defined measure, running the entire length of the coast as a territorial sea.

Denmark-Norway at one time claimed a large part of the North Atlantic Ocean as a private territorial sea—an integral part of the national domain. 53 In the face of pressure and opposition from other nations, particularly Great Britain and Holland, Denmark retreated on this claim at various times to claims of limited jurisdiction, varying from a distance of two to four Norwegian leagues (six nautical miles), depending on the type of claim asserted. 54 Jurisdictional claims as to fishing rights were asserted (and disputed) up to four Norwegian leagues from the Danish coast, and in 1736 a decree was issued denying the right of any foreign vessel to approach to within four leagues of Greenland for the purpose of establishing a trade monopoly. 55 During the Seven Years War, the Danes claimed a neutrality zone of "one ordinary sea league" (then four nautical miles), such zone to consist of a uniform belt along the coast. 56 Several warring nations attempted to have Denmark accept the more limited cannon-shot

53 See section II(c) supra, and sources cited therein.
54 Heizen, supra note 12, at 606.
55 Id. at 606-08.
56 Id.
rule, then in practice in most of Europe, but did not push their efforts for fear that Denmark would enter the war. The four nautical mile neutrality zone remained in force, therefore, but only for the limited purpose of neutrality. Finally, about 1811, formal claims of full territorial sovereignty were applied to this same zone, to give Denmark a four mile territorial sea which exists to this day. Swedish practice seemingly paralleled Danish practice during this period of time. Sweden was the first nation to establish a territorial claim to the seas approximating the modern territorial sea.

Just what effect the practice of the Scandinavian nations had on the development of the territorial sea of today is impossible to tell. It is logical to assume, however, that the effect was considerable. In the late Eighteenth and early Nineteenth Centuries, the cannon-shot rule was obviously inadequate to meet the needs of the nations which had previously practiced it. As more and more attention was given the claim to sovereign rights in coastal waters, it can be assumed that the various coastal nations looked to the long standing practice of Denmark and Sweden in formulating their own claims.

3. Nineteenth Century Practice

The Napoleonic Wars seem to have been the spark that started most nations on the path of adopting modern territorial seas. As with the cannon-shot rule and Scandinavian claims, the actions of these nations were rooted in the establishment of neutrality zones in a war, or series of wars, which were largely decided at sea. In 1793, the United States found it necessary to declare a neutrality zone along the entire length of its coastline, the zone being a marine league of three nautical miles from the coast. In the notes to the British and French ministers in which the declaration of the zone was declared, the use of such claims by other nations was noted, and it was stated that the three mile limit was provisional and the right to alter it was reserved. It is unclear why the marine league was chosen by the United States, but it is generally accepted that it was merely a measure of convenience and one that would not be seriously disputed by other nations. This neutrality zone became firmly established in 1794, when a statute was passed providing in part that “the district courts shall take cognizance of complaints . . . in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.” In 1807, an attempt was made to establish a neutrality

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57 Neutrality and neutrality zones carry heavy burdens in many instances. The neutral nation is, for example, under an absolute duty to protect the vessels of either belligerent nation from those of the other, by force if necessary. Further, neutrals are obligated to control the actions of any belligerent warship while in their waters. The dangers inherent in such a position can be seen when one looks at the position of Norway in the early months of the Second World War when that nation was forced to protect German shipping passing through its waters and at the same time liberate British and other nations vessels seized by the Germans. Norwegian actions led ultimately to invasion by Germany, though the actions taken as a neutral were not the only factors considered by Germany.

58 Carlisle, supra note 13, at 26. See also Heizen, supra note 12, at 615-16.

59 Id.

60 Id.

61 Act of June 5, 1794, ch. 50, § 6, 1 Stat. 384 (1845).
zone of five nautical miles by a treaty with Great Britain, but the attempt failed in both nations. Ever since that time, the United States has practiced the use of the three mile limit to territorial waters, though, as will be seen, wider distances were used for particular purposes, such as fishing. In 1862, the United States' position was reaffirmed by Secretary of State Seward, who stated that "this Government adheres to, recognizes and insists upon the principle that the maritime jurisdiction of any nation covers a full marine league from its coast." Finally, the United States Supreme Court held that the jurisdiction and hence all laws of the United States, by law and tradition extended to "a marginal belt of the sea extending from the coast-line outward a marine league or three geographical miles."

Great Britain, and through her most of the Commonwealth nations, adopted the three mile limit largely through a process of assimilation and expansion of the cannon-shot rule. The rule formed the basis for the claims in the seas in The Anna in which it was said, following a discussion of the cannon-shot rule, that the boundary of territorial waters was recognized to be three miles. The same rule and measurement were reaffirmed in a series of later cases involving international law.

With the adoption of the three mile territorial sea belt by the United States and Great Britain, other coastal states rapidly followed suit, including Germany, France, the Netherlands, China, and most Commonwealth nations. Thus, by the beginning of the Twentieth Century the legal concept of the territorial sea was well established in international law. Most nations accepted and adopted the one marine league of three nautical miles as the measurement, while a few nations claimed the four nautical mile German league, and a few nations made claims of up to twelve nautical miles. At this time, it also became evident that much broader claims were being made by most nations for particular purposes such as customs and smuggling control, fishing control, and movements of naval vessels.

Also at this time, there arose two general theories as to the degree of sovereignty which could be exercised by the claiming nation. One school asserted that the shore state had actual and full ownership of coastal waters, with all of the rights and obligations which go with the owner-

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65 See generally C. Colombos, supra note 7, at §§ 692-93.
66 See sections III and IV, infra.
67 Note to Secretary of the Navy Welles, 4 Aug. 1862, in 1 Moore, Digest of International Law 705 (1906).
69 C. Colombos, supra note 7, at §§ 105-08.
70 [1805] 5 C. Rob. 373, 385 c.
71 Stetson v. United States (The Alabama Claims), 4 Moore, International Arbitrations 4332 (1929); Gann v. The Free Fisheries of Whitesable, [1865] 11 H. of L. Cases 192. However, there remained a conflict between international law and British municipal law, in that the common law and equity courts extended their jurisdiction only to the low water mark on the coast, and refused to concern themselves with matters occurring beyond that point unless the events took place aboard a British vessel. C. Colombos, supra note 7, at § 105. This dispute resulted in the enactment of The Territorial Waters Jurisdiction Act of 1878, 41 & 42 Vict. c. 73 (1878), which declared that all coastal waters within one marine league of the British coast were part of Britain's territorial domain.
72 See generally Heinzen, supra note 12, at 615-19; H. Smith, supra note 5, at 69-78.
ship of territory. The other school claimed that the territorial sea remained primarily a part of the high seas, subject only to limited rights in the coastal state. The controversy was largely academic and there was little difference in actual practice, whichever theory was applied. It does, however, demonstrate the fact that there remained serious questions and undecided issues among nations claiming territorial seas, and early in the Twentieth Century, these nations finally began to make serious efforts to reach a common settlement on the problems involved.

