CHAPTER 2

United Nations Conferences on the Law of the Sea

21. GENERAL STATEMENT

The United Nations Conferences on the Law of the Sea, usually referred to as the First and Second Geneva Conferences, were convened at Geneva for the purpose of acting on the draft rules adopted by the International Law Commission and for considering matters on which the Commission was unable to reach agreement, for example, the breadth of the territorial sea (*see* 13).

The First Conference was in session from February 24 to April 27, 1958, and was attended by representatives of 86 States. Although the Conference brought to light a wide variety of conflicting interests between States, it was possible to reconcile many of these conflicts and to achieve a wide area of agreement on such substantive matters as the right to the use of the high seas, the right of passage through international straits and territorial waters, and the right of each coastal State to exploit the resources of its continental shelf. These areas of accord were further reflected in the adoption of rules for defining the limits of inland waters, for the drawing of baselines, for determining the status of indentations, and for delineating the outer limits of the territorial sea and boundaries through the territorial sea and the high seas. This, however, does not mean that the rules are so specific that they are susceptible of application, without further amplification, to the complex coastal configurations likely to be encountered throughout the world. In certain cases serious problems may still be raised in the interpretation and implementation of the rules adopted. These will be dealt with in succeeding sections.

Two major issues which were extensively debated at the Conference—the breadth of the territorial sea and fishing rights within a contiguous zone—were left unresolved because no proposal received the required two-thirds majority.[1]

1. It should be noted, nevertheless, that from the standpoint of delimitation the breadth of the territorial sea is a political rather than a technical problem. Whatever its width, the same method of delimitation will be applicable.

To further consider these questions, the Conference adopted a Resolution requesting the General Assembly to study the advisability of convening a second international conference of plenipotentiaries. This was approved by the General Assembly on December 10, 1958.[2]

The Second Conference on the Law of the Sea convened at Geneva on March 17, 1960. In contrast with the varied agenda of the First Conference, the Second Conference was limited to only two questions. After 6 weeks of debates between the 3-milers, who were willing to compromise on a 6-mile territorial belt, and the 12-milers, the Conference adjourned without any definitive action being taken. When the final vote was taken in plenary session on April 26, 1960, the compromise proposal failed by one vote from gaining the required two-thirds majority.

22. THE FIRST GENEVA CONFERENCE (1958)

The First Geneva Conference on the Law of the Sea was the first major attempt at codification since the abortive efforts of the League of Nations in 1930. But unlike the 1930 Conference, the Geneva Conference did adopt a number of conventions, even though agreement could not be reached on the breadth of the territorial sea.[3] There is another important distinction between the two Conferences. While both emerged from efforts of a world organization to codify international law, the 1930 Conference was largely a lawyer's conference, although the conferees did have before them a report by the League of Nations' Committee of Experts for the Progressive Codification of International Law. At the Geneva Conference, the national delegations included not only experts on law but on problems of fishery, on geography, oceanography, and other sciences.[4]

The rules of procedure of the Geneva Conference required a two-thirds majority for the adoption of any substantive proposal, while procedural decisions needed only a simple majority to become effective.

Four conventions emerged from the Conference and are now subject to ratification by the States. These are: (1) Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf.13/L.52); (2) Convention on

2. U.N. Doc. A/Res/1307 (XIII).

3. The 1930 Hague Conference for the Codification of International Law was concerned exclusively with the territorial sea. A failure to agree on its breadth caused the entire Conference to founder (*see* Part 1, 421).

4. Jessup, *The United Nations Conference on the Law of the Sea,* 59 COLUMBIA LAW REVIEW 235 (1959).

the Continental Shelf (U.N. Doc. A/Conf.13/L.55); (3) Convention on the High Seas (U.N. Doc. A/Conf.13/L.53); and (4) Convention on Fishing and Conservation of the Living Resources of the High Seas (U.N. Doc. A/Conf. 13/L.54). In addition, the Conference adopted an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes (U.N. Doc. A/Conf. 13/L.57).[5]

In evaluating the accomplishments of the Conference, the question might be raised whether the Conference was a success or a failure, considering the fact that no agreement was reached on the important question of the breadth of the territorial sea. On this the Acting Secretary of State, in his letter to the President submitting the agreements reached for transmission to the Senate, made the following significant remarks: "Had the Conference only agreed on the other rules in the convention on the territorial sea, particularly those on straight baselines, the right of innocent passage, and the contiguous zone, it would have been well worth while. But it did a great deal more. The conventions on the high seas and the continental shelf, while largely expressive of existing international law and practice, nevertheless by much needed codification give agreed form and certainty to the law. The convention on fisheries conservation lays down rules of law based on sound conservation principles which should do much to assure the preservation and increase of an important source of the world's food." [6]

221. Convention on the Territorial Sea and the Contiguous Zone

This convention contains 32 articles, and from the standpoint of sea boundaries is the most important of all the conventions adopted. Apart from the first two articles which provide that the sovereignty of a State extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast and described as the territorial sea, and that its sovereignty extends also to the airspace over the territorial sea as well as to its bed and subsoil, the substantive articles of the territorial sea part of this convention fall into two main groups: those dealing with questions of delimitation and those dealing with questions of passage. The first group will be dealt with in some detail, being more germane to the subject matter of this publication; the second group will be dealt with generally for a broader understanding of the problems of delimitation.

5. Because of the historic nature of the conventions adopted at the First Geneva Conference, and the likelihood that future reference will be made to them by the Bureau, the substantive articles of each convention are included as Appendix I to this publication.

6. Message from the President of the United States Transmitting Four Conventions on the Law of the Sea and an Optional Protocol, Executives J to N, Inclusive (Senate), 86th Cong., 1st sess. 4 (1959).

The provisions of the convention do not affect existing conventions or other international agreements between States that are parties to them (Art. 25).

2211. *Delimitation of the Territorial Sea*

Articles 3 to 13, inclusive, deal with delimitation of the territorial sea and are embodied in Section II of the convention, entitled "Limits of the Territorial Sea." In delimiting the territorial sea, two boundary concepts are involved—an inner one (known as the baseline), and an outer one which is dependent upon the inner boundary and upon the adopted breadth of the territorial sea. In both cases, technical principles are involved and are applicable irrespective of where the outer boundary is located. These principles and the basis for them will be discussed in this section.

A. BASELINES

Baselines play an important part in sea boundaries. Not only are they associated with the boundaries of the territorial sea but they mark the outer limits of a State's national or internal waters, such as bays, rivers, and other bodies of water that fall within this classification (*see* Part 1, 311). In addition, the baseline becomes the line from which the boundaries of the contiguous zone and the inner limits of the continental shelf and the high seas are measured. The term baseline is sometimes loosely used to refer to straight baselines, but as will be seen this is erroneous. Straight baselines form a distinct category and the convention recognized this by adopting two articles on baselines—one dealing with what might be termed the normal baseline, and the other dealing with straight baselines. In either case, it is the line (straight, curved, or sinuous) that is taken to be the inner limit of the territorial sea. Its specific placement thus becomes basic in determining how far offshore a State may exercise a particular type of jurisdiction.

(*a*) *Normal Baseline.*—Article 3 lays down the rule that the low-water line along a coast, as marked on large-scale charts of the coastal State, is the normal baseline for measuring the breadth of the territorial sea. (*See* fig. 24.) It is known as the rule of the tidemark, and is essentially the same as was recommended by the International Law Commission (ILC) in Article 4 of its final report.[7] The merit of a high-water baseline as against a low-water line was also

7. Report of the International Law Commission, 8th Sess. 13 (1956), and recorded in Official Records, U.N. General Assembly, 11th Sess., Supp. No. 9 (A/3159) (cited hereinafter as Report of the ILC (1956)). In its commentary to this article, the Commission stated that according to international law in force, the extent of the territorial sea is measured either from the low-water line, or from straight baselines independent of the low-water mark if brought within the *Judgment* of the International Court of Justice in the *Anglo-Norwegian Fisheries* case (*see* Part 1, 513).

debated by the Conference but the latter prevailed and had the support of the technical experts as giving the coastal State the right to measure the breadth of the territorial sea from the outermost land which is above water at low tide.[8] The lack of greater definiteness in the low-water datum also stems from the ILC recommendation, which followed the recommendation of a committee of experts, the purpose being to permit the coastal State to use the datum that best conforms to its rules of property or the datum used on its published charts.[9]

(*b*) *Straight Baselines.*—The rules regarding the use of straight baselines are among the most important in the convention. As was discussed in Part 1, chapter 5, the application of the method of straight baselines to the "skjaergaard" coast of Norway was the principal issue in the *Anglo-Norwegian Fisheries* case. There, the International Court of Justice in a historic decision upheld Norway's method of delimiting an exclusive fisheries zone by drawing straight baselines, independent of the low-water mark, along the seaward projections of the outermost of the numerous islands, islets, and rocks that constitute the so-called "rock rampart" of the Norwegian coast above the Arctic Circle. This method of delimitation results in the inclusion within internal waters and within the territorial sea of stretches of water that would be part of the territorial sea or part of the high seas if the traditional method of following the rule of the tidemark were used. Although the Court circumscribed the conditions under which straight baselines may be drawn, it was essentially an application of the method to particular circumstances and left some doubt as to the exact conditions under which the same method could be applied in other circumstances, thus making the limits of the rule difficult of ascertainment.[10] (*See* fig. 14.)

It was against this background that the Conference considered this complex and controversial problem. The rules pertaining to the use of straight baselines are embodied in Article 4 of the convention. Except as hereinafter noted, the language is substantially the same as adopted by the ILC and provides that the method of straight baselines joining appropriate points may be used in drawing

8. Pearcy, *Geographical Aspects of the Law of the Sea,* 49 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 6 (Mar. 1959).

9. This is based on personal correspondence with the United States representative on the committee of experts that met at The Hague in Apr. 1953, under the aegis of the ILC, to study problems concerned with the delimitation of the territorial sea. As to the possibility of abuse by a nation in selecting a particular low-water datum, the ILC was of opinion that the generality of the provision "is hardly likely to induce Governments to shift the low-water lines on their charts unreasonably." Report of the ILC (1956), *supra* note 7, at 13.

10. This problem was thoroughly considered at several sessions of the International Law Commission. It interpreted the Court's judgment as expressing the law in force and drafted Art. 5 on the basis of this judgment but with certain clarifications, in order to give greater precision to the criteria adopted by the Court. The most important of these concerned the paramountcy of geographic conditions of a coast over a State's economic interests. Report of the ILC (1956), *supra* note 7, at 14.

the baseline for the territorial sea in localities where the coast is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity (par. 1). This sets out the criteria that must be met to justify the use of such baselines. It is important to note that this is placed in paragraph 1 of Article 4 and indicates the priority intended to be given this provision. As a corollary to this principle, it is provided in paragraph 4 that where straight baselines are justified by these criteria, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage. This makes it clear that economic interests are not *per se* a justification for the use of straight baselines, thus correcting a common misinterpretation of the effect of the *Anglo-Norwegian Fisheries* case, namely, that it indicated the existence of an economic interest as sufficient in itself to justify the use of straight baselines. But where the geographical criteria laid down by paragraph 1 are present, then the existence of economic interests in a particular region may properly be allowed to influence the drawing of certain individual baselines. The practical effect of this is that the existence of these interests may justify a rather liberal interpretation of the conditions governing the method of drawing individual baselines. But the geographic criteria must be met in the first instance.[11]

The reference to "fringe of islands" along the coast, in paragraph 1, shows an intention to limit the use of straight baselines to coasts resembling the coast of Norway. The mere existence of islands off a coast is not a ground for using straight baselines. What must be present is a continuous fringe of islands sufficiently solid and close to the mainland to form a unity with it. Also the use of the words "In localities where etc.," in the same paragraph implies that a State would not be justified in using straight baselines along the whole of its coast merely because the geographic conditions warranted the use of baselines along one particular section.[12]

Another facet of the straight baseline question pertains to the manner in which the baselines must be drawn where the use of such baselines is permissible. Paragraph 2 of Article 4 lays down the conditions that must be fulfilled,

11. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea,* INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 77 (Jan. 1959). At the Conference it was argued by some that the initial choice of whether or not straight baselines could be used might be made on economic as well as geographical considerations. Had this point of view prevailed, it would have made possible a far broader application of the principle to coasts much more regular than the Norwegian, thus encroaching further on the freedom of the high seas. But both the International Law Commission and the Geneva Conference were of the opinion that the meaning of the Court's judgment in the *Fisheries* case was that only exceptional circumstances should permit the use of straight baselines. The rules adopted are a distinct advance and a contribution to clarity on the question. Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished,* 52 AMERICAN JOURNAL OF INTERNATIONAL LAW 617–618 (1958).

12. Fitzmaurice, *supra* note 11, at 78.

to wit: They "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." Similar phraseology was used by the Court in the *Fisheries* case and in the recommendations of the International Law Commission, but no specific guidelines are contained in either document for determining when a baseline conforms to this test. The "general direction of the coast" rule, as adopted by the Conference, is therefore subject to the same basic weakness as was pointed out in the discussion of the *Anglo-Norwegian Fisheries* case in Part 1, 5131. On the other hand, because of the diversity of coastlines, it is doubtful whether any specific formula can be arrived at that will automatically distinguish one group of islands that departs appreciably from the general direction of the coast from another that conforms to the rule. Perhaps the solution lies in studying each case separately on the basis of the general criteria adopted by the Conference but using the skjaergaard coast of Norway as the limiting condition for conformity to the criteria. (*See* Part 1, 513 note 11 and 53 note 25.)

Finally, it is provided in paragraph 3 that baselines shall not be drawn to and from low-tide elevations,[13] unless lighthouses or similar installations which are permanently above sea level have been built on them. In the *Fisheries* case the Court allowed Norway to draw some of its baselines to low-tide elevations. The ILC in its draft rules barred the use of such features as connecting points between straight baselines and specified in its commentary that only rocks and shoals permanently above sea level may be used for this purpose.[14] The provision adopted by the Conference is a compromise solution and meets the objection of the ILC regarding the necessity for visibility of the base points (*see* fig. 37).[15]

In applying the rules adopted, an essential question will be the maximum permissible length of baselines. In the *Fisheries* case, the Court did not recognize any mathematical limits to the length of individual lines but approved straight baselines of varying lengths, the longest in that particular situation being 44 miles. The ILC, acting on the recommendation of a group of experts,

13. Low-tide elevations are rocks or shoals that bare at low water but are covered or awash at high water. In the ILC report they are referred to as drying rocks and drying shoals.

14. The reason given for this requirement is that otherwise the distance between the baselines and the coast might be extended more than is required to fulfill the purpose for which the straight baseline method is applied, and, in addition, it would not be possible at high tide to sight the points of departure of the baselines. Report of the ILC (1956), *supra* note 7, at 15.

15. It has been suggested that the provision is ambiguous because it fails to specify whether it applies only to installations in place at the date of the convention, or whether it also includes future installations. If the latter, the possibility of abuse arises. Fitzmaurice, *supra* note 11, at 86. If a distinction is to be made, the date when the convention comes into force would seem to be the rational date (*see* 227), rather than the date of its adoption. This could be a considerable period of time (*see* 2272).

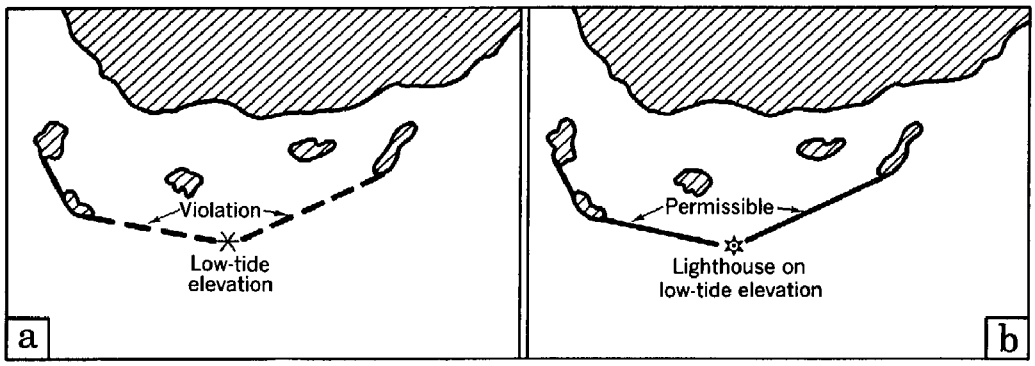

FIGURE 37.—Where straight baselines are permissible they may not be drawn to low-tide elevations (a) unless installations always above water are built on them (b).

sought to incorporate in its draft rules a maximum length of 10 miles for a straight baseline and a maximum distance of 5 miles from the coast for any point on such line. But in the final consideration of this rule all mention of length and distance from the coast was deleted.[16] At the Conference, a finite limit was adopted in Committee, but this did not obtain a two-thirds majority, and no maximum is provided.[17]

The method of straight baselines is relevant not only to the determination of the outer limit of the territorial sea but to a determination of the status of the waters lying to the landward of the baseline. In applying such baselines to a coast, waters may be enclosed which formerly were part of the territorial sea or the high seas. Following the analogy of baselines across the mouth of a bay, the Court in the *Fisheries* case attributed to the waters landward of the straight baselines the status of "internal waters," that is, as much subject to the sovereignty of the coastal State as its rivers and lakes. The legal consequence of this is that no right of innocent passage would exist through the area inside the baselines. This was not acceptable to the Geneva Conference, and while it

16. Report of the ILC (1956), *supra* note 7, at 14. Objections were raised by some governments that specifying any distance was arbitrary and not in conformity with the Court's decision.

17. It has been suggested that an answer to the problem of length may be found in terms of the relationship existing between the extent of waters closed off by territorial limits measured from the straight baselines and those measured from the low-water line on the basis that the significant point about straight baselines is not the possibility of excessive length *per se*, but rather on the relationship between the extent of water closed off by such baselines and the amount closed off by following the low-water mark. With this in mind, the following formula has been proposed for limiting straight baselines: "A straight baseline is justified providing that the water area lying between the baseline and the outer territorial limits measured from the low-water mark along any twenty-four miles of baseline is equal to or less than the area contained in a semicircle, twenty-four miles in diameter, measured from the straight baseline." ALEXANDER, A COMPARATIVE STUDY OF OFFSHORE CLAIMS IN NORTHWESTERN EUROPE 209–215 (1960) (sponsored by Research Foundation of the State University of New York and the Office of Naval Research). The analogy to the semicircular rule for bays, although an incomplete one, merits further consideration.

followed the Court in characterizing such waters as internal waters (Art. 5, par. 1), it provided that where the establishment of straight baselines has the effect of enclosing as internal waters areas previously considered part of the territorial sea or the high seas, the right of innocent passage shall exist in such waters (par. 2).[18]

(*c*) *Baseline at Rivers.*—Article 13 of the convention provides that where a river flows directly into the sea, the baseline is a straight line across its mouth between points on the low-tide line of its banks. This is in conformity with the recommendation of the ILC. Although not specified, this must be presumed to apply to any width across the mouth because of the peculiar internal nature of such waters.[19] No provision is made for rivers that empty into estuaries, although the ILC recommendation called for the application of the rules for bays, as did the Second Sub-Committee of the 1930 Conference. It would seem that whether expressed or not the rules relating to bays would be directly applicable from the nature of the configuration.

B. OUTER LIMIT OF THE TERRITORIAL SEA

Article 6, of the convention, specifies that the outer limit of the territorial sea is a line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.[20] This defines what is known as an "envelope line" because it is formed by the most seaward arcs of all those drawn from all points on the coastline. This line is fully described and illustrated in Part 2, 1621 (*c*).

This provision is identical with the recommendation of the International Law Commission, which in turn followed the recommendation of a committee of experts as the line most likely to facilitate navigation in the vicinity of the territorial limits of a nation. In any case, the Commission felt that nations should be free to use such line without running the risk of being charged with a breach of international law on the ground that the line does not follow all the sinuosities of the coast.[21]

18. This is essentially what was embodied in the draft articles of the ILC but without the limitation that the waters must have normally been used for international traffic. Report of the ILC (1956), *supra* note 7, at 14. Under the terms of the convention any such newly created internal waters, whether used for international traffic or not, would be subject to the right of innocent passage, thus further limiting the scope of the *Fisheries* decision in favor of preserving the freedom of the high seas.

19. In the Report of the Second Sub-Committee of the Second Committee of The Hague Conference of 1930 for the Codification of International Law it was specifically stated that a straight line is drawn across the mouth of the river, *whatever its width.*

20. No finite distance is mentioned because the Conference was unable to agree on what the breadth of the territorial sea should be. But whatever the width, the same principle will be applicable.

21. Report of the ILC (1956), *supra* note 7, at 15. For a discussion of other lines sometimes suggested for delimiting the territorial sea, *see* Part 2, 1621.

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C. THE PROBLEM OF BAYS

Whether a bay or indentation is part of the inland waters of a coastal State or part of the open sea is in reality a special case of the baseline problem (*see* 2211 A). For if the indentation is part of the inland waters then the baseline for drawing the outer limit of the territorial sea is a straight line across the entrance, and if it is part of the open sea then the baseline follows the low-water line.[22] (*See* fig. 24.)

Article 7 of the convention sets out the definition of a bay, as distinguished from a mere curvature, and provides certain rules by which the distinction may be ascertained. Except for the maximum length of closing line across a true bay (*see* 2211 C(*c*)), the article is essentially the same as that recommended by the International Law Commission in its draft articles.[23]

Before considering the specific rules adopted for bays, two limitations on the overall applicability of the article should be noted. The first is that it relates only to bays the coasts of which belong to a single State (par. 1). In other words, if a bay is formed by the coasts of two or more adjacent States, the rules for bays would not apply, and no closing line could be drawn across the bay. In such cases, each State bordering on the bay has a belt of territorial waters fronting its portion of the coast of the bay, the rest of the bay being part of the high seas.[24] (*See* fig. 38.) The other limitation on the applicability of the article is in the case of historic bays (par. 6). Where a State is able to establish an exceptional claim to a particular bay by reason of long, continuous usage and acquiescence by other States, the rules as to bays are waived (*see* Part 1, 45 and fig. 39).[25]

(*a*) *Definition of Bay.*—Paragraph 2 of Article 7 defines a bay as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." This sets forth the important concept of landlocked waters,

22. The straight baseline drawn across the entrance of a true bay should not be confused with the system of straight baselines, although both result in a closing off of water areas that have the status of inland waters (*see* 2211 A(*b*)). The distinction between the two is that a bay may occur along a coast to which the straight baseline system does not apply because it fails to satisfy the criteria set out for such baselines, while straight baselines might enclose indentations that would not satisfy the rules set out for true bays. That is the reason why bays and straight baselines are treated in separate articles in the convention. Fitzmaurice, *supra* note 11, at 80.

23. Report of the ILC (1956), *supra* note 7, at 15.

24. Even by agreement between the bordering States such a bay cannot be closed off as inland waters so as to deny access to vessels of other States not party to the agreement. Fitzmaurice, *supra* note 11, at 82–83.

25. Par. 6 also notes that the rules for bays would not be applicable in any case where the straight baseline system is applied. This would necessarily follow from the fact that such a system is broader in concept and more inclusive in scope than the concept of a bay, which is limited to a single geographic feature.

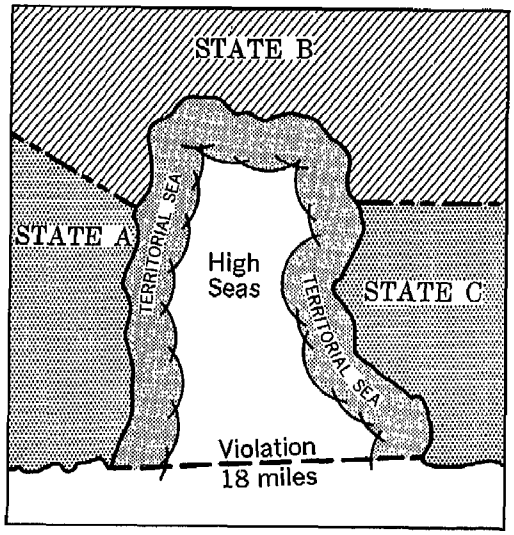

FIGURE 38.—No closing line is permissible across a bay formed by the coasts of two or more States to deny access to other States.

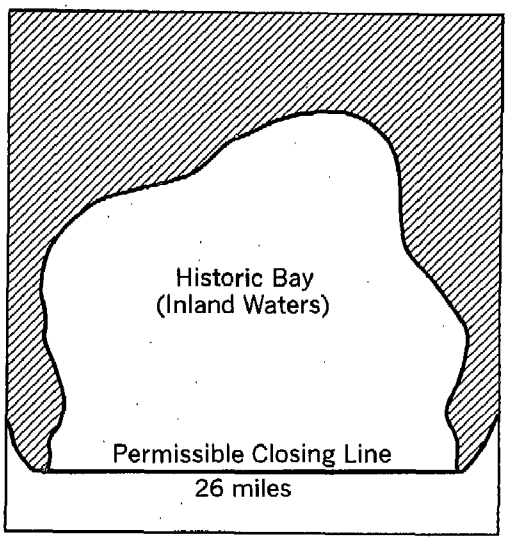

FIGURE 39.—The 24-mile closing line limitation does not apply to historic bays. No limitation on width of opening is required.

or waters situated within the body of the land, for an indentation to qualify as a bay. But of itself it provides no criteria for determining how landlocked an indentation must be in order to remove it from the category of a mere curvature. In effect, it would be little better than the "configuration and characteristics" rule promulgated by the tribunal in the North Atlantic Coast Fisheries Arbitration (*see* Part 1, 411).

To make the definition more specific, a second criterion was added in paragraph 2, namely: "An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation."[26] This is the semicircular rule, the genesis and development of which has been previously discussed (*see* Part 1, 42, 421).[27]

In the application of the semicircular rule to an indentation containing pockets, coves, or tributary waterways, the area of the whole indentation (including pockets, coves, etc.) is compared with the area of a semicircle. If the indentation meets the test, a closing line is drawn across the headlands. But

26. This provision originated with the report of the committee of experts (*see* note 9 *supra*), and was adopted by the ILC to repair the omission by The Hague Codification Conference of 1930. The added provision was also necessary to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying the rule for bays. Report of the ILC (1956), *supra* note 7, at 15 (commentary (1)).

27. It should be noted that neither the Conference nor the ILC adopted the "reduced area" rule for bays, the latter acting on the advice of the committee of experts (*see* Part 1, 4211).

if it fails to satisfy the test and the indentation becomes open sea, the semicircular rule should still be applied to any of the tributary waterways for the purpose of determining their status as inland waters.[28]

(*b*) *Area of a Bay.*—Since the semicircular rule is based on a comparison of areas, additional rules are required to avoid uncertainties in applying the principal rule to different coastal situations. This is provided in paragraph 2 of Article 7. For a simple indentation, with one mouth, the area is that lying between the low-water mark around the shore and a line joining the low-water marks of its natural entrance points. And in computing the area, islands within the indentation are included as if they were part of the water area. In such a case, the semicircle is drawn on the diameter joining the natural entrance points. But, where islands exist in the entrance, a complication arises and the convention provides that "the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths."[29] This is not free of ambiguity and raises the question whether the sum of the widths of the several entrances may exceed the length of the closing line (*see* (*c*), below), or whether it must be kept within that limit.

For an answer to this question, it is appropriate to examine the basis for the rule in the report of the International Law Commission. In commentary (2) of Article 7, it is stated that the Commission's intention in using the total length of the lines drawn across the different mouths "was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation." In such a case, the Commission notes, an indentation which, if it had no islands at its mouth, would not fulfill the necessary conditions, is to be recognized as a bay. Clearly, this indicates an intent to liberalize the rule for bays in

28. This is a reasonable interpretation and is based on the concept of a bay as inland waters, that is, it has the character of inland waters because it is situated within the body of the land (*see* Part 1, 42). If that is so, then any waterway that is tributary to another waterway and is situated within the body of the land by the semicircle test should have the character of inland waters. One difficulty that arises in including tributary waterways as part of the area of the indentation whose status is to be determined, is that the status may depend upon how far up the tributary one goes in computing the area. This may require the adoption of an additional rule limiting the width of such waterways to a fixed amount beyond which it would not be considered a part of the primary waterway. An alternative solution would be to first apply the semicircle test to the tributary waterways: if they become inland waters a closing line is drawn across them and the primary waterway is then subjected to the test; if they do not become inland waters they would then be included as part of the area of the main indentation for the purpose of determining its status by the semicircular rule.

29. This is identical with the draft rule adopted by the ILC. In most cases, a visual comparison of areas will probably be sufficient to determine whether an indentation satisfies or fails to satisfy the semicircular rule. In close cases, a measurement should be made by planimeter.

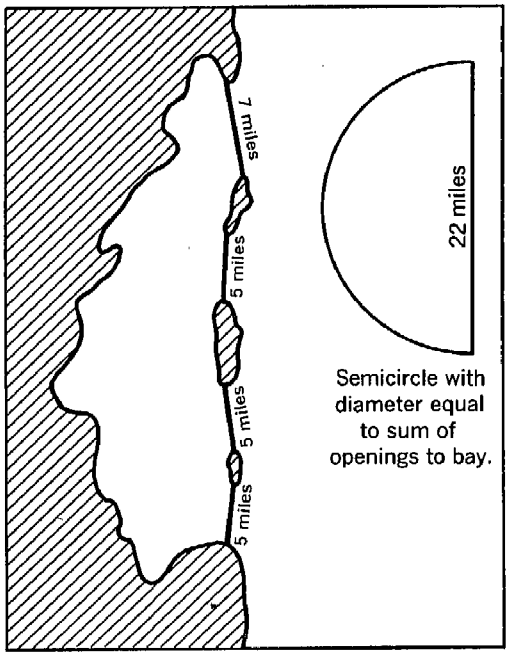

FIGURE 40.—The closing line of a multi-mouthed bay cannot exceed 24 nautical miles as measured across water entrances between the islands.

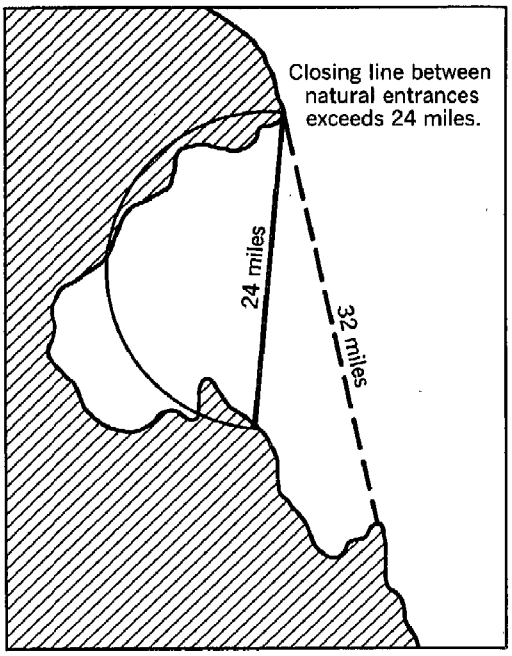

FIGURE 41.—24 miles is the maximum closing line allowable. Where the distance between headlands exceeds this amount a closing line is drawn within the bay.

such situations. This liberalization is accomplished by not using the full width of the bay, for purposes of applying the semicircular rule, but only the water distances across the several entrances, omitting the island expanses. The semicircle in such cases would be drawn on a diameter no greater than the closing line adopted for bays (*see* (*c*), below), thus reducing the diameter of the semicircle and altering the ratio of width to penetration so as to result in an indentation becoming a bay that might not meet the test if the full width from headland to headland were to be used. Under this interpretation, no opening could exceed 24 nautical miles (the closing line adopted by the Conference), nor could the sum of all the openings exceed such distance. If it did, the indentation could not qualify as a bay on the basis of islands at the entrance but would have to be tested by the rule for indentations wider than the closing line (*see* (*c*), below). (*See* fig. 40.)

Another basis for the suggested interpretation is predicated on an overall consideration of Article 7 of the convention. The provision with regard to the

use of the semicircular rule for single-mouthed bays and for multi-mouthed bays is contained in paragraphs 2 and 3 of the article, without any mention of a maximum closing line. It is in paragraph 4 that mention is first made of a maximum closing line (this applies also to the ILC report) and such limitation, it would seem, should be considered applicable to both situations.[30]

(*c*) *Closing Lines.*—One of the most significant departures from existing international law is the provision for a 24-mile closing line for bays (Art. 7, par. 4). Prior to the decision in the *Anglo-Norwegian Fisheries* case (*see* Part 1, 513), the United States and other important maritime countries had regarded the 10-mile closing-line rule as established international law (*see* Part 1, 441). The Court's holding that the rule had not acquired the authority of a general rule of international law left the legal situation in doubt. Adoption of the 24-mile closing line removes that uncertainty.[31] (*See* fig. 41.)

This limitation on the closing line of a bay finds application in the case of indentations wider than 24 miles at the mouth, and for such situations the convention provides (Art. 7, par. 5) that "a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." The purpose of the rule seems simple enough, but its application to an indentation raises an important question of interpretation—that is, whether the semicircular rule is to be applied to the whole indentation only, to the portion enclosed by the closing line, or to both.

30. This interpretation of the rule seems reasonable. The only other interpretation would be to permit each opening to be a maximum of 24 miles, but this would operate to defeat the intent to liberalize the rules in such situations. For, in the case of an indentation with three openings, each 24 miles wide, a semicircle with a diameter of 72 miles would have to be used (a more stringent requirement), as against a diameter of 24 miles under the other interpretation, and would result in the elimination of many areas from the status of inland waters.

31. Once the convention becomes operative, claims to wider indentations will have no sanction in international law, unless they can be brought within the doctrine of "historic waters" (*see* Part 1, 451). In 1957, Peter the Great Bay, which is 115 miles across at its mouth, was declared to be inland waters by the U.S.S.R. The United States protested this claim. 38 DEPT. STATE BULLETIN 461 (1958). The ILC in its draft articles adopted a 15-mile closing line for bays. Although not prepared to establish a direct relationship between the length of the closing line and the breadth of the territorial sea, it took note of the fact that the origin of the 10-mile rule dated back to a time when the breadth of the territorial sea was much more commonly fixed at 3 miles than it is now. Therefore, in the light of the present tendency to increase the breadth of the territorial sea, the Commission felt that an extension of the closing line to 15 miles was justified and sufficient. Report of the ILC (1956), *supra* note 7, at 15, 16. Adoption by the Geneva Conference of a 24-mile closing line is one of the major departures from the recommendations of the ILC. It has been stated that the 24-mile rule was promulgated by the U.S.S.R. delegation as being double the breadth of the territorial sea proposed by that delegation. It later appeared that there were insufficient votes for a 12-mile territorial sea, but the rule for bays was left at 24 miles. Sorensen, *Law of the Sea,* No. 520 INTERNATIONAL CONCILIATION 238 (Nov. 1958) (Carnegie Endowment for International Peace). The United States would have preferred the 10-mile rule for bays, as traditionally advocated in its foreign relations. *Hearing before Committee on Foreign Relations on Executives J to N, Inclusive,* 86th Cong., 2d sess. 92 (Question 29) (1960).

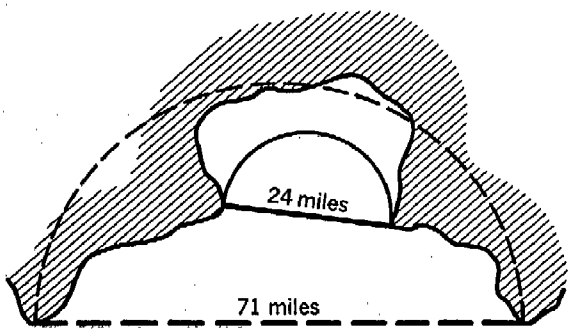

FIGURE 42.—The semicircular rule is applied to the indentation where it narrows to 24 miles, and not to the entire width. Its status does not arise until the limiting line is drawn.