III. THE LOCATION OF THE TERRITORIAL SEA BELT

As mentioned in an earlier section, there are three major divisions of the sea—inland waters, territorial waters, and the high seas. The location of each, particularly the territorial sea, requires the determination of two borders known as base lines, one between inland waters and territorial waters, and another between territorial waters and the high seas. While at first glance the fixing of these base lines would seem to be merely a process of drawing a line parallel to a nation’s coast, such is not the case. In fact, the process is very often difficult and involves claims and disputes over substantial areas of the sea.

A. Inland Waters/Territorial Waters Base Line Determination

In locations where the coastline is reasonably regular, without offshore islands or indentations which are unusually deep in relation to their width, (such as Start Bay on the English coast), the general rule is that the base line for inland waters is the low-water line along that portion of the coast. This is the rule adopted in 1958 in the Convention on the Territorial Sea and the Contiguous Zones. The low water mark in such cases is determined "as marked on large-scale charts officially recognized by the coastal State."

Difficulties arise along coasts which are rough and deeply indented, such as the coasts of Norway, Greece, and Scotland. Conflicts arise from the natural desire of a nation to claim as inland waters those bodies which are enclosed substantially within its land territory, and the opposition of those asserting that such claims encroach illegally on the high seas. In areas of a sea coast with such a rough configuration, the general practice is to use a series of artificial lines drawn through a series of selected base points along the coast. In many cases, this involves the use of headlands as base points, thus making many indentations in a coast subject to the regime of inland waters. This is the method commonly used by the Scandinavian

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71 H. SMITH, supra note 5, at 9.
72 Id. at 10-11.
73 See section I, supra.
74 Id. at § 133; H. SMITH, supra note 5, at 7.
76 Id. See also C. COLOMBROS, supra note 7, at § 133.
77 H. SMITH, supra note 5, at 7.
countries, and where the indentation is very narrow in relation to its depth, there are seldom serious complaints. 78

The procedure used by the United States is more representative of most nations. The Code of Federal Regulations provides in part:

At all buoyed entrances from seaward to bays, sounds, rivers, or other estuaries for which specific lines are not described in this part, the waters inshore of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation or any system of aids, are inland waters. . . 79

This procedure has the effect of enclosing a greater expanse of waters within the inland classification, and also has the advantage of providing a fairly definite and easily ascertainable line from the point of view of navigation.

The Convention on Territorial Seas and the Contiguous Zones adopts a procedure that, effectively, allows any reasonable method of determining the inner base line in cases in which the low water mark is inadequate. Article 4 of the Convention states that:

(1) In localities where the coast line is deeply indented and cut into, or there is a fringe of islands along the coast in its immediate vicinity, the method of straight base-lines joining appropriate points may be employed in drawing the base-line from which the breadth of the territorial sea is measured. 80

This article goes on to provide that the straight line method must bear some close relation to the actual direction of the coast, and that waters lying inside of that base line must be so closely linked to the adjacent land areas as to "be subject to the regime of internal waters." 81 In drawing the straight base lines, the Convention, taking a practical approach, allows a nation to take into consideration its own peculiar economic interests, though those interests and the resulting base lines must be supported by long established customs and usage. 82 A further protection is provided in that, if the straight base line method encloses areas traditionally considered high seas, a right of innocent passage is reserved for all merchant vessels, though in all other respects the inland waters regime is applicable. 83 Thus, the Convention attempts to reach a middle ground in establishing methods for determining base lines weighing the practical problems facing nations, such as Norway with its deep and narrow fiords, against the rights of other nations to use the high seas. The procedures presented above for determining the inner base line, and those presented below for the outer base line, while applicable in most cases, do not provide answers for special situations such as major bays and islands, and discussion of these situations will be presented later.

79 14 C.F.R. § 82.2 (1964).
80 Convention on the Territorial Seas, art. 4.
81 Id.
82 Id.
83 For a discussion of innocent passage, see section III infra.
There are two widely accepted methods for determining the location of the outer base line of the territorial sea. The first and most easily applied and popular method is that which was adopted in the Convention on Territorial Seas. This method simply requires that a line be drawn parallel to the inner base line at a distance equal to that claimed as the width of the territorial sea. Article 6 of the Convention declares that the outer base line "is the line every point of which is at a distance from the nearest point of the base line equal to the breadth of the territorial sea." This procedure provides a territorial sea belt of uniform breadth along an entire coastline, and effectively requires the determination of only one base line, the inner.

The second method, commonly called the "double circle" or "arcs of circles" method, is generally used in those instances where the straight line method of determining the inner base line is used, that is, when the coastline is rough and indented. The method consists of the drawing of arcs with a radius equal to that of the width of territorial sea claimed from recognized base points along the coast. A line is then drawn through the points where the arcs intersect, and the resulting lines form the outer limit of the territorial sea. Unlike the parallel line, the arc of circles does not give a uniform territorial sea. The width will vary in distance from the shore depending on the location of the various base points chosen.

In 1951, the International Court of Justice, in the Fisheries Case, was presented with the problem of determining which of the above two methods was the better. The case involved a dispute between Great Britain and Norway over certain fishing areas off of the coast of and claimed by Norway. In a split decision the Court decided that the straight line method was the most applicable in the case presented. The decision was qualified, however, by the fact that Norway had established her right to use this method by long custom and usage, and that otherwise the borders thus determined covered a larger area than normally recognized as permissible claims to territorial waters. The dissenting judges preferred the position of Great Britain and would have applied the low water mark as the inner base line with a line parallel to that as the outer.

The decision in the Fisheries Case was widely criticized as a departure from the traditional method of using the low water mark as the determinant of the territorial sea and thus allowing encroachment on the high seas. An analysis of the decision refutes the criticisms raised because the Court clearly stated that the decision was based largely on the exceptionally rough nature of the Norwegian coast. Further, no nation can effectively claim unnecessarily large areas of the sea since the validity of such claims

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84 Convention on the Territorial Seas, art. 6.
85 H. Smith, supra note 5, at 8; C. Colombos, supra note 7, at § 125.
86 Id.
88 Id. See also C. Colombos, supra note 7, at § 126.
89 Id.
90 Id.
91 C. Colombos, supra note 7, at § 128.
"with regard to other States depends upon international law," and international law really depends upon the acceptance of such claims by other nations. The appropriateness of the International Court's decision in the *Fisheries Case* was soon recognized by most nations and the straight line method, with appropriate safeguards, was adopted seven years later in the Convention on Territorial Seas.