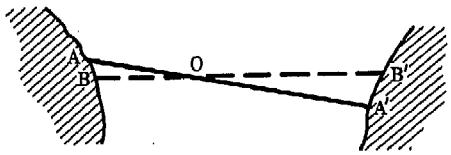

FIGURE 43.—Line *AOA'* encloses a greater water area than line *BOB'* and is permissible under the Geneva convention.

As paragraph 5 is worded, the inference could be drawn that the semicircular rule is first applied to the whole indentation; if it becomes a true bay by the test, the 24-mile line is then drawn within the bay without any further application of the semicircular rule. There is a measure of logic in this interpretation, since the semicircular rule is geometric in concept whereas a closing-line limitation is arbitrary in nature, and it could be reasoned that once an indentation has met the semicircle test it should suffice. But the difficulty with this interpretation is that if the situation were reversed and the whole indentation did not satisfy the test, it could automatically exclude an area within the 24-mile line from becoming inland waters even though it qualified as a bay (*see* fig. 42). This would not seem reasonable.

The more reasonable interpretation of paragraph 5 would be that only the portion of the indentation enclosed by the closing line must satisfy the semicircle test. The basis for this is that where an indentation has a greater width at the entrance than the permissible closing line, the question of its status does not arise until the limiting line is drawn. That this was also the thinking of the committee of experts (*see* note 9 *supra*), is borne out by the definition it adopted for a bay and by the 10-mile limitation it recommended. In its definition, it stated: "A bay is a bay in the juridical sense," and in adopting the 10-mile limitation on bays, it said: "The closing line across a (juridical) bay should not exceed 10 miles in width." [32] Identifying the term bay with the word "juridical" in the last sentence indicates that the portion of the indentation across which the closing line will be placed must satisfy the legal fiction of a

32. Shalowitz, *The Concept of a Bay as Inland Waters*, 13 SURVEYING AND MAPPING 439 (1953).

true bay, that is, satisfying the semicircular rule, otherwise it would not be a bay in the legal sense.[33]

The recommendation of the Special Master in the *California* case also supports this view. In his findings for bays, it is stated: "In either case [indentations not more than 10 miles wide at the entrance and those more than 10 miles] the requisite depth [penetration into the land] is to be determined by the following criterion:" (Here follows the semicircular rule for bays.) This contemplates the test for inland waters to be applied to the area enclosed by the closing line.[34]

The provision with respect to the closing line being drawn within the bay so as to enclose the maximum area of water possible, with a line of that length (Art. 7, par. 5), is intended to take care of those situations where more than one closing line is possible (see fig. 43).[35] This provision is wholly independent of the need for headlands in such cases. And where pronounced headlands are available but enclose less water they are not required to be used in drawing a closing line across the bay.[36] It should be emphasized, however, that the closing-line rule of itself does not create a bay, but rather the existence of a configuration to which the rule can be applied. The point selected as the headland must bear some relationship to the indentation under consideration. It would not be any point along the coast that falls within the closing-line distance.[37]

33. Support for this interpretation is also to be found in the Bases of Discussion submitted by the U.S. delegation at the 1930 Hague Conference where the semicircular rule was first proposed (*see* Part 1, 421). The illustration which accompanied the U.S. proposal clearly shows that the semicircle test is applied to the closing line, even though the full indentation meets the test. Acts of the Conference for the Codification of International Law (League of Nations Publications V: Legal) 198 (1930). *See also* Boggs, *Delimitation of the Territorial Sea*, 24 AMERICAN JOURNAL OF INTERNATIONAL LAW 546 (1930), where the method is discussed and the semicircle is shown constructed on a 10-mile closing line.

34. Report of Special Master, United States v. California, Sup. Ct., No. 6, Original, Oct. Term 3 (1952).

35. This was spelled out in Art. 7, par. 3 of the draft rules of the ILC. Report of the ILC (1956), *supra* note 7, at 15.

36. This follows from the fact that the 24-mile rule is an arbitrary limitation and not based on geographic characteristics and such characteristics should not be read into it. To require the line to be drawn between headlands would be incompatible with enclosing a maximum area of water, since it would be pure coincidence for both conditions to be satisfied. This view finds support in the North Atlantic Coast Fisheries Arbitration (see Part 1, 411), where it is provided that the 3 marine miles shall be drawn "from a straight line across the bay . . . at the first point nearest the entrance where the width does not exceed ten miles," bypassing completely the question of headlands inside the bay; in commentary (5) to Art. 7 of the draft rules of the ILC, where it is stated that "the closing line will be drawn within the bay at the point nearest to the sea where the width does not exceed that distance [15 miles]," without any mention of headlands; and in the Bases of Discussion submitted by the American delegation at the 1930 Hague Conference with regard to bays wider than 10 miles (in the example submitted the 10-mile line is drawn without regard to headlands).

37. A similar problem, in a slightly different context, was dealt with in *United States* v. *California*, with regard to the southeastern headland of San Pedro Bay (*see* Part 1, 4541 B). In the hearings before the Special Master, it was pointed out that the bulge at Newport Beach is no more than a small protrusion in an otherwise generally straight coast, or slightly curving coast, which bore no relationship to the curvature whose status was to be determined (*see* fig. 10).

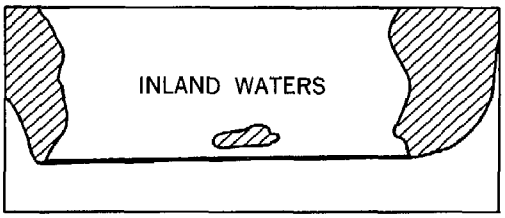

FIGURE 44.—Closing line of bay does not connect with the island.

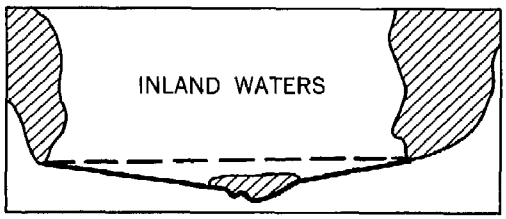

FIGURE 45.—Closing line of bay encompasses the island.

Another facet of the closing-line rule that requires interpretation is where islands are situated close to the entrance of an indentation that satisfies the semicircular rule for bays. How is the closing line to be drawn where an island lies to the landward of the line joining the headlands? And what is the treatment for an island lying to seaward of such line? Neither situation is provided for in the convention or in the draft rules of the ILC. A reasonable interpretation would be to draw a direct line between headlands for the first case (*see* fig. 44), but to the island from each headland for the second case (*see* fig. 45).[38]

D. ISLANDS AND LOW-TIDE ELEVATIONS

Another important facet in the process of delimiting the territorial sea is the treatment of islands and low-tide elevations. An island, whether within or without the territorial sea, carries its own belt of territorial waters, whereas a low-tide elevation generates such a belt only if it lies wholly or partly within the territorial sea (*see* text at note 51 *infra*). It therefore becomes necessary to be clear as to the meaning of these terms in the technical sense. (*See* figs. 46 and 47.)

(*a*) *Definition of Island.*—Article 10 of the convention defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." This definition is essentially the same as that recommended by the International Law Commission but with one important difference—where-

38. The basis for this interpretation is the observation of the ILC that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland (*see* text following note 29 *supra*). It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. This is consistent with Art. 7, par. 5 of the convention which calls for a closing line to be drawn that encloses the maximum area of water possible, and with par. 3 of the article which allows islands within an indentation to be considered part of the water area. The rule proposed would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule. The best solution would be to consider each case on its merits and apply a rule of reason. A more restrictive rule for the second case would be to join the island to each headland only if some part of the island is on a direct headland-to-headland line. This would also be in the interest of least encroachment on freedom of the seas.

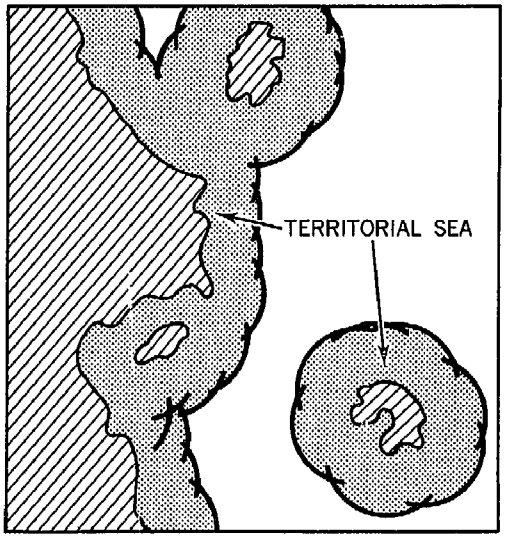

FIGURE 46.—An island within or without the territorial sea of the mainland generates a new territorial sea.

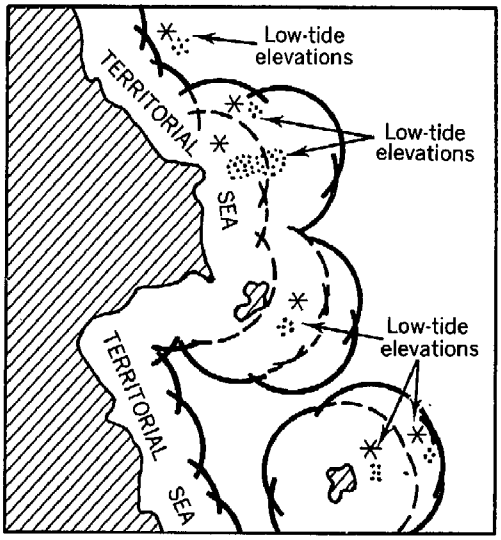

FIGURE 47.—Effect on outer limits of the territorial sea of low-tide elevations (rocks and shoals awash) at various locations.

as, the ILC definition left open the question whether artificially formed islands, such as spoil banks resulting from dredging operations, fall within the scope of the draft rules, the Geneva convention definitely excludes such formations.[39]

To fall within the definition, the land must be surrounded by water and must be above water at high tide. On the face of it, this would seem to raise the question whether it must be surrounded by water at high tide only or also at low tide. But a little reflection will show that insofar as the territorial sea is concerned it must be surrounded by water at all stages of the tide.[40] Although not specifically provided for, it must be assumed that neither habitability, shape, area, nor texture is a necessary ingredient of an island for the purpose of delimiting the territorial sea.[41]

39. Except for the term "naturally formed," the definition follows substantially the one given in JEFFERS, HYDROGRAPHIC MANUAL 247, PUBLICATION 20–2, U.S. COAST AND GEODETIC SURVEY (1960). For surveying and mapping purposes, it is obvious that the manner in which an island was formed would be immaterial. *See also* MITCHELL, DEFINITIONS OF TERMS USED IN GEODETIC AND OTHER SURVEYS 41, SPECIAL PUBLICATION NO. 242, U.S. COAST AND GEODETIC SURVEY (1948).

40. The reason for this is that if it were not also surrounded at low tide it would be within the low-water line of the mainland coast, and since that line is the baseline for drawing the territorial sea, the question of islands would not arise. It could only arise where the low-water line around the island is completely detached from the mainland low-water line. That could only occur where the area of land under consideration is surrounded by water at low water. The fact that within the low-water line there is an area of land exposed at high tide does not affect the drawing of the territorial sea boundary.

41. The matter of habitability, or occupancy, arose at the 1930 Hague Conference. The United States there took the position that separate bodies of land which were capable of use should be regarded as islands, but the Second Sub-Committee did not accept the capability-of-use principle and adopted instead

Islands have been considered in other contexts and may be defined somewhat differently from that adopted by the Geneva Conference. For example, for the purpose of determining the ownership of new islands formed in a navigable stream, it has been held that land surrounded by water only in times of high water is not an island within the rule that the state takes title to such lands.[42]

For mapping and charting purposes, the following definition has been used: A body of land extending above and completely surrounded by water at the mean high-water stage; an area of dry land entirely surrounded by water or a swamp; an area of swamp entirely surrounded by open water.[43]

(*b*) *Groups of Islands.*—Paragraph 2 of Article 10 provides that "the territorial sea of an island is measured in accordance with the provisions of these articles." The Conference thus took no stand on the question of the treatment of groups of islands, or archipelagoes as they are sometimes called, and it must be assumed that each island of such a group will be governed by the rule laid down in paragraph 2, that is, each will have its own territorial sea measured in the ordinary way according to the provisions of the convention adopted, and are not to be enclosed by a series of straight baselines.[44] The significant difference between these two treatments would be that in the case of straight baselines, the water areas behind such lines would be inland waters,

a definition similar to that given in Art. 10 except that no reference was made to "naturally-formed" areas. Acts of Conference, *supra* note 33, at 200, 219. That texture is no criterion would follow the rule laid down in the case of the American ship *The Anna,* which was seized by a British privateer in the Gulf of Mexico at a place more than 3 miles from the mainland but approximately 2 miles from small, mud islands composed of earth and driftwood off the mouth of the Mississippi River. It was held that they were the natural appendages of the coast and "whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil," even though it was contended that they were "not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests." *The Anna,* 5 Rob. 373, 385 c, d (1805).

42. *Payne* v. *Hall,* 185 N.W. 912, 915 (1921) (Iowa). The inference here is that it must also be surrounded by water at low water; hence, a piece of land that bares at high water but is connected to the main shore by a strip of land that bares at low water would not be considered an island in Iowa for the purpose stated. And to the same effect is *McBride* v. *Steinweden,* 83 Pac. 822, 824 (1906) (Kans.), where it was held that to constitute an island in a river the same must be of a permanent character, not merely surrounded by water when the river is high but permanently surrounded by a channel of the river and not a sand bar subject to overflow by a rise in the river and connected with the bank when the water is low.

43. EDMONSTON, NAUTICAL CHART MANUAL 77, U.S. COAST AND GEODETIC SURVEY (1956). This definition is geared to the charting needs of the Bureau. It has also been adopted by the U.S. Geological Survey for use on topographic quadrangles.

44. Art. 4 of the convention, which permits the use of straight baselines under certain circumstances, applies to islands along the coast and in its immediate vicinity, but not to midocean groups of islands. At the Conference, proposals that would have approved the application of straight baselines to such islands were submitted for consideration but withdrawn before being voted on. Sorensen, *supra* note 31, at 240.

whereas under the individual island rule, the waters would be either territorial or high seas.[45]

This question of groups of islands cannot be considered as settled. The International Law Commission, while recognizing the importance of the question, was unable to reach a decision because of disagreement on the breadth of the territorial sea and because of a lack of technical information on the subject. It pointed out, however, that the rules with regard to straight baselines may be applicable to groups of islands lying off the coast.[46]

(*c*) *Low-Tide Elevations.*—Article 11 of the convention defines a low-tide elevation as "a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide." Such elevations are the same as "drying rocks" and "drying shoals," the nomenclature used by the International Law Commission.[47] As was pointed out above, the important distinction between an island and a low-tide elevation, insofar as the law of the sea is concerned, is that an island, no matter where situated, carries its own territorial belt, while a low-tide elevation generates such a belt only if it lies within the territorial sea. (*See* figs. 46 and 47.)

Low-tide elevations fall in the category of submerged lands rather than tidelands, for the latter presupposes a high-water line at the upper boundary. Therefore, unless a low-tide elevation is connected to the mainland (or to an island), or is within the corresponding territorial sea, no territorial sea can be drawn around it.

A situation may exist where a low-tide elevation is partly within and partly without the territorial sea as measured from the mainland or an island. In such cases, the convention provides that "the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea." [48]

45. If the islands are fairly close together, for example less than 6 miles apart where a 3-mile rule prevails, the individual territorial seas will overlap, but where they are more than 6 miles, the waters between the various territorial seas will be high seas.

46. Report of the ILC (1956), *supra* note 7, at 17. In Dec. 1957, attention was focused upon this question by an Indonesian Proclamation under which its territorial sea was to be measured from straight baselines connecting the outermost points of the islands, thus enclosing vast areas of the sea between the islands. This was contested by the leading maritime countries. Sorensen, *supra* note 31, at 239. When Hawaii was admitted as a state, its sea boundaries did not include all the water areas between the islands but only a 3-mile belt around each island, leaving areas of high seas between most of them. S. Rept. 80, 86th Cong., 1st sess. 4 (1959).

47. In the Coast Survey, the terminology used for a low-tide elevation or a drying rock is "rock awash." Rocks awash are defined as "those exposed at any stage of the tide between mean high water and the sounding datum, or that are exactly awash at these planes." JEFFERS, *op. cit. supra* note 39, at 209.

48. This means that the portion of the low-tide elevation outside the territorial sea would be used to generate a new territorial sea. The effect of this is to treat such elevations as if they were islands, which seems inconsistent with the principle expressed in par. 2, of Art. 11, that a low-tide elevation situated outside the territorial sea "has no territorial sea of its own." The more consistent rule would be to treat such elevations as if they terminated at the outer limit of the territorial sea, but apparently both the ILC and the Conference considered these as special cases that justified a more liberal treatment. (*See* fig. 47.)

Low-tide elevations on which an installation is built—a lighthouse, for example which is itself permanently above water—apparently remain in the category of low-tide elevations and do not take on the character of islands.[49] But they may be used as end points for the drawing of straight baselines, which without such installations would not be permissible (*see* 2211 A).[50]

Finally, the territorial sea generated by a low-tide elevation applies only to such elevation within the territorial sea of the mainland or an island. If the bulge in the territorial sea caused by the presence of a low-tide elevation encompasses another low-tide elevation, the latter will not generate a new territorial sea.[51] But this does not apply to an island situated within the territorial sea. If the bulge resulting therefrom encompasses a low-tide elevation, the latter generates a new territorial sea. This follows from the fact that no distinction is made in the convention between an island lying within and an island lying without the territorial sea. Therefore, the rules applicable to the mainland should be applicable to all islands. (*See* fig. 47.)

E. HARBORS AND ROADSTEADS

Under the Geneva convention the distinguishing feature between harbors (or ports) and roadsteads is that the former is part of the inland waters while the latter is assimilated to the territorial sea. Neither term is defined specifically, but each is treated in terms of the method of delimiting the territorial sea where such features exist. It must therefore be assumed that the customary meaning of the terms is intended (*see* Part 1, 46).

(*a*) *Harbors.*—Article 8 of the convention provides: "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." This provision is open to interpretation as to what constitutes a "harbour system" and "harbour works." Of itself, the convention provides no ready answer. However, it is important to note that Article 8 is identical with Article 8 of the draft articles of the International Law Commission, and it is reasonable to assume that the Geneva Conference was aware of the ex-

49. This is not actually stated but must be inferred from the articles dealing with islands and low-tide elevations. In the ILC report, however (see commentary (2)(i) to Art. 10), this is spelled out as a limitation on the term "island."

50. This provision broadens the scope of the ILC recommendation which specifically prohibited the drawing of straight baselines between low-tide elevations and made no exception for the presence of lighthouses or similar installations (*see* note 14 *supra* and accompanying text). Report of the ILC (1956), *supra* note 7, at 14. *See also* note 15 *supra.*

51. This follows from par. 2 of Art. 11, which states that where a low-tide elevation is "at a distance exceeding the breadth of the territorial sea *from the mainland or an island,* it has no territorial sea of its own." (Emphasis added.)

planatory comments of the ILC. In its commentary (1), the Commission notes that "The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State." The situation envisioned by this commentary is one where the entrance to a port is protected from closing up by building jetties seaward into the ocean. Other situations may not be as clear cut, but some guidance is possible from commentary (2), which states that "Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works." [52]

(*b*) *Roadsteads.*—Roadsteads are sea areas used for loading, unloading, and anchoring of ships. Article 9 provides that when such areas would otherwise be situated wholly or partly outside the outer limit of the territorial sea, they are to be included in the territorial sea. This provision is identical with the draft rules of the ILC and also follows substantially the Report of the Second Sub-Committee at the 1930 Hague Conference.[53]

2212. *Boundary Through the Territorial Sea—The Median Line*

If coastlines were relatively straight, and the land boundary between adjacent coastal States reached the shore at right angles, the problem of delimiting the boundary between them through the territorial sea would be a simple one—an extension seaward of the last land frontier would be a logical solution. But coastlines are rarely straight, and land boundaries seldom reach the shore at right angles. Figure 48, for example, illustrates a situation where an extension of the land boundary through the territorial sea would clearly be inequitable for State *A* because it would deprive it of a portion of the territorial sea that clearly belongs to it. The inequity would be magnified as the line is extended seaward to the edge of the continental shelf. What then is the most equitable method to apply?

The problem was exhaustively considered by the International Law Commission with the aid of a study by a committee of experts. The solution agreed on as the most satisfactory and the most equitable was to draw the boundary "by application of the principle of equidistance from the nearest points on the baseline from which the breadth of the territorial sea of each country is

52. Report of the ILC (1956), *supra* note 7, at 16. While the ILC in commentary (3) posed the question whether Art. 8 could still be applied where a jetty extends several kilometers into the sea or whether such installations should be considered the same as installations for the exploration of natural resources on the continental shelf, which would have safety zones but no territorial sea (*see* note 93 *infra*), it declined to state an opinion because of the rareness of the situation. Nor did it express an opinion as to where a dividing line might be drawn.

53. The ILC notes in a commentary that the question of treating roadsteads as internal waters was considered but was decided against because of the possibility that innocent passage through them might be prohibited. It felt that the rights which a coastal State must exercise over such areas were sufficiently safeguarded by assigning to them a status of territorial sea. Report of the ILC (1956), *supra* note 7, at 16.

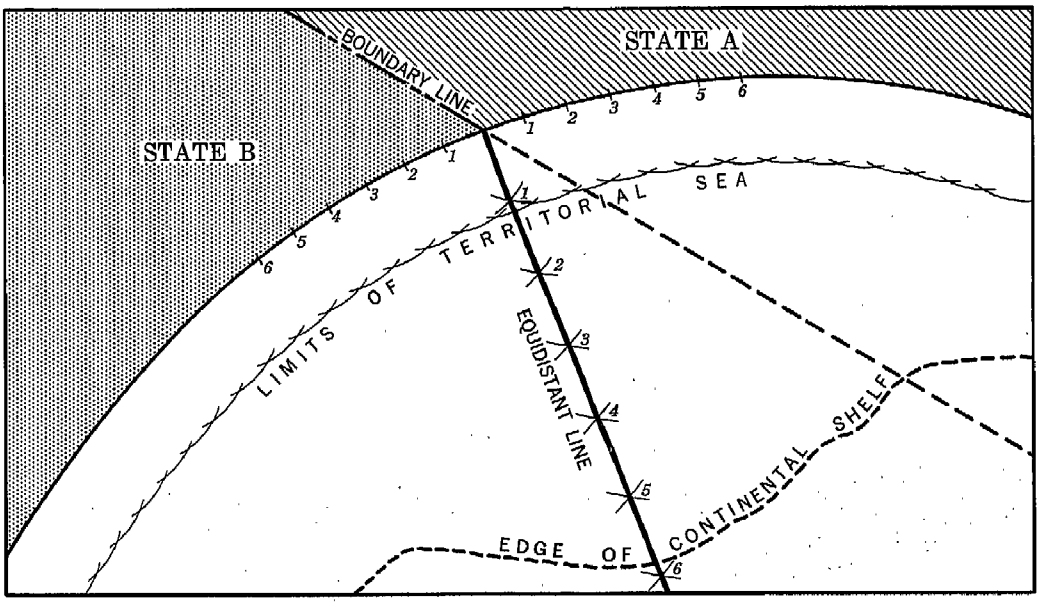

FIGURE 48.—A continuation seaward of the land boundary results in an inequity to State *A*. An equidistant line is preferable under such conditions (*see* note 60 *infra*).

measured." [54] This principle is embodied in the median-line concept. The ILC adopted a separate rule for cases where the coasts of two States are opposite each other, the boundary in such cases being the median line. This distinction between an equidistant line and a median line seems valid from a geometrical point of view, for a true median line presupposes a line that is in the middle. Theoretically, at least, a boundary line through the territorial sea between two adjacent States, while an equidistant line, is not a true median line.

The Geneva convention combines both cases—opposite coasts and adjacent coasts—into a single article (Art. 12). It fixes the boundary between two States not directly but as a prohibition against either State extending its "territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured." This, in effect, adopts the median-line principle as the boundary between two States.

Since in all cases of boundary making, the objective is agreement between the parties concerned, the convention provides for the use of the median line

54. Report of the ILC (1956), *supra* note 7, at 18. Besides considering the continuation of the land frontier, the Commission studied several other possibilities, namely: a line at right angles to the coast at the point where the land frontier reached the sea; a line coinciding with the geographic parallel passing through the point at which the land frontier meets the coast; and a line at right angles to the general direction of the coast. The Commission rejected these methods as impracticable for a general rule of law, although suitable in special situations. It adopted instead the principle of equidistance.

only in the absence of such agreement, and justifies a departure from such mathematical line where a historic title or other special circumstance exists. But even in such cases, the median line would still provide the best starting point for arriving at an agreement.[55]

The ILC made an additional recommendation on the matter of enclaves within the territorial sea. This provided that where the delimitation of the territorial seas of two States lying opposite each other results in an enclave of high seas not more than 2 miles in breadth within the territorial sea, such enclave could by agreement be assimilated to the territorial sea. This, however, was not adopted by the Conference.[56]

A. CONSTRUCTION OF A MEDIAN LINE

The precise median line or the median-line principle can be applied in a large variety of geographic situations to delimit the sea boundary between coastal States in an equitable manner. Among these may be found cases where States are opposite each other, adjacent to each other, opposite and adjacent, or where islands exist in the vicinity of the boundary line.[57] Only the methods applicable to the first two will be described.[58]

55. Exceptional configurations of a coast, the presence of islands, the existence of special mineral or fishery rights in one of the States, or the presence of a navigable channel are among the special circumstances which might justify a deviation from the median line. It might be noted in this connection that a questionnaire, drawn up by the Special Rapporteur of the International Law Commission and submitted to a committee of experts, contained the following question regarding the international boundaries in the territorial sea: "How should the international boundary be drawn between two countries, the coasts of which are opposite each other at a distance of less than $2T$ miles [T being the breadth of the territorial sea]? To what extent have islands and shallow waters to be accounted for?" To this, the committee replied: "An international boundary between countries the coasts of which are opposite each other at a distance of less than $2T$ miles should as a general rule be the median line, every point of which is equidistant from the base-lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line. The line should be laid down on charts of the largest scale available, especially if any part of the body of water is narrow and relatively tortuous." Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AMERICAN JOURNAL OF INTERNATIONAL LAW 649 n.131, 651 (1958).

56. At the 1930 Hague Conference, the American delegation had proposed a somewhat analogous rule for the assimilation of partly surrounded pockets of high seas. It provided that where the delimitation of the territorial sea results in a pronounced concavity such that a straight line not more than 4 miles long entirely closed off the concavity, the coastal State may regard it as part of the territorial sea if it satisfies the semicircular rule for bays. This proposal was not adopted by the Second Sub-Committee of that Conference.

57. Examples of these and others may be found in Pearcy, *Geographical Aspects of the Law of the Sea*, 49 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 17–19 (Mar. 1959).

58. These are based on a paper prepared by Commander Kennedy, of the United Kingdom delegation to the Conference on the Law of the Sea, entitled "Brief Remarks on Median Lines and Lines of Equidistance, and on the Methods Used in Their Construction," and distributed at the Conference on Apr. 2, 1958. Also, *see* Boggs, *Delimitation of Seaward Areas Under National Jurisdiction*, 45 AMERICAN JOURNAL OF INTERNATIONAL LAW 256–263 (1951), for a discussion of median-line techniques.

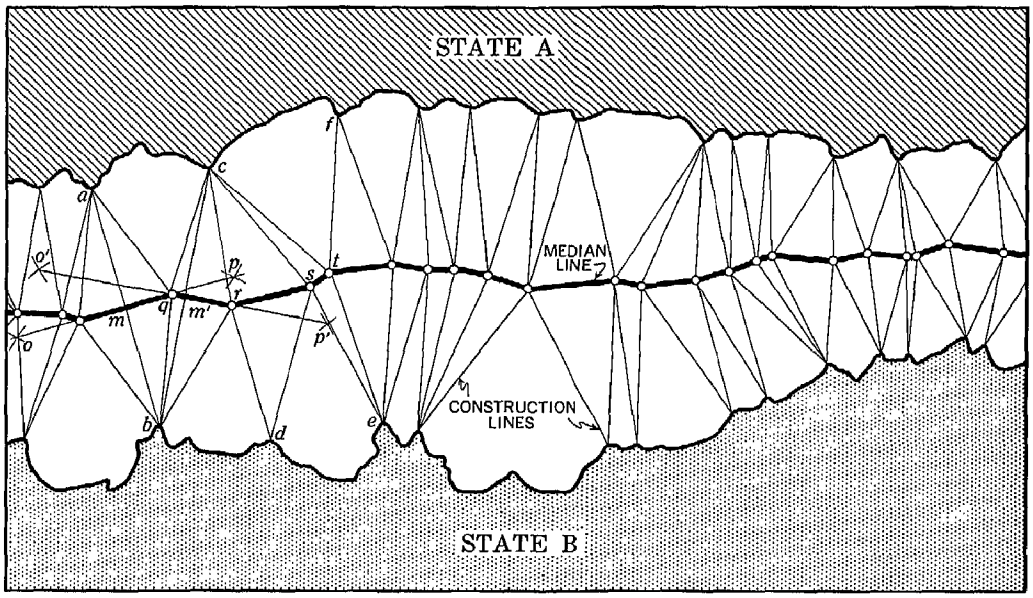

FIGURE 49.—Construction of a median-line boundary between coasts opposite each other. Only two of the perpendicular bisectors are shown.

In constructing a true median-line boundary, it is essential to keep in mind that every point on such boundary must always be equidistant from the nearest points on the baselines from which the territorial sea is drawn. Unless this geometric principle is satisfied the resulting boundary will not be a true median line. And for purposes of drawing median lines, the baselines from which equal distances are measured may be the low-water lines, closing lines of bays, or straight baselines. The technical construction for the two cases is somewhat different and will be treated separately.

(*a*) *Where the Coasts Are Opposite Each Other.*—In figure 49, a point on the true median line must first be established. This can be a trial-and-error method, or it may be a direct method as follows: Center the dividers on a prominent point on the coast of State *A* and swing an arc until a point on the coast of State *B* nearest to this center is found. With the same radius, center the dividers on the point on the coast of State *B* and verify that the original point on State *A* is the nearest to it. (This is not necessarily always so and is dependent upon the particular shapes of the coastlines.) If the selected points are not the nearest to each other *from both coasts*, two other points must be found that are. The initial point on the median line is the midpoint of the line joining these two points. In the figure, *a* and *b* are the points near-

est to each other and *m* is a point on the median line. Having established the initial point, other points on the median line are derived as follows:

(1) Draw a perpendicular *omp* to the line *ab* at point *m*. This will be the median line, since from the geometric construction every point on this line is equidistant from both *a* and *b*.

(2) A point *q* is next found by trial and error in the line *mp* that is equidistant from the nearest point on the coast of either State and from points *a* and *b*. Let this point be *c* on the coast of State *A*. Hence, at *q*, the relationship $qa=qb=qc$ exists, and there are no points on the coastline of either State nearer to the median line than points *a*, *b*, and *c*.

(3) A perpendicular bisector *o'm'p'* is next drawn to line *bc* (this must pass through point *q* since *qb* is equal to *qc*), and a point *r* found on this bisector that is equidistant from *b* and *c* and from the nearest point on the coast of either State. Let this point be *d* on the coast of State *B*.

(4) A perpendicular bisector is next drawn to line *cd*, and a point *s* is found on this bisector that is equidistant from *c* and *d* and from the nearest point on the coast of either State. Let this point be *e* on the coast of State *B*.

(5) A perpendicular bisector is next drawn to line *ce*, and a point *t* found on this bisector that is equidistant from *c* and *e* and from the nearest point of the coast of either State. Let this point be *f* on the coast of State *A*.

(6) This process is continued to the desired limit of the boundary to be delimited.[59]

(*b*) *Where the Coasts Are Adjacent to Each Other.*—Figure 50 illustrates an application of the median-line principle to delimit the boundary through the territorial sea of two adjacent States. In this case, a point is first selected at a distance from the coast sufficient to encompass the outer limit of the territorial sea. This point should be equidistant from the nearest point on the coastline of each State. Let this point be *t* in the figure and *a* and *b* the nearest points to it on the coastlines of States *A* and *B*, respectively. This, by definition, is a point in the median line. Having established this initial point on the median line, other points on it are derived as follows:

(1) Draw a perpendicular bisector *otp* to the line *ab* through point *t*. This bisector is the median line since every point on it is equidistant from both *a* and *b*.

(2) Proceed shorewards along the median line until a point is found that is equidistant from the nearest point on the coast of either State and from points *a* and *b*. Let this point be *u* and the nearest point be *c* on the coast of State *A*. Hence, at *u*, the relationship $ua=ub=uc$ exists.

(3) Draw a perpendicular bisector through *u* to the line *cb* and proceed along this bisector shorewards until a point is reached that is equidistant from points *b* and *c* and the nearest point on the coast of either State. Let this point be *v* and the nearest point be *d* on the coast of State *A*.

59. Where a point on the median line is equidistant from four or more points, as occasionally happens, the median line continues along the perpendicular bisector of the two points on the opposite coasts furthest removed from the starting point.

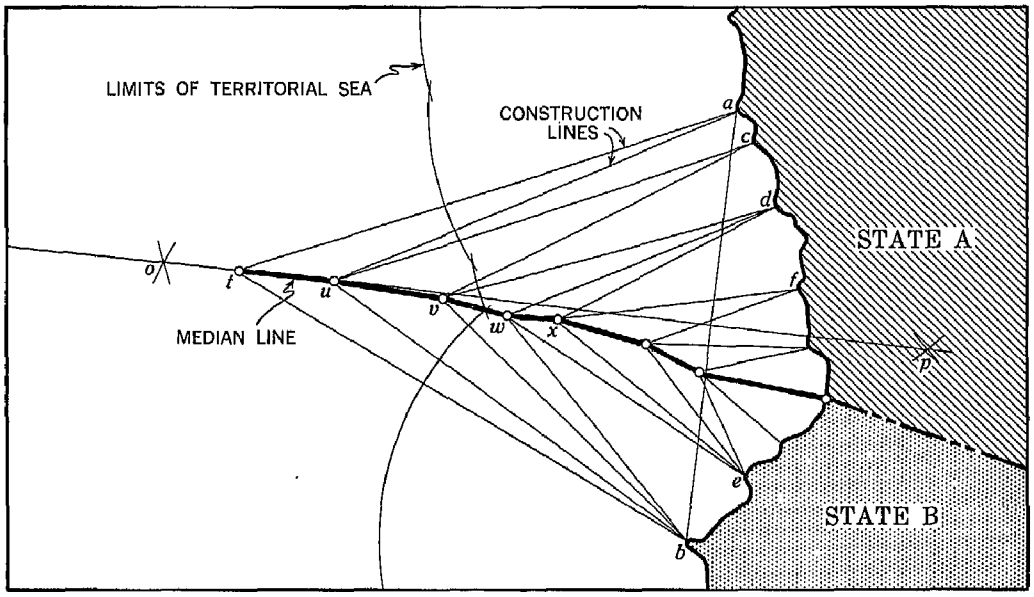

FIGURE 50.—Construction of a median-line boundary between coasts adjacent to each other. Only one perpendicular bisector is shown.

(4) Draw a perpendicular bisector through *v* to the line *db* and proceed along this bisector shorewards until a point is reached that is equidistant from points *d* and *b* and the nearest point on the coast of either State. Let this point be *w* and the nearest point be *e* on the coast of State *B*.

(5) Draw a perpendicular bisector through *w* to the line *de* and proceed along this bisector shorewards until a point is reached that is equidistant from points *d* and *e* and the nearest point on the coast of either State. Let this point be *x* and the nearest point be *f* on the coast of State *A*.