C. Determining Base Lines In Special Cases

1. Islands

Serious questions as to the location of base lines and territorial seas arise in the case of offshore islands. In those cases in which the island is within the limit claimed by the owning nation, i.e., when a nation claims a three mile limit the island is within three miles of the mainland, the belt of waters around it will constitute the territorial sea. In other words, in that case, the island carries no territorial seas of its own. This rule is subject to modification, however, when the straight line method of determining the inner base line is used since the island itself may be considered as one of the base points, making it, effectively, part of the mainland. If the island is outside the territorial belt claimed by a nation, it is generally considered to carry with it a territorial sea of its own. It is generally agreed that rocks and banks which are exposed only at low tide do not constitute islands and carry no territorial belt of their own. A further point is that many nations claim that where the territorial belt of an offshore island merges with that of the mainland, the area between the island and the mainland is an area of internal waters and that the territorial belt runs around the outer portion of the island.

Archipelagos present their own special problems. If a group of islands is historically considered an archipelago for the purposes of determining the territorial belt, the entire body of islands is considered as one unit, and the inner base line is a series of straight lines from the outermost points of the islands. The waters enclosed within the polygon thus formed are considered internal waters. If the group of islands are determined to be too far apart to form an effective archipelago, then each island is considered to have its own territorial water belt.

2. Bays and Gulfs

There is no single, definite rule applicable to the measurement of the territorial claim in bays and gulfs because of the importance attached to historic and prescriptive considerations in each particular case. One very general rule is recognized, however, in that indentations in the land that are relatively narrow, generally six miles or less in width at the opening,
are universally considered to be inland waters, with the inner base line measured from headland to headland.\textsuperscript{98}

The first serious attempt to establish a common rule of international law for the measurement of territorial claims to bays that could not otherwise be considered inland waters came in 1894 at the Institute of International Law. For bays twelve nautical miles or less in width at their opening, the Institute adopted the rule of establishing the base line from headland to headland.\textsuperscript{99} For larger bays, the Institute agreed that the base lines, both inner and outer, should follow the sinuosities of the coast, "unless a continuous usage of long standing has sanctioned a greater width" than the twelve miles for the straight line measurement.\textsuperscript{100} The question was again considered in the International Law Association Conference at Vienna, in 1926, and the same basic rule was adopted.\textsuperscript{101}

The limits that should be applied to bays next arose in 1951 in the Fisheries Case, where the International Court refused to adopt any set rule, since none of the procedures presented above had acquired the authority of customary international law.\textsuperscript{102} Instead, the court stated that a nation must determine for itself what claims should be made, local conditions dictating the results, and then that nation had the duty of showing that its claim was justified as a departure from the general rule that the territorial belt must follow the coastline.\textsuperscript{103} The problem remains the same today. The attempts at reaching a settled rule in the Convention on Territorial Seas in 1958 was largely a failure, and generally the question was left to the claiming states to settle among themselves by interpreting the provisions of the Convention.\textsuperscript{104} What has resulted, at least in the United States and Great Britain, is an interpretation which gives a twenty-four mile closing line from headland to headland, anything larger requiring a line following the sinuosities of the coast.\textsuperscript{105}

Thus, there can be no precise answer to the question of how a base line is drawn in a bay situation. Seemingly the problems peculiar to each bay will have to be settled individually as disputes arise, largely on the basis of historical claims and the ability to assert those claims. For example, the position as regards Chesapeake Bay in the United States arose in the The Alabama claims following the War Between The States.\textsuperscript{106} The case arose out of the sinking of the merchant vessel The Alleganean by the C.S.S. Alabama within the bay. It was determined that the sinking occurred

\textsuperscript{98} Id. at § 183.
\textsuperscript{99} C. Colombus, \textit{supra} note 7, at § 110.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} [1911] I.J.C. at 131.
\textsuperscript{103} Id. at 164-65.
\textsuperscript{104} H. Smith, \textit{supra} note 5, at 12.
\textsuperscript{106} 4 Moore, \textit{supra} note 77, at 4332 et. seq. The Alabama Claims arose as a result of captures of U.S. merchant vessels during the War Between the States by the Confederate raider C.S.S. Alabama. The United States and the merchants concerned claimed reparations from Great Britain for the losses thus suffered, claiming that Britain had breached her neutrality by building the Alabama for the Confederacy and then allowing the ship to "escape" to international waters, where she was then armed and commissioned as a warship.
within the territorial waters of the United States since the bay "from the earliest history of the country has been claimed to be territorial waters and that the claim has never been questioned."\(^{107}\)

The present state of the base line situation seems to be that most nations will draw the inner base line from headland to headland where the width at those points does not exceed twenty-four miles (other measures may have been established by convention or treaty). Where the headlands are farther apart than that distance, the inner and outer base lines will follow the course of the coast itself. However, if a nation can show that it has historically claimed a different territorial sea in that gulf or bay, and that claim has never been seriously disputed, then the historical claim will be allowed to stand.

3. Inland Lakes and Seas

Completely land locked bodies of water seldom cause any serious problems since there is little trouble in showing that they constitute inland waters. Troubles arise, however, when two or more nations border on an inland sea or lake. Unless agreement can be reached as to the limits of the boundaries of each, the general rules applied and discussed above for coastal states on the oceans will apply.\(^{106}\) Generally, where only two nations border the body of water in question, agreement will establish the line of demarcation through the middle of that body, such as with the Great Lakes between Canada and the United States.\(^{106}\) In those cases where a larger number of nations border on the same body of water, or where that body is widely used for navigation purposes, and there is an outlet to the high seas, international conventions generally allow freedom of navigation to all nations, applying a rule of innocent passage as with normal territorial waters.\(^{106}\) Even where the outlet is bounded on both sides by the same State, as with the Straits of Kertch, the general rule is that there is a right of innocent passage, at least in times of peace.\(^{111}\)

IV. Legal Rights in the Territorial Sea

The entire concept of the territorial sea is built on the idea that a coastal nation, for various reasons, is entitled to certain special rights in an area of the seas off of its shores. Today, all countries recognize at least a three nautical mile limit, though many claims go beyond this distance.

A. The Extent Of Jurisdiction

As noted in the previous section, two schools of thought existed at the beginning of the Twentieth Century as to the nature of the relationship

\(^{107}\) Id.

\(^{106}\) C. Colombos, supra note 7, at § 194; H. Smith, supra note 5, at 12-15. For many years, this procedure was used by the United States and Great Britain on the Great Lakes between Canada and the United States until the entire border dispute was settled.

\(^{109}\) The settlement of the border dispute on the Lakes was part of a general settlement of the borders between the United States and Canada, a dispute which had never been settled following the United States War of Independence. The dispute was also part of the cause of the War of 1812.

\(^{111}\) Convention on the Territorial Seas, art. 1.

\(^{111}\) For a discussion of innocent passage, see section III, infra.
of the coastal state with its adjacent seas. One, the more widely accepted, held that the relationship is that of actual ownership, or the dominium theory of ancient times. The other school, basing its assertions on the idea that the territorial sea remained essentially a part of the high seas, claimed that the coastal belt was subject only to certain limited and well defined rights in the shore state. By the end of the first quarter of the Twentieth Century, the dominium theory was the accepted norm. In 1930, the first international conference on the territorial sea was convened by the League of Nations in an attempt to settle many of the disputes relating to the territorial sea. While generally unsuccessful in handling the major problems, one fact was made clear—almost all nations were in agreement that the territorial sea forms a part of the actual territory of the claiming coastal state.

The position taken at the 1930 conference was firmly established and reaffirmed at the Geneva Conference on the Territorial Seas and Contiguous Zones. Article 1 of the Convention, adopted by 86 nations, provides that "the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Commenting on this Article, the International Law Commission stated that "the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over the other parts of its territory." Thus, as applied today, the theory of the territorial sea is based entirely on the ancient dominium concept of territorial ownership by the claiming state. Like all rules of law, however, there are exceptions to the rule of absolute dominion, and the rights of the coastal state, as will be seen below, are subject to and limited to some extent by other norms of international law and convention.

National rights in airspace over territorial seas came into question with the growth of aviation following World War I. The Paris Conference of 1919 which resulted in the International Aerial Navigation Convention of 1919 stated that a nation had absolute sovereignty in the airspace over its territory, and included in the definition of territory those adjacent seas recognized as territorial waters. The same principle was repeated in the Pan American (Havana) Convention on Commercial Aviation of 1928 and the Convention on International Civil Aviation of 1944 (The Chicago Convention). Most nations supplemented the international agreements with pertinent national legislation claiming rights in airspace over territorial seas. The Air Commerce Act of 1926 of the United

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113 H. Smith, supra note 5, at 33.
114 Convention on the Territorial Seas, art. 1.
States provided in section 6 (a) that the United States has "complete and exclusive sovereignty . . . above those portions of the adjacent marginal high seas, bays, and lakes over which . . . the United States exercises national jurisdiction."\textsuperscript{110} The Federal Aviation Act of 1958\textsuperscript{121} accomplished the same end by including in its definition of sovereign, national territory "the territorial waters and the overlying airspace thereof."\textsuperscript{112} Similarly, the British Air Navigation Act of 1920\textsuperscript{122} states that sovereign jurisdiction "extends . . . over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto. . . ."\textsuperscript{113}

Recently, with the growth of the ability to develop its resources, even national rights in the seabed underlying territorial waters have come into question. It is generally agreed today that such areas of the seabed, just as the airspace above territorial waters, constitute part of the claiming nation's territory.\textsuperscript{123} The Convention on the Territorial Seas and the Contiguous Zones clearly recognized that a nation has territorial rights in that portion of the seabed underlying its territorial sea and has full rights to control and development.\textsuperscript{124} Today, problems arising from development of the resources of the seabed, as with problems relating to the territorial sea and airspace above it, come primarily from a lack of definition of the breadth of the territorial sea or contiguous zone claimed.

B. Types Of Jurisdiction Exercised

Generally, the rights of nations and the types of controls exercised over territorial waters have been divided into four broad categories:

(1) Jurisdiction over foreign vessels, both merchant ships and ships of war;
(2) police, customs, and revenue functions;
(3) fishery rights; and
(4) the establishment of defense and security zones.\textsuperscript{125}

In each of these categories, the statements given above relating to the nature of sovereign control and dominion of a nation in its territorial sea apply, with one exception, that of the right of innocent passage. The major point of dispute relating to the breadth of the territorial sea and the contiguous zones arise from interests in each category, and, as will be seen in the next section, such interests are inherent in the varying claims laid to territorial waters.

1. Jurisdiction over Foreign Vessels and the Right to Innocent Passage

A coastal state, being sovereign, has legislative power over its territorial sea and may prescribe rules and regulations governing the activities of any

\textsuperscript{110} Id.
\textsuperscript{113} 10 & 11 Geo. 5, c.80.
\textsuperscript{114} Id. at Preamble.
\textsuperscript{115} See, e.g., Comment, 19 Sw. L.J. 97 (1965) and sources cited therein.
\textsuperscript{121} See, e.g., Comment, 19 Sw. L.J. 97 (1965) and sources cited therein.
\textsuperscript{122} Convention on the Territorial Seas, art. 24.
vessel within that portion of the sea. In addition to specific rules and regulations relating to such matters as rules of the road, pilotage, and similar navigation and sailing requirements, foreign vessels are subject to the criminal and civil laws of the state into whose waters they enter. The rule commonly applied by the United States and Great Britain was clearly stated by the United States in *Cunard S. S. Co. v. Mellon* that:

[A] merchant ship of one country voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence just as with other objects within those limits. Of course, the local sovereign may out of consideration of public policy choose to forego the exertion of his jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in his discretion. France and a number of other nations, on the other hand, tend to adhere to a rather strict observance of the concept of the law of the flag, a rule whereby all questions relating to a vessel's internal and other affairs not affecting the interests of the territorial sea state are left to the authorities of the flag state. In practice, there is little difference in the outcomes of the two procedures. British and United States courts will assert jurisdiction, but will decline to render a decision on the basis of international comity and usage, deferring to the courts of the flag state. In the alternative, these courts will render a decision, but will apply the law of the flag state themselves. In cases which affect its own citizens or interests, the nation claiming the area of the sea in which the event took place will usually take full jurisdiction. There are no firm rules in such cases, however, and ultimately the decision as to whether or not to take jurisdiction is up to the authorities particularly concerned. What has been stated in the above paragraph applies equally to both persons and to the vessel itself.

There is one major exception to the general rule that a nation has absolute jurisdiction and control over its territorial waters and vessels therein, that exception being the international rule of innocent passage. The rule grew out of the concessions granted by nations claiming territorial seas in the past century in order to justify its right to control areas of the high seas. Basically, it provides that foreign vessels have a right of innocent passage in those areas of the sea normally used for the movement of seaborne commerce even though such areas are claimed as territorial seas by another nation. The passage includes the right to free and innocent movement, and the right to stop and weigh anchor so long as the stopping is incident to the normal conduct of navigation. Foreign vessels...
have the further right to enter territorial waters when compelled to do so by weather or other hazards of the sea. A nation claiming the territorial waters subject to innocent passage is not entitled under international law to levy tolls or duties for that passage beyond payment for special services rendered to the passing vessel. Even while in territorial waters on the basis of innocent passage, however, a merchant vessel must observe the laws, rules, and regulations of the nation claiming those waters. In time of war or other national emergency, a nation is generally recognized to have the right to limit or deny completely passage of merchant ships through portions of its territorial waters if reasonable grounds for such limits exist.