(6) This process is continued, always taking the perpendicular bisector from a point on the median line to the nearest points on the coasts of States *A* and *B*, until the boundary at the coast is reached.[60]

2213. *Charting of Boundary Lines*

The Convention on the Territorial Sea and the Contiguous Zone calls for the charting of boundary lines or baselines on the official charts of the coastal State in four situations: (1) Where a normal baseline is used (Art. 3)—this is

60. Where the coastline of two adjacent States is not particularly complex, the principle of equidistance can be preserved by drawing the lateral boundary between them as shown in figure 48. With the shore terminus of the land boundary as a center, intercepts are drawn at equal intervals on the coastline of each State. Arcs are then swung seaward from corresponding intercepts with radii equal to the distances between them. The intersections of corresponding arcs form points on the lateral boundary, each of which is by construction equidistant from corresponding points on the coastline of each State.

the low-water line as indicated on the large-scale charts;[61] (2) where straight baselines are used (Art. 4, par. 6);[62] (3) where roadsteads exist they must be indicated together with their boundaries (Art. 9); and (4) where there is a boundary between the territorial seas of two States opposite to each other it is to be shown on large-scale charts (Art. 12, par. 2).

In the case of straight baselines and roadsteads, the convention also calls for giving due publicity to such boundaries. Presumably this would mean in *Notices to Mariners* and in *Coast Pilots.*

2214. *The Right of Innocent Passage*

The rules pertaining to innocent passage through the territorial sea are embodied in Articles 14 through 23 of the convention, and are subdivided into those applicable to *All Ships,* to *Merchant Ships,* to *Government Ships Other Than Warships,* and to *Warships.*

Since no boundary problems *per se* are involved, these rules will be noted only insofar as they represent a limitation on the right of a coastal State to control the waters within its national boundaries.

The right of innocent passage is the one feature of the territorial sea that distinguishes it from national or internal waters. The principle of such passage has been recognized for a long time as an integral part of the law of the sea, and represents a balance between the maritime interest in preserving the greatest possible freedom of passage and the coastal State's interest in protecting its security.

(*a*) *Rules Applicable to All Ships.*—The basic paragraphs of this section of the convention are those that define "passage" and "innocent passage." *Passage* means "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters" (Art. 14, par. 2).[63]

61. The lack of specific details as to the exact low-water line to be used gives this provision a degree of flexibility so as to encompass both a low-water line and a lower low-water line, depending upon which is used on the official charts (*see* 2211 A(*a*)). The ILC recognized this in commentary (2) to Art. 4 by observing that the traditional expression "low-water mark" may have different meanings, and that there is no uniform standard by which States in practice determine this line. Report of the ILC (1956), *supra* note 7, at 13.

62. This was not a requirement in the recommendations of the ILC.

63. This includes stopping and anchoring, but only insofar as they are incidental to ordinary navigation or are made necessary by *force majeure* or by distress (Art. 14, par. 3).

Passage is defined as *innocent* (Art. 14, par. 4) "so long as it is not prejudicial to peace, good order or security of the coastal State." [64]

(*b*) *Rules Applicable to Warships.*—Article 23, which applies to warships, does not specifically grant warships the right of innocent passage in the territorial sea; it merely gives the coastal State the right to require a warship to leave the territorial sea if it has disregarded the regulations of that State concerning passage, after being requested to comply. The implication, however, is clear that warships have the right of innocent passage.[65]

A. PASSAGE THROUGH INTERNATIONAL STRAITS

A special aspect of the doctrine of innocent passage is its applicability to international straits, that is, waterways used for international navigation.[66] The background for the consideration of such waterways by the Geneva Conference was the case of *United Kingdom* v. *Albania* (commonly known as the *Corfu Channel* case), in which the International Court of Justice laid down the doctrine that the decisive criterion for a strait being open to the passage of vessels of other nations is "its [the strait's] geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation" (*see* Part 1, 52).[67]

The International Law Commission followed the decision in the *Corfu Channel* case and adopted a rule to the effect that the innocent passage of foreign ships must not be suspended "through straits normally used for inter-

64. Other provisions give the coastal State the right to suspend temporarily, in specified areas, the innocent passage of foreign ships if the security of the coastal State is endangered (Art. 16, par. 3), and require foreign ships to comply with the laws and regulations enacted by the coastal State that are in conformity with the articles of the convention and other rules of international law (Art. 17).

65. This provision is practically identical with Art. 25 of the draft rules of the ILC, but the ILC also provided a more positive rule (Art. 24) which granted innocent passage to warships but subject to previous authorization or notification. This article failed to receive a two-thirds vote, and the convention was left only with Art. 23, with no special provision relating to the innocent passage of warships. The point has been made that the proceedings of the Conference indicate that a majority of the delegations did not intend warships to have such right. Sorensen, *supra* note 31, at 235. For a comprehensive discussion of the articles dealing with the right of innocent passage, *see* Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea,* THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 90–108 (Jan. 1959).

66. An international strait is not necessarily one that lies between two coastal States but can be situated wholly within the territory of a single State, as, for example, the Kiel Canal, which, although within German territory, was held by the Permanent Court of International Justice, under the Treaty of Versailles, to be open to all vessels. Similarly, the Corfu Channel was held to be an international strait, even though for a part of its length the shores belong to the same country (*see* fig. 15). COLOMBOS, INTERNATIONAL LAW OF THE SEA (4th ed.) 170, 191 (1959).

67. A strait in the juridical sense is thus distinguishable from a strait in the geographical sense, the latter being usually defined as a relatively narrow waterway connecting two larger bodies of water. It will be recalled that the *Corfu Channnel* case was relied on by the Government in the *California* case to uphold its contention that the waters between the southern California coast and the offshore islands are not inland waters but high seas (*see* Part 1, 53).

national navigation between two parts of the high seas." [68] The convention adopted at Geneva goes further than the *Corfu Channel* case and the ILC draft. It incorporates in Article 16, paragraph 4, the new concept that innocent passage should also include straits that connect the high seas with the *territorial sea* of another State. This is a distinct broadening of the existing rule and in the direction of greater freedom of the seas. The full text of the convention on this matter is as follows:

"There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." [69] (*See* fig. 38.)

2215. *The Contiguous Zone*

The term "contiguous zone" in international law may be defined as an area of the high seas, outside and adjacent to the territorial sea of a country, over which it exercises control for special purposes, such as the protection of its revenue and health laws. The origin of this doctrine goes far back into history,[70] but the first attempt to codify it as a principle of international law was in 1930 at the Hague Codification Conference. No agreement was reached on the matter, but nations continued to claim various rights of control for different purposes in areas beyond the traditional 3-mile limit.

Based upon the recommendation of the International Law Commission, the Geneva Conference gave clear, legal status to the contiguous zone doc-

68. Report of the ILC (1956), *supra* note 7, at 19 (Art. 17, par. 4). In commentary (4) to this rule, the Commission stated: "The question was asked what would be the legal position of straits forming part of the territorial sea of one or more States and constituting the sole means of access to a port of another State. The Commission considers that this case could be assimilated to that of a bay whose inner part and entrance from the high seas belong to different States. As the Commission felt bound to confine itself to proposing rules applicable to bays, wholly belonging to a single coastal State, it also reserved consideration of the above-mentioned case." *Id.* at 20. This question was raised by the State of Israel and had reference to the Strait of Tiran at the entrance to the Gulf of Aqaba, which is bordered by Egypt, Saudi Arabia, Jordan, and Israel. It was against this background that the Geneva Conference considered the right of innocent passage through straits.

69. According to the chairman of the U.S. delegation to the Geneva Conference, this provision specifically determines the controversy as to the right of Israeli shipping to pass through the Strait of Tiran to the Gulf of Aqaba (the Israeli port of Eilat is located at the head of the Gulf). Dean, *supra* note 11, at 621–623. For critical studies of the legal status of the Gulf and the right of passage through it, *see* Selak, *A Consideration of the Legal Status of the Gulf of Aqaba,* 52 AMERICAN JOURNAL OF INTERNATIONAL LAW 660 (1958), and Gross, *The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba,* 53 AMERICAN JOURNAL OF INTERNATIONAL LAW 564 (1959).

70. The United States, since 1799, has claimed its right to enforce anti-smuggling measures within 12 miles of its shores. The treaties signed by the United States between 1924 and 1932 for the enforcement of its prohibition laws are an implicit affirmation of this doctrine. (*See* Part 1, 3211.)

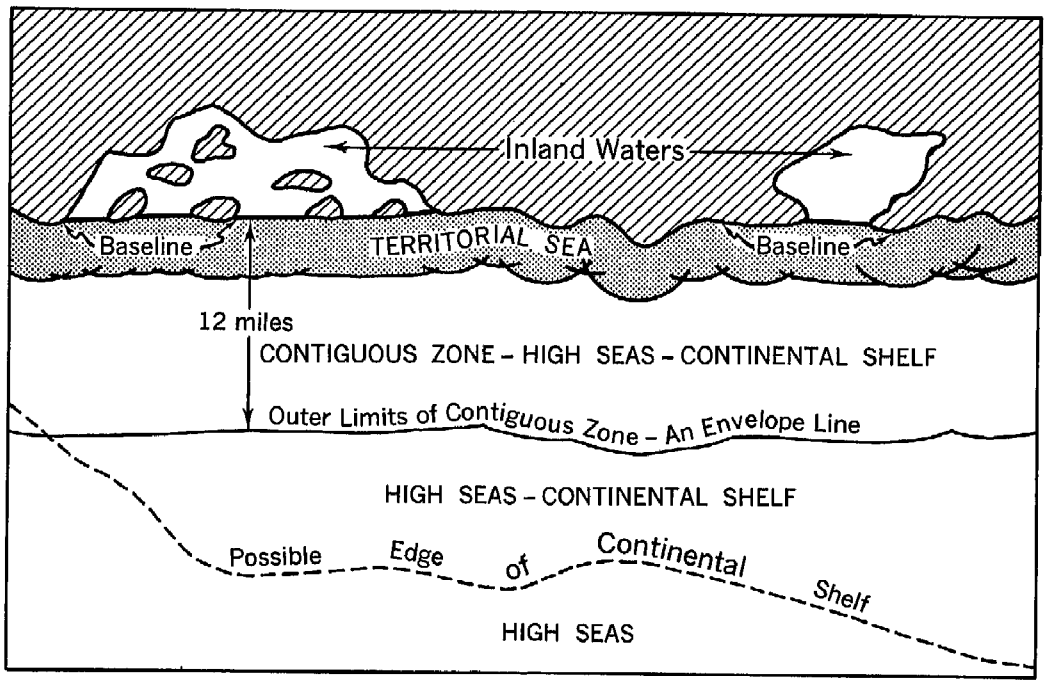

FIGURE 51.—Zones of water areas recognized in international law. These zones are not mutually exclusive but overlap in some instances.

trine.[71] In Article 24, the convention provides (1) that "in a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to . . . prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea," and (2) that "the contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."[72] (*See* fig. 51.)

It should be noted first that the contiguous zone is a part of the high seas and not merely something separate from the territorial sea. The legal status of the waters of the zone is not changed. The coastal State exercises no sovereignty over such waters but rather control to the extent provided by the convention. It differs from the rights it exercises over the territorial sea in that in the former (the contiguous zone) the rights are derived

71. The juridical basis for the recognition of a contiguous zone was set forth by the ILC in commentary (1) to Art. 66. It said: "International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea." Report of the ILC (1956), *supra* note 7, at 39.

72. This is identical with Art. 66 of the ILC report except for the reference to immigration which was omitted from the Commission's draft rules on the ground that there was no need to grant the coastal State special rights for this purpose in the contiguous zone. *Id.* at 40 (commentary (7)).

from international law, whereas in the latter (the territorial sea) the powers are derived from its own laws in an area which international law regards (for all practical purposes) as belonging to it.[73]

The second point that should be noted is that the convention makes it clear that not only is the maximum breadth of the zone limited to 12 miles measured from the coastline, or from straight baselines where permitted, but that such distance includes, and is not additional to, the territorial sea, as similarly measured. Thus, for a 3-mile territorial sea, the maximum breadth of the contiguous zone would be 9 miles. This would be reduced to 6 and 3 miles for a 6- and 9-mile territorial sea, respectively; while for a 12-mile territorial sea there would be no contiguous zone.[74]

(*a*) *Delimitation of Outer Limits.*—No specific provision is made for the method of delimiting the outer limits of the contiguous zone. Inasmuch as the measurement is made from the baseline, there is no reason why the same method that the Conference adopted for drawing the outer limits of the territorial sea should not be used for the contiguous zone, that is, by the use of an envelope line. All the reasons advanced for the use of this method in the first case are equally applicable to the second case (*see* 2211 B and Part 2, 1621(*c*)).

(*b*) *Boundary Through the Contiguous Zone.*—As in the case of the territorial sea, the convention does not fix directly the boundary through the contiguous zone between two States opposite or adjacent to each other, but as a prohibition against either State extending its "contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured" (Art. 24, par. 3). This, in effect, adopts the median line as the boundary between the two States through the contiguous zone. The reasons

73. Fitzmaurice, *supra* note 65, at 112. There is one limitation to the character of the contiguous zone as part of the high seas, and that is in the matter of "hot pursuit." Hot pursuit is the right which a coastal State has to pursue a foreign vessel on the high seas that has committed an offense in territorial waters. The limitations on this right are that the pursuit must follow immediately upon the escape of the vessel and must be continuous. Hence, normally, hot pursuit cannot originate if the offending vessel is first spotted in the contiguous zone, since that is part of the high seas. But the Convention on the High Seas adopted at Geneva permits such pursuit if there has been a violation of the rights of the coastal State for the protection of which the contiguous zone was established (*see* 223(*d*)).

74. It was maintained by some of the delegations that the contiguous zone is independent of the territorial sea and that countries were entitled to a contiguous zone of up to 12 miles, regardless of what they claimed as territorial sea. On the basis of a 12-mile territorial sea this would mean a zone of 24 miles over which a coastal State could exercise some kind of rights with respect to foreign shipping. *Id.* at 109. Commentary (9) to Art. 66 of the draft rules of the ILC would seem to be an answer to this contention. The Commission noted: "Until such time as there is unanimity in regard to the breadth of the territorial sea, the zone should be measured from the coast and not from the outer limit of the territorial sea. States which have claimed extensive territorial waters have in fact less need for a contiguous zone than those which have been more modest in their delimitation." Report of the ILC (1956), *supra* note 7, at 40.

for such selection and the method of constructing such boundary have been discussed in connection with establishing a boundary through the territorial sea (*see* 2212).

2216. *Internal Waters*

Article 5 of the convention deals with the status of the waters on the landward side of the baseline of the territorial sea. Paragraph 1 applies to the case of normal baselines (*see* 2211 A(*a*)) and follows the accepted rule that the waters on the landward side of such baselines form part of the internal waters of the State, over which no right of innocent passage exists (*see* Part 1, 311). (*See* fig. 51.) Where straight baselines are permissible, the problem is different. The approved use of such baselines is a relatively new development in the law of the sea (*see* 2211 A(*b*)), and areas of water which formerly were part of the territorial sea or the high seas may be enclosed as internal waters by the use of such baselines. In the *Anglo-Norwegian Fisheries* case, the Court considered these waters to be internal waters and as much subject to the complete sovereignty of the coastal State as are rivers and lakes. The Conference, while following the Court on the status of such areas as internal waters, nevertheless, added in paragraph 2 the important modification that where the establishment of a straight baseline "has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage . . . shall exist in those waters." [75]

2217. *The Breadth of the Territorial Sea*

There is one patent omission from the Convention on the Territorial Sea as adopted at Geneva—it contains no article relating to its breadth. This subject, together with the related one of the extent to which a coastal State should have exclusive fishing rights in the waters off its coast, was considered by the Conference but none of the proposals submitted received the necessary votes required for adoption.[76]

75. This provision follows closely the recommendation of the ILC except that the latter limited innocent passage to waters normally used for international traffic. Report of the ILC (1956), *supra* note 7, at 14. The elimination of this restriction from the convention is in the direction of greater freedom of the seas.

76. It will be recalled that the International Law Commission was also unable to reach agreement on a uniform distance and contented itself with merely noting some of the difficulties that stood in the way. The Commission did, however, note that international law does not permit an extension of the territorial sea beyond 12 miles (*see* 1313).

Although the United States believed the 3-mile territorial sea to be firmly established in international law, and although it regarded that distance a proper compromise between the national interests of the coastal State and the international community's interest in the freedom of the seas, it was, nevertheless, willing to explore the situation in the hope of achieving agreement.[77]

A variety of proposals was made by different delegations, ranging from a continuation of the 3-mile limit to a 12-mile limit. When it became apparent that none of these proposals could muster the necessary two-thirds majority, the United States offered a compromise proposal for a 6-mile territorial sea with the right of the coastal State to regulate fishing for an additional 6 miles, subject to certain historical fishing rights for foreign vessels.[78]

In plenary session, the United States proposal received more votes than any other proposal—45 votes for, 33 against, and 7 abstentions—but still 7 votes short of the required 52. No further action was taken by the Conference on this proposal.

The breadth of the territorial sea was again considered at the Second Geneva Conference in 1960 where various proposals were discussed but no agreement reached (*see* 231).

2218. *Comparison of Convention With Boundary Criteria Formerly Used by the United States—Agreements and Differences*

The positions taken by the United States from time to time with respect to the delimitation of territorial waters are set out (with citations) in the letter of November 13, 1951, from the Acting Secretary of State to the Attorney General (*see* Appendix D).[79] The provisions may be summarized as follows:

(*a*) In the case of a relatively straight coast, or a coast with small indentations not equivalent to true bays, the baseline for measuring the territorial sea is the low-water mark, following the sinuosities of the coast, and is not drawn from headland to headland. The United States maintained this position at the

77. Support of a narrow territorial belt by the United States was based on compelling military and commercial, as well as legal, reasons. Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AMERICAN JOURNAL OF INTERNATIONAL LAW 610–613 (1958).

78. *Id.* at 614. This was the first time the United States had departed from its traditional adherence to the 3-mile limit, and was advanced with the belief that it accommodated the sincere interests of all States represented. The effect of the proposal would have been to accord each State a 12-mile zone for fishing, at the same time preserving 6 miles of the 12-mile zone as high seas. The complete text of the U.S. compromise proposal may be found in 38 DEPT. STATE BULLETIN 1110–1111 (1958). For a discussion of the proposals made by other maritime nations for the breadth of the territorial sea and fishing rights in adjacent areas, *see* Sorensen, *supra* note 31, at 245–249.