Whether or not warships have a right of innocent passage is still an open question. Unlike the situation of merchant vessels, there is no commercial interest involved and there may be danger at times to the nation whose waters are being used. International conferences and conventions have recognized the principle of innocent passage, but have refused to grant an absolute right. At best, the right of passage for a warship is granted only subject to special rules and regulations of the nation whose waters are being used. The requirements for the passage of warships vary from nation to nation. Some require at least notification of the intended passage while others require not only notice, but also actual authorization.

International law does attempt to distinguish between passage through a territorial straight connecting two portions of the high seas and passage through the territorial waters of a nation which do not form part of a strait. Where the strait in question opens on the unenclosed high seas on both sides, an absolute right of free passage is normally recognized for warships in peacetime. In the few cases where the strait opens into an "enclosed" sea, such as the Black Sea, international agreement usually limits the number of warships which can pass through the straits, except for those nations which have coasts on the enclosed sea. An example is the Montreux Convention of 1936 concerning the Dardanelles.

Unlike merchant ships, warships and other ships of state in foreign territorial waters do not become subject to the jurisdiction of the coastal state. This result is based on the theory that the warship forms a part of the territory of the nation whose flag it flies. While normally bound to follow rules of navigation and sailing, the warship cannot be seized
or interfered with in any manner by judicial proceeding. The United States Supreme Court in *The Schooner Exchange v. McFadden* was faced with the problem of determining the ownership of a vessel which had been illegally seized when used as a merchant vessel by her American owners and converted into a warship by her French captors. Chief Justice Marshall, in refusing to permit the seizure of the vessel by a United States admiralty court stated:

> It seems to the Court to be a principle of public law that national ships of war, entering the port of a friendly Power open for their reception, are to be considered as exempted by the consent of that Power from its jurisdiction.

The general rule seems to be that by admitting a foreign warship to its territorial waters, either impliedly or specifically, a nation waives any claim to jurisdiction. If a breach of a nation's laws are committed by a foreign warship, the only recourse, apparently, is to lodge a complaint with the nation owning that ship. As stated by the Institute of International Law in 1928, "[w]arships cannot form the subject of seizure . . . by any legal means whatsoever, or by any judicial procedure, [however, they must respect and obey] the local laws and regulations . . . relating to navigation, anchorage and sanitary police."

2. Other Legal Rights in the Territorial Sea

The other categories listed above, including police and revenue functions, fishery controls, and defense zones, will not be discussed in this section. The legal rights relative to each present no particular problems as such. The problems arise from attempts to expand the territorial sea or extend such rights to areas outside of the purely territorial sea, and will be discussed in the following section.

V. THE BREADTH OF THE TERRITORIAL SEA: NO SOLUTION IN SIGHT

As seen from prior sections, the primary values in the sea itself are the right to use the waters for transit and the right to develop and exploit the economic resources in and under the seas. Great progress has been made in establishing a workable and acceptable legal regime governing these values and rights through international conventions and treaties. Virtually every nation has, for example, accepted the doctrine of innocent passage for merchant vessels and many have extended the same right to vessels of war and state. Fishing disputes, such as those in the North Sea and the conflict between Great Britain and Iceland have been settled by treaty. Even in the area of development of the resources of the seabed,
progress has been made with little friction. In the issue of the breadth of the territorial sea, however, there has been a consistent failure to reach any sort of lasting agreement, and the differing views seem to grow farther apart with each attempt at settlement. There have been three major international conferences on the law of the sea and many smaller ones, but every one, despite progress in other areas, resulted in deadlock over the question of the breadth of the territorial sea. This section will attempt to present the basic reasons that such a deadlock exists today, even though the underlying reasons have been for the most part settled by more direct routes.

A. The 1930 Hague Conference

At the beginning of the Twentieth Century, most maritime nations accepted a limit of three nautical miles as the maximum extent of territorial waters, though at times several asserted wider claims without effect. Within a very few years, however, for numerous reasons, the situation had changed and many states extended their claims to distances varying from four to twelve nautical miles, some claiming absolute jurisdiction in these extended areas and some jurisdiction for limited purposes, usually fishing controls. The situation soon became so confused and so many conflicts arose that in 1930 the League of Nations called an international conference designed to settle and codify a general rule for the breadth of the territorial sea.

There was a general willingness among the 38 nations attending the conference to accept a three nautical mile limit for the actual territorial sea, though the Scandinavian countries asserted their historical four mile claim. The main point of conflict was the desire of many of the nations to include in the proposed code national rights to exercise limited jurisdiction in a zone contiguous to the territorial sea. The demands for the contiguous zones were intended primarily for protection of fishery rights and enforcement of customs laws. Several states, notably Great Britain and Australia, adhered to their long standing positions of refusing to recognize any kind of claim extending beyond three nautical miles. The delegates, despite long and hard efforts, were unable to reach any compromise, largely because of the unyielding stand taken by Great Britain, and the conference deadlocked and finally broke up without any result on the breadth of the territorial sea, though there was general agreement on the legal status and rights related to territorial waters.

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146 See Heinzen, supra note 12, at 629-37 for a discussion of state practice at this time.
147 See Conference for the Codification of Int'l Law, The Hague [1930], Minutes of the Second Committee at 123-27. See also, Heinzen, supra note 12, at 636-37.
148 The nations accepted the three mile limit without additional claims or recognition of claims of other nations to anything but three miles. Three of those states indicated that limited contiguous zones would be acceptable, and four others stated that they would give the matter consideration. Great Britain, Australia, and India, however, refused to even consider any claim beyond three miles for any purpose. Heinzen, supra note 12, at 637 n.176.
149 Id.
150 C. Colombos, supra note 7, at § 117.
B. Development And Practice Between 1930 And 1958

There was little serious effort among nations to establish a definite breadth for the territorial sea between 1930 and 1945 because of the unsettled international situation and the intervention of the Second World War. One point of importance during this period was the wider acceptance and recognition of the existence of contiguous zones. In 1945, for example, the United States, long a supporter of the position that the maximum territorial sea was three miles, declared that a fishing conservation zone existed outside of the three mile territorial waters of the United States. 154

In doing so, the United States stated that similar actions of other nations would be recognized up to a limit of twelve miles from the coast, but that no limit on rights to free use of the seas would be asserted or recognized in others. Almost at once, a number of other nations in the western hemisphere followed suit, although some went far beyond the twelve miles established by the United States. 155 Other nations extended their claims to similar zones, and some reasserted old claims. While in many cases there were protests, and later open conflict over such claims, most were recognized by most other nations, either formally or by de facto recognition through failure to protest effectively. 156

Another major factor which encouraged expanded claims to territorial seas or contiguous zones was the development of the technical abilities to profitably exploit the resources of the seabed. Again, the United States took the lead in declaring its position in this particular field, when in 1945, by Presidential Proclamation, claim was laid to the "natural resources of the . . . continental shelf beneath the high seas but contiguous to the coasts of the United States. . . ." 157 Again, several other nations evidently interpreted this action as a repudiation of an established rule of international law and quickly followed with claims that the full territorial sea was determined by the limits of the continental shelf. 158 The results were similar to those flowing from the United States' fishery proclamation of the same year, though not as widespread. Most nations refused to recognize such extensive territorial claims, though little effective action was taken to refute the claims.

Two other very important events occurred following World War II which, as will be seen, exerted and continue to exert a much greater influence on the problems of the territorial sea than would normally be expected. The first was the division of the nations of the world into the various political camps of the cold war. The constant threat of war, the development of new and deadlier weapons, and the use of economic war-

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155 Some of these nations, including Argentina, Chile, El Salvador, and Peru, went so far as to extend this claim to the waters overlying the entire continental shelf, a claim vigorously protested by the United States. See C. Colombos, supra note 7, at § 161.
156 In some areas, the situation deteriorated to the point of undeclared war, as in the Anglo-Icelandic and Anglo-Norwegian fishing disputes. See, e.g., sources cited in note 172 supra. The United States has extended such de facto recognition to the claims of Peru to a fishing zone of 200 nautical miles by paying fines levied on U.S. fishing boats seized in those waters, though payment was made with protest.
158 Comment, 19 Sw. L.J. 97, 109 (1965).
fare made the nations of the world take a very long look at their territorial sovereignty and integrity and gave increasing importance to the territorial sea. It also became increasingly difficult to reach any reasonable settlement as to the breadth of the territorial sea because of the problems inherent in getting two warring political camps to agree on anything of such world-wide importance. The second major development was the end of the so-called colonial era and the emergence of a large number of new nations. These nations were intent on asserting their newly-found political rights as members of the community of nations and were averse to agreeing to anything that was supported by former colonial masters, no matter how beneficial.

With the exception of a few very expanded and inflated claims immediately after the end of World War II, there was little actual change in the situation involving the measurement of the territorial sea proper. The United States and Great Britain led a small group of nations which denied any right to extend the territorial sea beyond three nautical miles.\(^{109}\) The greater number of maritime nations, however, varied their claims between four and twelve nautical miles, and it was generally accepted as a rule of international law that twelve miles was the maximum that could be legally claimed by any littoral state. The most important development during these years was the acceptance by most nations of the legal position of the contiguous zone in international law.

C. The 1958 and 1960 Geneva Conventions

In 1945, the task begun by the League of Nations in attempting to codify the laws of territorial waters devolved on the International Law Commission of the United Nations. In 1951, the Commission declared that the legal regime of the territorial sea was one of the most important matters needing codification in international law, and urged immediate action.\(^{106}\) Finally, in 1958, under the auspices of the United Nations, the first serious conference on the territorial sea since 1930 was convened in Geneva, Switzerland. Eighty-six nations participated in the conference, and in general, it was successful. Four conventions, one each on fisheries, the high seas, the continental shelf, and the territorial seas and contiguous zones were signed, and have all become effective.\(^{106}\) As in 1930, however, no satisfactory settlement could be reached on the breadth of the territorial sea, even though the major underlying problems had been solved to a great extent by the four conventions that were adopted.

1. Positions of the Attending Nations

The major maritime nations at the 1958 and 1960 Conferences displayed

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\(^{106}\) The United States did not assert its position with great force, as is indicated by the expansion of contiguous zones for fishing and development of the continental shelf. However, it did refuse to recognize any full claim to sovereignty which tended to restrict the mobility of its naval forces. See section IV(D)(4) and sources cited therein.


an unexpectedly conciliatory attitude and showed a definite desire to reach a compromise solution on the issue of the breadth of the territorial sea. Great Britain, departing from its usual stand of refusing to recognize any territorial sea claim beyond three nautical miles, put forth a proposal which read that:

(1) [T]he limit of the breadth of the territorial sea shall not extend beyond six miles. Extension to this limit shall not, however, affect existing rights of passage for aircraft and vessels . . . outside three miles . . .

The British proposal was not even seriously considered by most of the nations present, and was rapidly defeated.

The United States and Canada presented a compromise proposal which, it was hoped, would appeal not only to the nations supporting the British position, but would give its opponents at least a portion of their demands. The compromise plan thus submitted involved the same six mile territorial sea proposed by the British, but added an additional six mile contiguous zone for fishery control. The United States-Canadian proposal provided further that any nation which could show that it has historically fished in waters which were included in the territorial sea or contiguous zone of another state would be permitted to continue such action for a period of ten years. When no such practice could be shown by a nation, the concerned state could then claim exclusive jurisdiction in the six mile contiguous zone for fishing. Though a great many nations supported this proposal, the block voting of particular interest groups at the conference defeated attempts to obtain the two-thirds majority necessary for passage, even though at the 1960 Conference the proposal was within one vote of success.

Blocks of nations with particular common interests made it virtually impossible to reach a satisfactory solution at the conference. The Soviet block nations, a total of ten votes, were adamant in refusing to accept any limit that imposed a distance of less than twelve nautical miles for a true territorial sea. The second major bloc, and one which gave its support to the Soviet Union in 1960, was composed of the various Arab states, a total of eleven votes. The third discernible group was composed primarily of newly independent nations. The South American nations were joined by a few others to form a shifting and rather amorphous body of states which shared several characteristics. Basically, this group was made up of those nations which asserted particular economic interests which required the protection of extremely wide contiguous zones, often in excess of 200 nautical miles.

2. Situation at the End of the Conferences

The international situation at the end of the two conferences was one of even greater confusion than before. One definite result was the virtual
end of serious adherence to the traditional concept of the three mile limit. While a number of nations, including the United States, paid lip service to the traditional breadth, their actions clearly indicated that the general feeling was one of freedom to extend territorial waters and contiguous zones unilaterally. There were limits, however, to the freedoms taken by most nations, and the greater number did adhere to the doctrine that no territorial sea should extend beyond twelve nautical miles. The situation as it existed in 1958 after the end of the first conference and as it exists today was summed up by Max Sorensen:

The situation remains as [the International Law Commission] described it—state practice is not uniform and certain states object to a territorial sea wider than three miles. On the other hand, it also remains the position [of the] overwhelming majority of . . . Governments . . . that no state is entitled to extend its territorial sea beyond twelve miles. . . . It is fair to assume, however, that after the Conference, the three-mile limit can never again be taken into consideration as a possible element of any negotiated solution."

Even the United States, still proclaiming that it would recognize no claim of territorial waters beyond three miles in 1966 enacted legislation extending exclusive fishing rights to twelve miles. The act was accompanied by statements that the United States considered the right to extend exclusive fishing zones unilaterally to be established in international law, but only to a maximum of twelve miles.