79. This letter deals primarily with boundary questions raised by the *California* case (*see* Part 1, 2111). Other pertinent matters, such as delimitation of the outer limit of the territorial sea, will be considered in the light of the United States position at the 1930 Hague Conference for the Codification of International Law (hereinafter cited as the 1930 Conference).

1930 Conference and in the proceedings before the Special Master in the *California* case.[80]

(*b*) Where a coast is broken by a deep indentation having the character of a bay, the baseline for measuring the territorial sea is a straight line across the headlands if the distance between is 10 miles or less; for distances greater than 10 miles, the baseline is a straight line drawn at the point nearest the entrance where the distance does not exceed 10 miles, provided that the water area landward of such line itself has the character of a bay. This position was supported by the United States at the 1930 Conference. It also proposed a rule (the semicircular rule) for determining when a particular indentation of the coast should be regarded as a bay to which the 10-mile rule would apply. Both the 10-mile rule and the semicircular rule were urged by the United States in the *California* case.[81]

(*c*) Where a strait or channel between the mainland and an offshore island or islands connects two areas of open sea, the baseline follows the shore of the mainland and of each island. The waters of the strait or channel are either marginal sea or high sea, depending upon whether the width is less or greater than 6 nautical miles. With respect to a strait which is merely a channel of communication to an inland sea, the rules regarding bays apply. This was the position of the United States at the 1930 Conference and in the *California* case.[82]

(*d*) With respect to the measurement of territorial waters when rocks, reefs, mudbanks, sandbanks, islands or groups of islands lie off a coast, the position of the United States has been to regard as islands separate bodies of land which are capable of use, irrespective of their distance from the mainland, while separate bodies of land, whether or not capable of use, but standing above the level of low tide (low-tide elevations, drying rocks, rocks awash), are regarded as islands if they are within 3 nautical miles of the mainland. Each island, as

80. Brief for the United States before the Special Master 9 (May 1952), United States v. California, Sup. Ct., No. 6, Original, Oct. Term, 1951. The Geneva convention follows this rule with regard to normal baselines, but adopts the new concept of straight baselines in accordance with the principles laid down by the International Court of Justice in the *Anglo-Norwegian Fisheries* case (*see* 2211 A). In the *California* case, the United States contended that the rule of the *Fisheries* case was not obligatory on States not party to the controversy, citing the letter of Feb. 12, 1952, from the Secretary of State to the Attorney General (*see* Appendix D). It therefore adhered to the principles set out in the letter of Nov. 13, 1951, *supra*. *Id.* at 35–36, 173–175.

81. *Id.* at 9–10. The Geneva convention follows the semicircular rule for bays, but adopts a 24-mile closing line instead of a 10-mile line (*see* 2211 C(*a*) and (*c*)).

82. *Id.* at 9, 171–172. There are no comparable provisions in the Geneva convention dealing with straits, other than the provision relating to the right of innocent passage through straits used for international navigation. This necessarily implies that such straits do not take on the character of inland waters but rather marginal sea or high sea, and to that extent is the same as the position heretofore advocated by the United States. The distinction of the Geneva convention lies in the fact that it also applies to straits that connect the high seas with the *territorial sea* of another State (*see* 2214A).

defined, has its own territorial belt measured in the same manner as in the case of the mainland.[83]

(*e*) With respect to mouths of rivers which do not flow into estuaries, although the United States made no proposal regarding them at the 1930 Conference it was in accord with the recommendation of the Second Sub-Committee which agreed to take for the baseline a line following the general direction of the coast and drawn across the mouth of the river, whatever its width.[84]

(*f*) Regarding harbors and roadsteads, the position of the United States at the 1930 Conference was that both were to be considered as inland waters. In the case of the former (harbors), the outermost permanent harbor works were to be used as the baseline for measuring the extent of the territorial sea, and in the case of the latter (roadsteads), the exterior boundary of the roadstead was to be used as the baseline.[85]

(*g*) For defining the seaward limits of the territorial sea, the United States proposed at the 1930 Conference the use of the envelope of all arcs of circles having a radius of 3 nautical miles drawn from all points on the coast. This line has been identified more specifically as a line every point of which is at a distance of 3 nautical miles from the nearest point on the baseline from which the territorial sea is measured (*see* Part 2, 1621(*c*)).[86]

(*h*) With regard to boundaries through the territorial sea, no proposals were made by the United States at the 1930 Conference, nor were any recommended by the Second Sub-Committee. Reference to the use of "equitable

83. *Id.* at 171. This was the position of the United States at the 1930 Conference, but the Second Sub-Committee of that Conference did not accept the capability-of-use criterion, which would have included as islands natural appendages of the seabed exposed only at low tide. Instead, it defined an island as an area of land, surrounded by water, which is permanently above high-water mark, but it agreed that natural appendages exposed at low tide should be taken into account in delimiting territorial waters if they are situated within the territorial sea of the mainland or of an island. *Ibid.* The Geneva convention is essentially the same as the recommendation of the Second Sub-Committee except that while the latter did not exclude artificial islands from the definition, the Geneva convention specifically confines the term to a "naturally-formed area of land" (*see* 2211 D(*a*) and (*c*)).

84. *Id.* at 170–171. The sub-committee also recommended that if a river flows into an estuary, the rules applicable to bays apply to the estuary. The Geneva convention contains a similar provision with regard to rivers except no mention is made of estuaries (*see* 2211 A(*c*)).

85. The report of the Second Sub-Committee adopted the same provision for harbors as proposed by the United States, but did not adopt an inland water status for roadsteads, but rather a territorial sea status. The Geneva convention, in the case of harbors, appears on the face somewhat more restrictive than the United States proposal, inasmuch as the outermost permanent harbor works are noted as those "which form an integral part of the harbour system." However, reference to the final report of the International Law Commission, which contained an identical provision, shows the difference to be more apparent than real. For an interpretation of the application of the provision in the Geneva convention to a coast, *see* 2211 E(*a*). With regard to roadsteads, the Geneva convention follows the report of the Second Sub-Committee of the 1930 Conference and assigns to them a territorial sea status and not an inland waters status (*see* 2211 E(*b*)).

86. The Geneva convention follows this definition except no distance is specified for the breadth of the territorial sea (*see* 2211 B).

principles" for determining the boundary between the United States and the nation concerned was included in the Truman Proclamation of 1945 on the continental shelf (*see* Part 2, 2221), but no working rule was specified. The Geneva convention represents the first formulation of the median-line principle for delimiting boundaries through the territorial sea and the continental shelf (*see* 2212 and 2224).

222. Convention on the Continental Shelf

Of all the subjects included within the scope of the Geneva conventions, none treat of more recent concepts than those pertaining to the continental shelf. The development of techniques for drilling for oil in the subsoil gave rise to claims by coastal States for extensive rights over the seabed beyond the limits of the territorial sea. There was no uniformity in these claims either as to extent or to the degree of control exercised (*see* Part 2, 2221). This created a highly explosive situation and the first attempt to bring order out of the developing chaotic condition was a consideration of the regime of the continental shelf by the International Law Commission (*see* 1312). The recommendations of the ILC, with certain modifications, form the basis of the Convention on the Continental Shelf adopted by the Geneva Conference.

While the claims heretofore made were for the most part unilateral in nature, the Geneva convention represents the first worldwide accord on the subject and marks a significant forward step in the orderly development of this aspect of the international law of the sea. What was attempted to be accomplished was a balanced compromise between the requirements of the coastal State and the needs of the international community.

The convention rejects the view that the continental shelf doctrine justifies claims to vast offshore areas regardless of depth or exploitability, or that it entitles a coastal State to exercise unlimited jurisdiction over the waters above the shelf. On the contrary, the regime of the continental shelf as developed by the convention is subject to and within the orbit of the paramount principle of the freedom of the high seas and of the airspace above.

One of the important contributions that the convention makes regarding rights and obligations in the continental shelf is its clarification of the nature and extent of scientific research that may be carried on there, which was left unresolved by the International Law Commission.[87]

87. For a comprehensive article-by-article discussion of the first seven articles of the convention, together with the various proposals made in Committee IV, *see* Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 American Journal of International Law 629 (1958).

The convention contains 15 articles, the first 7 being substantive in nature and the last 8 procedural. Only the pertinent ones of the first 7 will be examined.

2221. *Definition of Continental Shelf*

Substantively, Article 1 of the convention follows the ILC draft and defines the continental shelf as "the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"; and "the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands." [88]

The definition thus provides alternative criteria for determining the outer limit of the shelf over which a coastal State may exercise sovereign rights. The first—a depth of 200 meters (or 100 fathoms)—coincides with the geographic concept of the average shelf edge and provides a fixed legal limit of a State's rights.[89] The second alternative adopts the criterion of exploitability as the limit beyond the conventional edge of the shelf over which sovereign rights may be exercised. Although the exploitability test does not satisfy the requirement of certainty, which is essential in any legal concept, it does have the advantage of flexibility and makes the convention applicable, without prior alteration of the limit adopted, to future situations brought about by technological developments in the field of oceanic exploration.[90]

88. In one draft, the ILC adopted the exploitability test with no reference to a specific depth of water; in another, it adopted the 200-meter depth test with no exploitability test; in the final draft it adopted the 200-meter test *and* the exploitability test on the basis of its adoption by the Inter-American Specialized Conference on "Conservations of Natural Resources: Continental Shelf and Oceanic Waters," held at Ciudad Trujillo in 1956. Report of the ILC (1956), *supra* note 7, at 41. The latter part of the definition is clarifying in nature. It was not a part of the draft rules of the ILC but was stated in commentary (10) as being applicable to submarine areas contiguous to islands. *Id.* at 42. Proposals made in Committee IV of the Geneva Conference for defining the continental shelf included the following criteria: 550 meters but not over 100 miles from the outer limit of the territorial sea; deletion of depth-of-exploitability test; 550-meters test only; shelf edge or 200 meters; shelf edge or 550 meters; shelf and slope (continental terrace); and exploitability test only. Whiteman, *supra* note 87, at 634.

89. This limit is conventionally accepted as the edge of the shelf, although in any given instance the edge of the geographic or geologic shelf may actually occur at either a greater or lesser depth. There is a practical reason for adopting this limit, since it is usually marked on nautical charts. In 1952, the International Committee on the Nomenclature of Ocean Bottom Features adopted the following definition for the continental shelf: "The zone around the continent, extending from the low water line to the depth at which there is a marked increase of slope to greater depth. Where this increase occurs the term shelf edge is appropriate. Conventionally its edge is taken at 100 fathoms (or 200 metres) but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low water line is highly irregular, and includes depths well in excess of those typical of continental shelves, the term Continental Borderland is appropriate." BULLETIN, INTERNATIONAL UNION GEODESY AND GEOPHYSICS 555 (July 1953).

90. It has been suggested that since the legal concept of the continental shelf owes its origin to the generally recognized need for giving the coastal State an exclusive right to its exploitation,

In summary, for purposes of the convention, the normal limit to which the right of the coastal State extends is where the depth of water does not exceed 200 meters. And this is irrespective of the existence of a continental shelf in the geologic sense or of its extension beyond 200 meters. In this area, exploitability, and therefore the necessary control, will be presumed. Beyond this normal limit, however, the coastal State may exercise the specified rights only if exploitation of such areas is feasible.[91]

2222. *Sovereign Rights of Coastal State*

Article 2 of the convention provides that the coastal State exercises *sovereign rights* over the continental shelf for the purpose of exploring it and exploiting its natural resources. This provision is identical with Article 68 of the ILC draft articles.[92] Paragraphs 2 and 3 of the article enunciate the principle that the rights recognized are exclusive in the coastal State and do not depend on actual exploration or on occupation, effective or notional, or on any express proclamation. No one may undertake such activities or make a claim to the continental shelf without the express consent of the coastal State.

Within the limitations noted below, the coastal State may construct and maintain installations and other devices necessary for exploration and ex-

it would be contrary to the concept if exploitable resources outside the adopted limit could not be reached by the State. Sorensen, *supra* note 31, at 228.

Present Exploitability.—In the consideration of the conventions on the law of the sea by the Senate Foreign Relations Committee, the question was asked: "What are the practical or theoretical limitations on the exploitation of the natural resources of the 'Continental Shelf' at great depth?" The answer by the Department of State was that for mineral resources, the present practical limitation of operations is around 200 feet (*see* fig. 52), some holes for petroleum having been drilled in depths of 1,500 feet. The Department also noted that operational depths are continually increasing as new techniques are developed, and that serious discussion is now going on relative to the possibility of drilling, for research purposes, even from oceanic depths. But it probably will be some time before oil and gas operations are practical on a substantial scale at depths even as great as 200 meters. As for living organisms, there seem to be no insurmountable difficulties in exploiting sedentary marine organisms in depths in excess of 200 meters, but they are not numerous, and are not presently exploited by United States fishermen. *Hearing, supra* note 31, at 88 (Question 19).

91. For a discussion of the physical characteristics of the continental shelf, the development of its legal status, and the impact of the new shelf doctrine on the freedom of the high seas, *see* Part 2, 221, 2222, and 223.

92. The term "sovereign rights" was adopted by the ILC as a compromise between the views of those desiring to use the term "sovereignty" and those who preferred "jurisdiction and control." The Commission avoided the use of sovereignty because of its possible interpretation as an infringement on the principle of the full freedom of the superjacent waters and the airspace above. The Truman proclamation (*see* Part 2, 2221) and the Outer Continental Shelf Lands Act (*see* Part 2, 232) both used the words "jurisdiction" and "control," the United States taking the position that under such decisions as the *Island of Palmas Arbitration,* 2 International Arbitral Awards 829 (1928), there can be no sovereignty without effective occupation and control. Dean, *supra* note 77, at 620. The *Palmas* case involved a dispute between the United States and the Netherlands over the Island of Palmas (Miangas) in the Western Pacific. It was claimed by the United States as a cession from Spain in 1898, but the Permanent Court of Arbitration denied the claim on the ground that the evidence showed the Netherlands had been exercising undisputed sovereignty over the island for more than 200 years.

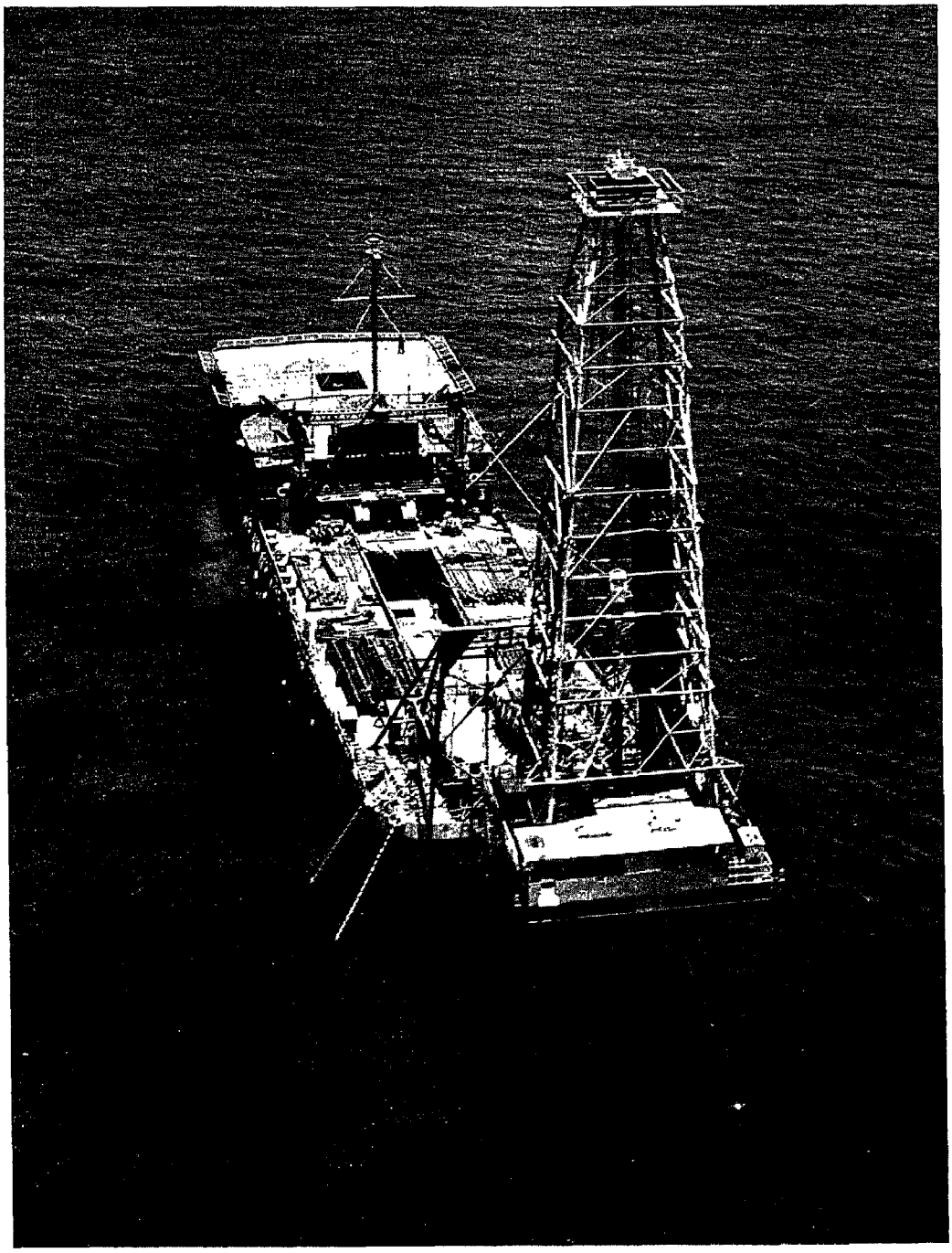

FIGURE 52.—Tender-type platform on the outer continental shelf in the Gulf of Mexico, approximately 60 miles from shore in 206 feet of water. (*Courtesy, J. Ray McDermott & Co., Inc.*)

ploitation of the natural resources of the shelf, and establish safety zones around them up to a distance of 500 meters, measured from each point of their outer edge, and within such zone to take those measures as are necessary for the protection of the installations (Art. 5, pars. 2 and 3).[93]

The last substantive article of the convention (Art. 7) declares the right of the coastal State "to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil." [94]

(*a*) *Limitations.*—That the rights of the coastal State under the convention do not amount to a general extension of its sovereignty is spelled out in several of the articles. For example, Article 3 preserves the legal status of the superjacent waters over the continental shelf as high seas, and of the airspace above those waters;[95] Article 4 maintains the freedom to lay submarine cables and pipelines; Article 5, paragraph 1, protects the freedom of navigation, fishing, and the conservation of the living resources of the sea from unjustifiable interference by the coastal State; and Article 5, paragraph 6, prohibits the establishment of installations where they will interfere with the use of recognized sea lanes essential to international navigation.[96]

(*b*) *Obligations of the Coastal State.*—The sovereign rights over the continental shelf which are granted to the coastal State carry with them certain obligations to the rest of the international community. Included are the obligations to give due notice of the construction of installations and the permanent means for giving warning of their presence must be maintained; to completely remove any installations abandoned or disused (this is mandatory upon the coastal State); and to undertake, in the safety zones, appro-

93. Such installations do not possess the status of islands; they have no territorial sea and their presence do not affect the delimitation of the territorial sea of the coastal State (par. 4).