Great Britain returned to a similar position on the three mile limit, but its stand on the contiguous zones was somewhat modified. While stating that the British government still considered unilateral extension of territorial seas and contiguous zones both unnecessary and improper, recognition would be given to claims of contiguous zones for the purpose of enforcement of customs, fiscal, and sanitary regulations. British recognition was conditioned, however, in that no claim beyond twelve miles would be recognized under any circumstances, and that any claim to a contiguous zone by another nation would have to be accompanied by a statement that no claim would be made to a territorial sea greater than three miles.

D. What Basis For Dispute?

The most commonly asserted bases for extension of territorial sea claims and the wide contiguous zones are enforcement of customs and fiscal laws, protection of fishery resources, and national security. The supporters of the severely limited territorial sea and contiguous zone rely on the need for free and efficient flow of seaborne commerce, efficient exploitation of the resources of the seas for all nations, and the problems presented to coastal states in terms of neutrality, police, and similar functions. An analysis of the points relied on discloses that they no longer have any real relevance.
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today, either because of surrounding circumstances or because of the settlements reached in various treaties and conventions.

1. Customs, Fiscal, and Police Functions

The importance of territorial sea claims to the enforcement of customs and fiscal laws has virtually disappeared from the scene in light of today's trade practices. Enforcement of anti-smuggling laws played a large role in the development of the concept of the territorial sea, but conditions have undergone a tremendous change since the smuggling days of the Eighteenth and Nineteenth Centuries. Nations no longer depend on customs as a primary source of income, and even the use of customs as a protective device for local industry has diminished in today's international commerce. The importance of the territorial sea to customs enforcement was a valid argument in an era when smuggling was carried on by the shipload in order to avoid restrictive tariffs and taxes, but the nature of today's commerce has made such actions largely unnecessary and has removed the tremendous profit from this form of bulk smuggling. Instead, smuggling has centered around small, highly valuable items, ranging from narcotics to diamonds, which are usually shipped in conjunction with legally transported cargos which go through the usual forms of customs controls. Finally, it is common practice today to use a contiguous zone for the enforcement of customs controls in those areas where wider distances are in fact required. Thus, customs enforcement can be carried on without imposing the restrictions on the high seas inherent in full territorial control.

Much the same can be said for enforcement of general police and safety controls as for customs. Generally, the rules of navigation and safety are controlled by international convention in areas outside of territorial waters, and special controls, such as required pilotage are seldom necessary even as far from the coast as three miles. Modern navigation aids and international controls in the police and safety field have made full territorial control both unnecessary and undesirable.\(^1\)

2. Protection of Fisheries

It is conceded that the fishing industry is often of vital importance to the economy of a coastal state. Therefore, there is support for the theory that a wider territorial sea is necessary to protect those interests. Closer analysis, however, reveals that even a twelve mile territorial claim with exclusive fishing rights would not significantly improve most national fishing industries when they are considered in relation to resources outside that distance.

The main desire of the states relying on wide territorial seas for fishery control is primarily the conservation of fishery resources and the development of their domestic fishing industries. Oddly enough, many states can only be hurt in the long run by such measures. Those states with a relatively small amount of coastline that attempt to exclude fishing by

\(^1\) See C. Colombos, supra note 7, at §§ 147-80.
other nations over very wide areas off their coasts will find similar action taken against their own fishermen. So long as fishing is plentiful inside the territorial area claimed, there is no difficulty for the claiming state, but should the fish migrate to other areas, these nations may well find their fishermen excluded from the most profitable areas by other nations which felt themselves forced to adopt similar protections. In those cases where the coastline is relatively long, few nations possess the resources and abilities to properly patrol and police the areas claimed.\textsuperscript{178}

The conservation argument ignores another major fact. Even if territorial claims were extended to twelve miles for fishery control by all nations, the greater portion of the seas would still be open to largely uncontrolled fishing. As high seas areas adjacent to territorial waters or even contiguous zones were heavily fished and depleted, the fish inside the boundary would tend to migrate out for a more even distribution, thus defeating the entire conservation program.\textsuperscript{179}

In a few cases, the assertion that resources need protection through a territorial sea bears no relation to reality. Libya, for example, extended its territorial sea to twelve miles claiming as the sole purpose the protection of its fisheries, which, it was stated at the 1958 Conference, formed a vital part of the economy and food supply of the entire nation.\textsuperscript{174} However, a United Nations research team had reported that

\begin{quote}
[0]ne of the factors which hinder the development of the fishing industry is the very low consumer demand [in Libya] . . . . Catches could easily be increased, since fish are abundant, but any increase is . . . . opposed by the local fishermen, because it would lead to lower prices.\textsuperscript{175}
\end{quote}

Russia too relies on the argument of fisheries protection in support of its twelve mile claim.\textsuperscript{176} Yet the greatest portion of the fish caught and consumed by the Soviet Union comes from areas outside the Soviet waters.\textsuperscript{177}

In fact, the Soviet Union is an excellent example of how minimum restrictions on fishing throughout the world can lead to the development of a fishing fleet; Russia's excellent and highly mechanized fishing fleets cruise the oceans of the world in pursuit of their catches.

Any effective conservation of the world's fishery resources, which would give at the same time maximum benefits to all nations, requires a limited use of contiguous zones in conjunction with an international convention. Such a convention did arise from the 1958 Conference,\textsuperscript{178} and most na-
tions showed a great desire to see it implemented. Most of the problems on which many states based their claims to extended territorial seas were settled by this Convention, and it appears that it was highly successful. Even in the few instances in which the peculiar problems of one state could not be solved by the provisions of the Convention, unilateral and multilateral treaties have gone a long way towards solving those problems. The main point is that for proper conservation and development of the sea’s fisheries and for maximum benefit for each nation, extended territorial seas present no answers, but in fact create additional problems. Further, with the adoption of the Fisheries Convention and its potential value, the argument that maximum territorial seas are necessary is not valid. Further, the legal rights and obligations that are inherent in full territorial claims in themselves have no value or relevance to the fisheries question at all.

The questions of rights in other resources of the sea, such as development of minerals in the seabed, have not been of much importance in the question of the breadth of the territorial sea. The prime reason thus far is that few nations have even made attempts to make economic use of such resources, and efficient development of any great degree lies in the future. But, because of the potential, these resources could present problems very similar to those presented by claims to fishery rights. Luckily, most nations at the 1958 and 1960 conferences recognized this fact, and the result was the Convention on the Continental Shelf and provisions in the Convention on the Territorial Seas and the Contiguous Zones for protection and development of such resources. Through the application and proper use of these two conventions, it is anticipated that undersea resources will not play an important part in any future questions on the territorial sea, though excessive claims to contiguous zones might raise other problems.

3. The Flow of Commerce

The main basis asserted by nations refusing to recognize extended territorial seas beyond approximately three miles is that this would interfere with the free and efficient flow of seaborne commerce. Under ordinary circumstances, this argument is obviously without a firm foundation. As has already been described, the well recognized right of innocent passage through territorial seas allows reasonable claims and enforcement of those claims without interference with commercial traffic. Admittedly, a nation could, if it desired, use its territorial claim to disrupt such traffic, but it is submitted that such action would take place with or without a problem of territorial rights if a nation felt such a procedure to be in its best interests. The right of innocent passage as recognized in international

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179 See, e.g., supra note 172 and sources cited therein.
180 See supra notes 87 & 92 and accompanying text.
181 See section IV (B) (1) supra.
law has been codified and even expanded in the Convention on Territorial Seas and the Contiguous Zones, and commerce should present no barrier to settlement of the question of the breadth of the territorial sea.\textsuperscript{182} Supporters of the flow of commerce theory point to situations in which nations have used the claim to territorial seas to further political motives through the cutting of commerce. The most obvious and glaring example of such an event occurred when the Arab states extended their territorial seas to twelve miles in order to "legally" deny use of the Straits of Tiran and the Gulf of Aqaba to Israel.\textsuperscript{183} In answer, it must be pointed out that such actions are rare today, and in all probability the same action would be taken no matter what territorial sea was claimed, as it was despite international guarantees to Israel of rights of passage.

4. National Security

It is submitted that the only rational basis remaining which can support the various disputed claims of nations to a proper breadth for a territorial sea is that of national security. It is further submitted that, as will be shown, even this field of interest can no longer be rationally related to a territorial sea, but can be better settled by special rules and contiguous zones relating to military and naval problems.

Concepts of national security and defense are no longer related to the protection of the coast itself but to the freedom of action and flexibility of military, naval, and air power throughout the world. The United States is today the greatest seapower on earth, despite the rapid growth of the Soviet Navy, and many political and military policies are based on that seapower.\textsuperscript{184} Therefore, with its widespread commitments, the United States is particularly interested in maintaining maximum freedom of the seas. The Soviet Union, on the other hand, is interested in limiting the use of United States seapower, as evidenced by its insistence on a maximum territorial sea coupled with a denial of any right of passage for warships without permission.\textsuperscript{185} The effect of the Soviet attempt can be seen when it is considered that any general world-wide extension of the territorial sea to twelve miles would remove from the regime of the high seas an

\textsuperscript{182} The three main articles on innocent passage contained in the Convention on the Territorial Seas are, in part:

Article 5 which provides that when straight base lines established under Article 4 enclose what had previously been high seas, a right of innocent passage shall exist in those waters.

Article 14(1) provides that, subject to the provisions of the Convention, "ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea." The article goes on to define innocent passage as that which is "not prejudicial to the peace, good order or security of the coastal state."

Article 16 provides in part that "subject to the provisions of paragraph 4, the coastal state may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security."

\textsuperscript{183} See, e.g., supra note 1 and sources cited therein.


\textsuperscript{185} See, e.g., Butler, The Legal Regime of Russian Territorial Waters, 62 Am. J. Int'l L. 51, 69 (1968). At the 1968 Convention, the Soviet Union consistently refused to recognize any convention which would give even a limited right of innocent passage to foreign warships, unless such passage was subject to the permission and rules and regulations of the state claiming the waters in question.
area of approximately 3,000,000 square miles. In the Mediterranean alone, presently an area in which seapower is playing a major role, the high seas would be reduced by about 145,000 square miles. One hundred sixteen straits and passages around the world would then be entirely within the territorial waters of one or more nations. When coupled with a limited or a complete denial of a right of passage for warships, the result on naval flexibility can be seen. Even if a right of free, innocent passage were extended to warships, aircraft have no such right, whether military or civil, and would still require permission, thus putting a severe limit on the value of air transport for military purposes. Until the Soviet Union and the United States can resolve in some way the problems and aims presented, there is little chance for settlement of the question of the territorial sea.

This is not to say that the position of the Soviet Union is unalterable any more than that of the United States. The United States has shown a willingness to extend the territorial sea to a maximum of six miles, and if proper provisions were made for defense zones and control of passage for warships, the Soviet Union would probably present a much more flexible attitude. Both nations rely heavily on seaborne commerce today and have a vital interest in maximum freedom of the seas. With the growth of Soviet seapower, both have an interest in maximum freedom for naval power.

Many of the smaller nations have their own interests in a reasonable territorial sea for purposes of neutrality. The rights and obligations that are attendant on a claim of neutrality are often extremely heavy, and the wider the area in which neutrality is claimed, the heavier the burden. Just what the optimum breadth would be for small nations is difficult to say, but for purposes of national security, a distance of from three to six miles presents the maximum that can be effectively policed for neutrality purposes.

As can be seen from the above discussion, the basis of "national security" still has some validity in the dispute over territorial waters. However, as with fisheries control, the problems could probably be settled without reference to claims of a full territorial sea. Until the nations concerned are willing to face the above problems openly, however, as they have evidently avoided doing in the past, there is little chance for settlement.

E. Any Solution For The Future?

Even with most of the underlying problems settled by various means, the lack of definition for the breadth of the territorial sea is troublesome, confusing, and often dangerous. Unfortunately, there does not seem to be any real chance for settlement in the near future, especially if the great seapowers refuse to openly face and discuss the matters raised under the discussion of national interests.

180 Sweitzer, supra note 214, at 38.
187 Id. at 39. Defense zones are very common for both the United States and the Soviet Union, particularly submarine and air defense areas which are under rigid control.
The situation, however, is not as hopeless as it may seem at first glance. The six plus six proposal presented by the United States and Canada is the most promising. In 1960, it failed by only one vote being adopted by the 87 nations present, and conditions would seem to be even more favorable for its passage today were another conference to be convened. Many of the newer nations are taking a much more realistic view of the situation, and, while the anti-colonial bias is still strong, they are recognizing that such bias should not take precedence over national interests. The states which urge protection of fisheries and claim such wide contiguous zones for that purpose are retreating to some extent in the fact of international pressure and economic fact. Finally, the position of the Arab states, in relation to Israel has been changed by the 1967 war. Any lasting settlement of the Middle East dispute will have to include a right of passage for Israeli shipping through the Straits of Tiran which can be enforced and maintained, thus removing a major stumbling block in the way of passage of the six plus six proposal.

In conclusion, it is submitted that the six plus six proposal is the only settlement that will be accepted by the great majority of nations. It represents a definite and workable compromise for all purposes, even the politico-military interests extant today. It is also submitted, however, that until the question of the breadth of the territorial sea is divorced from essentially unrelated political disputes no solution can ever be reached, and the friction can only increase as use of the problem as a political ploy is increased.

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