94. This is a new article and did not appear in the draft rules of the ILC. The phraseology is not too well chosen since "subsoil" connotes an indefinite penetration below the seabed and "depth of water" is associated with the seabed rather than with the subsoil. The article is also unclear as to whether "tunnelling" includes the technique of directional drilling. For the views of writers on the meaning of the terms "sea-bed" and "subsoil" in relation to the continental shelf, *see* Johnson, *The Legal Status of the Sea-Bed and Subsoil,* ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 462–463 (Mar. 1956).

95. With this limitation in the convention, the distinction between sovereignty, sovereign rights, and exclusive jurisdiction and control are not of great practical importance. The United States accepted the term "sovereign rights" in the convention after it became clear that its use in the light of the limitation could not even remotely cast doubt on the status of the superjacent waters and airspace. Whiteman, *supra* note 87, at 635–637.

96. In the ILC draft rules, there was a specific prohibition against establishing installations in narrow channels because the importance of such areas to international navigation precludes the construction of installations. Report of the ILC (1956), *supra* note 7, at 43, 44. This was omitted by the Conference, presumably on the basis that the main consideration should be interference with navigation and not the nature of particular areas.

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priate measures for protecting the living resources of the sea from harmful agents. (Art. 5, pars. 5 and 7.)[97]

A. NATURAL RESOURCES—WHAT THEY ENCOMPASS

Inasmuch as the whole basis for establishing a continental shelf doctrine is to give the coastal State the right to explore and exploit the natural resources, it was important that the term be clearly defined. Article 2, paragraph 4, of the convention, makes this clear. Natural resources are defined as including not only mineral and other nonliving resources of the seabed and subsoil, but also "living organisms belonging to sedentary species," that is, those "which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil." This definition is the result of a joint amendment to the ILC draft (Art. 68) which merely referred to "natural resources" but did not define the term because the Commission believed that the drafting of an appropriate definition required a combination of legal and scientific experience, which it lacked. The joint amendment is the result of close consultation between lawyers and biologists, and is based on the principles laid down in the Commission's commentaries (3, 4, and 5) to Article 68.[98]

The exact nature of the natural resources intended to be covered by the joint amendment was spelled out in the debate in Committee IV. Because of their importance in clarifying the scope of the convention, a summation of the statement made by the Australian delegate, who submitted the amendment on behalf of five other countries, is included here.[99]

97. The ILC noted in its commentary to this provision that installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.), and interested parties should be notified of their construction so that they may be marked on charts. This also applies to provisional installations that are likely to interfere with navigation, although there is no obligation to disclose plans relating to contemplated construction. *Id.* at 44. This would seem to place an obligation on the coastal State to show such installations on the nautical charts and to give notice thereof in the *Coast Pilots* and the *Notices to Mariners.*

98. Whiteman, *supra* note 87, at 639. The Commission set forth the following principles: that sedentary fisheries, especially those permanently attached to the bed of the sea, would be encompassed within the term natural resources, but not so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom or are bred there; that the marine fauna and flora should live in constant physical and biological relationship with the seabed and continental shelf; and that objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil are not included. Report of the ILC (1956), *supra* note 7, at 42.

99. He stated that the words "and other non-living resources" were added so that the article would apply to resources such as the shells of dead organisms. So far as the living resources were concerned, it was the permanent, intimate association of certain living organisms with the seabed which justified giving the coastal State exclusive right in them. The living organisms belonging to sedentary species comprised coral, sponges, oysters, including pearl-oysters, pearl-shell, the sacred chank of India and Ceylon, the trochus, and plants. The sponsors of the amendment had agreed that no crustacea or swimming species should be covered by the definition. The term "harvestable stage" refers to the stage of life during which the resources

2223. *Oceanographic and Other Scientific Research*

Article 5 (pars. 1 and 8) of the convention contains two references to research on the continental shelf.

Paragraph 1 provides that the exploitation of the natural resources of the shelf must not result "in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication." This provision did not appear in the ILC draft articles but was added by the Geneva Conference. The Commission's 1953 proposals caused some anxiety in scientific circles, where it was thought that extending sovereign rights of a coastal State over the continental shelf might affect the freedom of oceanographic research at sea, unless specific safeguards were provided.[100] The Commission, however, made no change in the final article adopted in 1956 (Art. 68).[101]

As originally introduced, Article 5 did not include the phrase "or other scientific research." It was added after it was explained (by the delegate from Denmark) that the proposal referred to "fundamental oceanographic research only" and that "oceanography was a study of the phenomena of the ocean, which included the seabed as well as the ocean waters but did not extend to the subsoil." There was therefore no danger of those engaged in oceanographic research also exploring the subsoil of the continental shelf for the purpose of finding useful mineral resources.[102]

This limitation was unacceptable to the scientists attached to the American delegation because it would have excluded such important adjuncts of oceanographic research as coring and sampling. The result was the incorporation of the phrase "or other scientific research" so as to include research in the subsoil of the continental shelf.[103]

are harvestable and not to the particular moment at which they are captured. Whiteman, *supra* note 87, at 638–640. In further amplification of what is encompassed by the term "natural resources," the Department of State stated that the term "includes such species as shellfish which burrow into the sea bottom or are constantly in contact with the sea bottom during the part of their life history when they are of value commercially. Hence, clams, oysters, abalone, etc. are included in the definition, whereas shrimp, lobsters, and finny fish are not." *Hearing, supra* note 31, at 88 (Question 18).

100. The Governing Board of the National Academy of Sciences—National Research Council took cognizance of this on June 20, 1954, and adopted a resolution urging that "the traditional freedom of scientific research at sea be protected by international agreement." *Freedom of Scientific Research at Sea,* 4 NEWS REPORT 57 (National Academy of Sciences—National Research Council, July–Aug. 1954).

101. Report of the ILC (1956), *supra* note 7, at 42. The Commission did, however, take cognizance of the viewpoint of scientists in its commentary (10) to Art. 68, by observing that the anxiety was unjustified insofar as research in the waters above the shelf is concerned, since these waters form part of the high seas and freedom to conduct research there is not affected. Consent of the coastal State, in the Commission's view, would only be required for research relating to the exploration or exploitation of the seabed or subsoil, but that refusal of consent would only be made in exceptional cases, as where the coastal State fears an impediment to the exclusive rights granted. *Id.* at 43.

102. Whiteman, *supra* note 87, at 644.

103. This information was conveyed verbally to the author by a member of the American delegation.

Paragraph 1 is thus a limitation on the coastal State's right to explore the natural resources of the continental shelf, the same as in the case of navigation and fishing, except that *any* interference with research is prohibited, whereas only *unjustifiable* interference with navigation and fishing is prohibited.[104]

Paragraph 8, on the other hand, sets forth the obligations of those desiring to engage in research. The consent of the coastal State must first be obtained. This is a prerequisite to any research on the shelf, as is the right of the State, if it so desires, to participate in the research. In addition, the research must be purely scientific research into the physical or biological characteristics of the continental shelf. All this is subject to the overriding provision that the results of the research shall be published. While the paragraph also contains an admonition that the coastal State should not normally withhold its consent if the request is submitted by a qualified institution, this must be subordinate to the primary requirement that express consent must be obtained in the first instance. The net result is that whereas prior to the Convention on the Continental Shelf oceanographic and other research outside the territorial sea of a nation could be carried on by foreign vessels as a matter of right, once the convention becomes operative this right will be greatly curtailed (*see* 2223 A).[105]

A. IMPACT ON U.S. OCEANOGRAPHIC PROGRAM

The consent aspect of the oceanographic research provision of the Convention on the Continental Shelf will have an important impact on the world-wide oceanographic program recommended for the United States.[106] How best to implement such program within the framework of the convention and what agreements can be entered into with other countries whereby international research programs can be carried out effectively and with adequate protection of national interests have been under study for some time.[107]

104. Some doubt was expressed at the Conference whether such distinction should be made, but the words "in any interference" were approved on a separate vote in plenary. *Id.* at 648.

105. Par. 8 was also put to a separate vote in plenary on the basis that if no kind of scientific research could be undertaken without the consent of the coastal State, much valuable purely scientific work would be stopped. The paragraph was nevertheless approved by the Conference. *Ibid.*

106. In 1959, a Committee on Oceanography, working under the sponsorship of the National Academy of Sciences, submitted its report stressing the importance of an ocean-wide, ocean-deep survey program through international cooperation in which the United States' share would be about 30 percent. *Oceanography 1960 to 1970, 1–Introduction and Summary of Recommendations,* National Academy of Sciences—National Research Council (1959).

107. In August of 1959, the Committee on Oceanography (*see* note 106 *supra*) sponsored a special meeting on this problem (the author attended as an observer) at which it was the consensus that a letter be addressed to the Standing Committee on Science of the Federal Council for Science and Technology recommending that a statement of policy be drafted, for enunciation by the President of the United States, setting forth the principles under which oceanographic research in the continental shelf areas could be undertaken by foreign countries. This pronouncement could then be used as the basis for subsequent bilateral agreements with foreign countries.

Related to the problem of research on the continental shelf is the interpretation of Public Law 212—The Outer Continental Shelf Lands Act (*see* Part 2, 23). This involves questions with respect to U.S. nationals engaging in research on the shelf without prior permission from the Secretary of the Interior who administers the act, and whether bilateral agreements with other countries could be reconciled with the act without the need for supplemental legislation.[108]

2224. *Boundary Through the Continental Shelf*

Article 6 of the convention adopts in substance the same principles for delimiting the boundary between two States through the continental shelf as was adopted for the territorial sea (*see* 2212) and for the contiguous zone (*see* 2215(*b*)). Agreement among the States concerned is stressed as the first approach.[109] Only in the absence of agreement, or unless another boundary line is justified by special circumstances (*see* note 55 *supra*), is the rule laid down in the article to be resorted to. This rule follows the principle of equidistance. In the case of two States whose coasts are opposite to each other (par. 1), the boundary line is to be a median line between their respective baselines (*see* 2212 A (*a*) and fig. 49). For two adjacent States having a common continental shelf (par. 2), the boundary line is to be "determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured" (*see* 2212 A(*b*) and fig. 50).

The final provision of Article 6 (par. 3) calls for the boundary lines between States to be defined with reference to charts and geographical features as they exist at a particular date using fixed, permanent, identifiable points on land. This requirement is somewhat different from that required for the boundary between the territorial seas of two States, where an actual charting of the boundary line is provided for (*see* 2213). The draft articles of the International Law Commission contained no requirement for either charting or for defining such boundary, but in commentary (2) to Article 72 it stated that certain advantages would accrue to having the boundary lines marked on official large-scale charts, but since such boundaries were less

108. At the meeting noted in note 107 *supra*, divergent views were expressed regarding this matter, and it was agreed to ask for a ruling and further clarification of this matter from the Secretary of the Interior (*see* Part 2, 234 note 41).

109. Although stated more directly than in the Convention on the Territorial Sea and the Contiguous Zone, the intent is the same, namely, that the possibility of agreeing upon a boundary line be first explored.

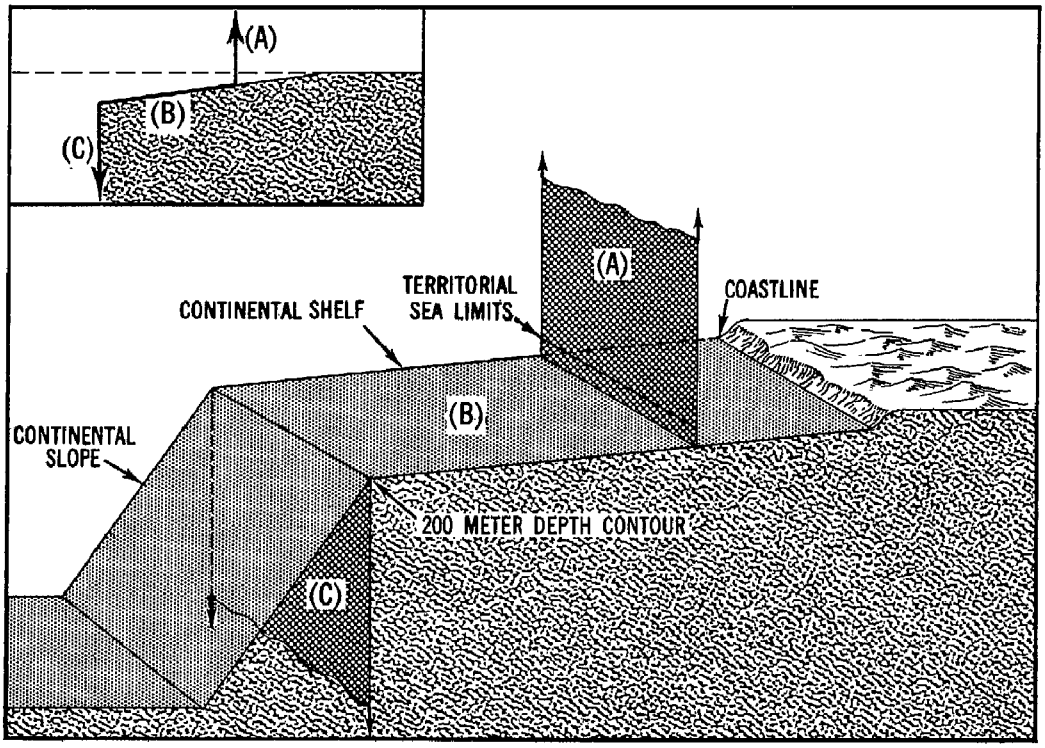

FIGURE 53.—Three-dimensional character of an offshore boundary. (*After Moodie.*)

important to users of charts than to know the boundary of the territorial sea, the Commission refrained from imposing any obligation in the matter.[110]

2225. *Three-Dimensional Character of an Offshore Boundary*

Under the conventions adopted at Geneva, the offshore boundary of a coastal State through the territorial sea and the continental shelf takes on a three-dimensional character (*see* fig. 53). At the outer limit of the territorial sea, it is defined by the vertical plane (*A*) rising from the sea floor through the superjacent waters and the airspace above for an indefinite height. From plane (*A*) the boundary is the inclined plane (*B*) of the continental

110. Report of the ILC (1956), *supra* note 7, at 44. This can only mean that inasmuch as the Commission adopted no rule requiring the charting of the outer limits of the territorial sea, it felt no obligation for charting the lateral boundary through the continental shelf. But the two are not comparable because the uniqueness of the arcs-of-circles method lies in the fact that only one such line can be drawn along a given coast and hence no line need be drawn at all (*see* Part 2, 1621(*c*)); whereas, the boundary through the shelf depends upon the configuration of the coast, the presence of islands, and the agreement between the parties for an equitable adjustment of a median or equidistant line. The latter factors are probably the reason why the Geneva Conference added paragraph 3 to the article. COLOMBOS (1959), *op. cit. supra* note 66, at 70.

shelf extending seaward until the 200-meter isobath is reached, after which it becomes the descending vertical plane (*C*) penetrating into the subsoil for an indefinite distance. In profile, the boundary would appear as shown in the inset in the upper left-hand corner of the figure.[111]

223. Convention on the High Seas

Freedom of the high seas is today a dominant principle of maritime law, and to that extent the Convention on the High Seas is the only one of the four conventions adopted at Geneva that is generally declaratory of international law (see preamble to convention). The modern concept of the freedom of the seas dates back to the time of Elizabeth I of England who in 1580 resisted the extravagant claims of Spain with the declaration that "the 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." [112] This principle was later expounded by Grotius in a pamphlet published in 1609 under the title *Mare Liberum* (free sea), in which he defended the right to resist by force the monopoly claimed by the Portuguese in the East Indies (*see* Part 1, 32). By the close of the 17th century this doctrine won general acceptance as in the best interests of the community of nations, and except for certain claims put forward to defined areas of territorial or internal waters, no modern nation now attempts to assert any exclusive or special authority over the domain of the high seas. This liberation of the high seas from the national law of any nation means that they are governed by the law of nations, and any exercise of national authority on the high seas must be validated by reference to that law.

Since the high seas are *res communis* (the property of all) and incapable of appropriation by any State, no boundary problems are involved except in those portions covered by the contiguous zone (*see* 2215) and by the continental shelf (*see* 2222) where international law recognizes certain rights as exclusive in the coastal State.

The convention comprises 37 articles and covers such topics as freedom of navigation, the nationality and status of ships, the immunity of warships and other governmental ships, piracy, hot pursuit, and the right to lay sub-

111. Figure 53 takes into account only the geographical concept of the continental shelf as conventionally accepted. Under the exploitability test, the boundary could extend for an indefinite distance along the continental slope before descending vertically into the subsoil (*see* 2221).

112. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 American Journal of International Law 757 (1960).

marine cables and pipelines. Only those articles will be considered that have a bearing on the subject matter of this publication.

(*a*) *Definition of High Seas.*—Article 1 defines the term high seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." This is identical with the definition recommended by the International Law Commission. The high seas are thus in part coextensive with the waters of the contiguous zone and those over the continental shelf (*see* fig. 51).[113]

(*b*) *The Four Freedoms.*—Article 2 of the convention sets forth the four broad principles on which the law of the sea is predicated. It begins with the recognized principle of international law that "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." Freedom of the high seas is exercised under the conditions laid down by the articles of the convention and by other rules of international law. It comprises, *inter alia,* both for coastal and non-coastal States, the following freedoms: "(1) Freedom of navigation; (2) freedom of fishing; (3) freedom to lay submarine cables and pipelines; and (4) freedom to fly over the high seas." These freedoms, and others which are recognized by general principles of international law, "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

These principles are substantially the same as those embodied in the draft rules of the ILC. They are not restrictive but merely specify four of the main freedoms.[114] Only two of the freedoms are treated in the convention—freedom of navigation and freedom to lay submarine cables and pipelines. Omitted are freedom of fishing, which is dealt with separately under the Convention on Fishing and Conservation of the Living Resources of the High Seas (*see* 224), and freedom of air navigation. The latter, although closely associated with freedom of the sea, is not part of the law of the sea (*see* note 114 *supra*).

113. Normally there is no need for a boundary in the high seas, but occasionally a demarcation line is shown through the high seas for the allocation of territory, as was done in the case of the Treaty of 1867 by which Russia ceded Alaska to the United States (15 Stat. 539 (1867)). This line is shown in part on Coast Survey chart 9302.

114. Report of the ILC (1956), *supra* note 7, at 24. The Commission notes that freedom to fly over the high seas is expressly mentioned because it considers that it follows directly from the principle of the freedom of the sea. It refrained, however, from formulating rules on air navigation because its work was confined to the codification and development of the law of the sea. The Commission recognized that any freedom to be exercised in the interests of all must be regulated. Among these regulations are: (1) "The right of States to exercise their sovereignty on board ships flying their flag"; (2) the "exercise of certain policing rights"; (3) the "rights of States relative to the conservation of the living resources of the high seas"; and (4) the "institution by a coastal State of a zone contiguous to its coast for the purpose of exercising certain well-defined rights." *Ibid.*

Freedom of navigation on the high seas, includes, *inter alia,* such rights as the right of a State, whether coastal or not, to sail ships under its flag (Art. 4); and the right to fix conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag (Art. 5). These rights, however, carry with them certain obligations, among which are promulgation by the State of regulations to ensure safety at sea with regard to the use of signals, maintenance of communications, prevention of collisions, and seaworthiness of ships (Art. 10); requiring ships flying its flag to render assistance to persons or ships in distress (Art. 12); and cooperation in the repression of piracy (Art. 14).[115]

(*c*) *Immunity of Warships and Other Government Vessels.*—Warships on the high seas have under the convention (Art. 8) complete immunity from the jurisdiction of any State other than the flag State. And warship is defined as "a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality." The same immunity applies to ships owned or operated by a State and used only in government noncommercial service (Art. 9).[116]

(*d*) *Hot Pursuit.*—Brief mention has already been made of the doctrine of hot pursuit in connection with the contiguous zone (*see* note 73 *supra*). This doctrine of international law permits a vessel to be pursued on the high seas and there seized when she commits a violation of the laws of a foreign State while within its territorial waters. Pursuit under these circumstances is considered in point of law to be a continuation of an act of jurisdiction which began while the offending vessel was within the jurisdiction of the State whose laws are being violated. It is rationalized on the ground that without this right the power of the coastal State to protect its own interests would be largely nullified.

115. Of interest, in connection with collisions at sea, is Art. 11 of the convention, which provides that only the flag State, or the State of which the accused is a national, may exercise penal jurisdiction in matters of collision or with respect to any other incident of navigation (damage to submarine cables or pipelines) concerning a ship on the high seas. This provision is identical with the recommendation of the International Law Commission (Art. 35) and in effect reverses the 1927 judgment of the Permanent Court of International Justice in the celebrated *Lotus* case (P.C.I.J., Ser. A., No. 10 (1927)). The *Lotus,* a French ship, collided with a Turkish collier in the Aegean Sea outside territorial waters. The collier was sunk and eight persons were drowned. When the *Lotus* arrived at Constantinople, the Turkish authorities tried and convicted the officer-in-charge notwithstanding protestation by France that Turkey lacked jurisdiction under international law. The case was ultimately referred to the Permanent Court, which decided that Turkey did not violate international law (the Court was evenly divided with the President casting the deciding vote). A diplomatic conference held at Brussels in 1952 disagreed with the Court. The ILC agreed with the conference as did the Geneva Conference. Report of the ILC (1956), *supra* note 7, at 27 (commentary (1)).

116. In the draft articles of the ILC, merchant ships engaged in commercial government service were also given immunity on the ground that there were no sufficient reasons for making any distinction between the two classes of merchant ships. But the Geneva Conference did not accept this view. Report of the ILC (1956), *supra* note 7, at 26.

Being an exception to the general rule of freedom of navigation on the high seas, the right can be used only in strict observance of the rules laid down.[117]

Article 23 of the Convention on the High Seas sets forth in some detail in what manner and under what circumstances such pursuit may be undertaken. It is substantially the same as Article 47 of the draft rules of the International Law Commission which in the main was taken from the regulations adopted by the Second Commission of The Hague Conference.

The right of hot pursuit attaches when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. It may be undertaken if the suspected vessel or one of its boats is within the internal waters, the territorial sea, or the contiguous zone of the pursuing State, but in the last case only "if there has been a violation of the rights for the protection of which the zone was established" (*see* 2215). Other requirements are that the pursuit may only be continued outside the territorial sea or the contiguous zone if it has not been interrupted; that a visual or auditory signal to stop has been given; and that it be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized for that purpose. But it is not necessary for the pursuing ship to be within the territorial sea at the time she gives the order to stop. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.[118]

(*e*) *Submarine Cables and Pipelines.*—One of the consequences of the freedom of the high seas is that States are entitled to lay submarine telegraph cables from their shores to the shores of other States that agree to the connection.[119] The need for their protection soon became apparent and negotiations to this end were begun which culminated in the signing on March 14, 1884, of the International Convention for the Protection of Submarine Tele-

117. Basically, this is not a new doctrine. It was recognized by Justice Story as early as 1826 in the case of *The Marianna Flora,* 11 Wheat. 1, 42 (24 U.S., 1826); was adopted by the Institute of International Law in 1894 (COLOMBOS (1959), *op. cit. supra* note 66, at 142, 143); and was embodied in the Report of the Second Commission of the 1930 Hague Conference on the Codification of International Law.

118. The doctrine of hot pursuit was one of the questions raised before a Canadian-American Commission in connection with the sinking of the Canadian ship *The I'm Alone* on Mar. 22, 1929, 215 miles from the American coast, following a two-day pursuit by a U.S. Coast Guard vessel. The case arose under the Anglo-American Treaty of 1924 (U.S. Treaty Series, No. 685) which allowed United States officers to board British vessels outside the limits of territorial waters but up to a distance of one hour's sailing from the United States' coast, measured by the speed of the offending vessel or her boats, for the purpose of enforcing the Prohibition laws. The Report of the Commission in 1935 was to the effect that the sinking was unlawful and could not be justified by any principle of international law. But a direct decision on the point of hot pursuit was avoided. COLOMBOS (1959), *op. cit. supra* note 66, at 122, 123, 146.

119. The first cable was laid between Dover and Calais in 1851. *Id.* at 329. The first Atlantic cable between Europe and America was completed in 1866. Knox, *Precise Determination of Longitude in the United States,* 47 THE GEOGRAPHICAL REVIEW 561 (1957).

graph Cables.[120] The Convention on the High Seas (Arts. 26 to 29) confirms the freedom to lay submarine cables and pipelines and adopts rules regarding the exercise of this right and the duties of States to take measures to protect them against damage. The provisions follow closely the draft rules of the ILC, which in turn are based generally on the Convention of 1884.[121]

224. Convention on Fishing and Conservation of the Living Resources of the High Seas

This convention flows from Article 2 of the Convention on the High Seas, which enumerates "freedom of fishing" as one of the four freedoms comprised within the broad doctrine of freedom of the high seas (*see* 223(*b*)). In the draft articles of the International Law Commission (ILC), it was dealt with as a subsection of the General Regime of the High Seas, but the Geneva Conference codified it as a separate convention, as it did the Convention on the Continental Shelf (*see* 222). Of the four conventions adopted at Geneva, the Convention on Fishing and Conservation of the Living Resources of the High Seas has the least to do with sea boundaries. It will therefore be dealt with only peripherally.

2241. *Background of Convention*

Although the right of everyone to engage in fishing outside the territorial waters of coastal States has been a recognized principle of international law for many years, maritime nations have recognized for a long time that unlimited fishing at all seasons may seriously deplete the seas of fish. Over the years, a number of agreements (bilateral and multilateral) have been entered into for the international regulation of fisheries. One of the earliest of such agreements was between England and France in 1839 for the joint

120. The convention was signed by 26 States, including the United States. Colombos (1959), *op. cit. supra* note 66, at 330.

121. The 1884 Convention referred only to submarine cables, whereas the present convention includes pipelines. The ILC draft rules also included high-voltage power cables, but this was not embodied in Art. 26 of the Geneva convention, which grants States the right to lay cables and pipelines. It was, however, included in Art. 27, which provides for their protection. The reason for the discrimination is not apparent and is very likely a drafting omission in Art. 26. Report of the ILC (1956), *supra* note 7, at 38. The United States at first urged the Conference to refrain from dealing with the subject of cables and pipelines because of existing conventions, but withdrew its objection on the understanding that existing conventions or other international agreements already in force would not be affected. This understanding is embodied in Art. 30 of the convention. Message from the President of the United States Transmitting Four Conventions on the Law of the Sea and an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Executives J to N, Inclusive (Senate), 86th Cong., 1st sess. 9 (1959).

regulation of fisheries in the English Channel.[122] One of the important multilateral agreements, in which the United States was a party, was the Bering Sea Fur Seal Arbitration of 1893, culminating in the treaty of July 7, 1911, between the United States, Great Britain, Russia, and Japan. The treaty prohibits the killing, taking, and hunting of seals within the Pacific Ocean north of latitude 30° North, including the seas of Bering, Kamchatka, Okhotsk, and Japan. The seals may only be captured on land by the littoral States concerned.[123]

With the development of new methods and techniques permitting more intensified fishing over wide sea areas, the need for conservation and protection of fishery resources has become more urgent, and unilateral conservation regulations have been issued by a number of countries, following the Presidential Proclamation of September 28, 1945, which set forth the policy of the United States with respect to fisheries in certain areas of the high seas. The proclamation (known as the Truman proclamation) included, among other things, the concern of the United States over the inadequacy of present arrangements for the protection and perpetuation of the fishery resources adjacent to its coasts, and therefore "regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale." The proclamation further provided that where only United States nationals fish, such zones can be established and controlled by the United States alone, but where activities have been or shall hereafter be developed and maintained jointly by nationals of the United States and other countries, explicitly bounded conservation zones may be established by agree-

122. COLOMBOS (1959), *op. cit. supra* note 66, at 349.

123. *Id.* at 357–358. This arbitration arose out of the arrest by American revenue officers of a British schooner in Bering Sea, 59 miles from land, in violation of the laws of the United States which prohibited the killing of fur seals in the waters of the Alaska Territory. The laws were construed by the executive branch of the Government as applying to the Bering Sea beyond the 3-mile limit on the basis that this jurisdiction was asserted by Russia for more than 90 years and jurisdiction over the waters east of the cession boundary was transferred to the United States by the treaty of 1867. The Supreme Court of the United States upheld the finding of the District Court of Alaska against the owner of the schooner on the ground that the Court was bound by the actions of the executive branch in its interpretation of the treaty and the laws of Congress enacted on the basis of what was acquired under that treaty. *In Re Cooper*, 143 U.S. 472 (1892). A series of diplomatic exchanges followed this decision, and the matter was submitted to arbitration. The issue for the tribunal was by agreement of the parties "what right of protection or property" the United States had "in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?" (In the oral argument the tribunal was advised that the United States did not assert a territorial claim to the waters of the Bering Sea beyond the 3-mile limit. 12 *Fur Seal Arbitration 107–110, Proceedings of the Tribunal at Paris, 1893.*) A majority of the tribunal answered that the United States had no right of protection or property in the fur seals. The tribunal also drafted regulations for the joint control of the seal fisheries but they proved unworkable in practice and were ultimately superseded by regulations incorporated in the multilateral treaty of July 7, 1911, *supra*. SMITH, THE LAW AND CUSTOM OF THE SEA 56–58 (1950); COLOMBOS (1959), *op. cit. supra* note 66, at 136–138, 357–358. This has now been superseded by the Interim Convention on Conservation of North Pacific Fur Seals, signed at Washington, D.C., on Feb. 9, 1957, by Canada, Japan, the U.S.S.R., and the United States. *Id.* at 358. For a discussion of other treaties and conventions relating to fishing on the high seas, see *id.* at 359–366.

ment and all fishing shall be subject to regulation and control as provided in such agreements.[124]

2242. *The Convention Proper*

Such unilateral measures as the Truman proclamation, together with other treaty arrangements between interested nations for conservation in certain

124. Presidential Proclamation No. 2668, 59 Stat. 885 (1945). The proclamation recognized the right of other nations to establish similar conservation zones provided corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. It is also provided that the character of the areas as high seas and the right to unimpeded navigation in the conservation zones are in no way affected. For a comprehensive documentation of fishery matters, including proclamations, treaties, conventions, and diplomatic documents of States in the Western Hemisphere, together with the final 1956 Report of the International Law Commission on the Law of the Sea (*see* 13), *see* BAYITCH, INTER-AMERICAN LAW OF FISHERIES (1957).

Regulation of Coastal Fisheries.—It should be borne in mind that the proclamation deals only with fisheries on the high seas. The regulation of coastal fisheries within state boundaries in the United States is under the control of the individual state, in the absence of conflicting federal legislation. This was pointed up in the recent case of *Corsa* v. *Tawes,* 149 F. Supp. 771 (1957), where a Maryland fishing statute was sought to be enjoined on the ground that it unduly burdened interstate commerce. In upholding the statute, the court set forth the constitutional principles applicable in such cases. "Since the decision in *Manchester* v. *Commonwealth of Massachusetts,* 139 U.S. 240 (1890)," the court said, "it has been beyond dispute that in the absence of conflicting congressional legislation under the commerce clause, regulation of the coastal fisheries is within the police power of the individual states under the doctrine of *Cooley* v. *Board of Wardens of Port of Philadelphia,* 12 How. 298 (53 U.S., 1852)." (The *Cooley* case upheld a Pennsylvania statute regulating pilots on the ground that it was a matter properly lending itself to local state control, and until Congress through legislation has shown an intent to establish a general policy in this field states could regulate them.) The *Corsa* case applies to both residents and non-residents who fish within the 3-mile limit. The doctrine has been extended to the area beyond the 3-mile limit, that is, to the high seas, insofar as residents of a state are concerned, and is based on the analogous principle of the Federal Government having the right to control the conduct of its citizens upon the high seas. Thus, in the case of *Skiriotes* v. *Florida,* 313 U.S. 69, 77 (1940), the Supreme Court upheld a Florida statute regulating the taking of commercial sponges by citizens of the state from waters at a point 6 nautical miles from the coast in the Gulf of Mexico, the Court saying: "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict of Congress." It follows that the United States could control fisheries on the high seas that would be effective against citizens of every state, for example, the establishment of conservation zones under the Truman proclamation, *supra.*

Another facet of state regulation of coastal fisheries was presented in the case of *Toomer* v. *Witsell,* 334 U.S. 385 (1947), where the South Carolina statute regulating shrimp fishing in the 3-mile belt was attacked by residents of Georgia as violative of the Federal Constitution. The statute required non-residents of South Carolina to pay a license fee of $2,500 for each shrimp boat and residents to pay only $25. The Supreme Court held this to be discriminatory against non-residents to the point of being virtually exclusionary, and as such violated the privileges and immunities clause of the Constitution (Art. IV, sec. 2), which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This was designed to insure to citizens of State *A* who venture into State *B* the same privileges which the citizens of State *B* enjoy. "One of the privileges," the Court said, "which the clause guarantees to citizens of State *A* is that of doing business in State *B* on terms of substantial equality with the citizens of that State." On the question of state jurisdiction over coastal waters beyond low-water mark being contrary to the federal paramount rights doctrine of the *Submerged Lands Cases* (*see* Part 1, 112), the Court said that in deciding that the United States had paramount rights in the 3-mile belt, it gave emphasis to a statement in *Skiriotes* v. *Florida, supra,* that Florida has an interest in the proper maintenance of the sponge fishery and that the state statute "so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State."

The intent of Congress to leave the matter of control over coastal fisheries to the states has recently been made explicit in the Submerged Lands Act of 1953 (67 Stat. 29), which declares it to be in the public interest that the right to manage and develop the natural resources (including fish) in the waters within the boundaries of the states be vested in such states (*see* Part 2, 121 note 12 and accompanying text).

areas, however important they were, did not form a coherent and complete universal system with full international sanction. This was the purpose of the Geneva convention, the keynote of which was "conservation" and "international cooperation," and is reflected in the preamble in such phraseology as "the development of modern techniques for the exploitation of the living resources of the sea," "the need of the world's expanding population for food," and "a clear necessity that they [the problems] be solved . . . on the basis of international co-operation."

The basic principles of the convention are set forth in Article 1. It reaffirms the historic rights of all States to fish upon the high seas, subject to individual treaty obligations and to the provisions of the convention. It imposes a new duty upon all States to adopt, or to cooperate with other States in adopting, for their nationals such measures as may be necessary for the "conservation of the living resources of the high seas." [125]

(*a*) *International Cooperation.*—The convention provides the framework for a new system of international cooperation. Where the nationals of only one State fish a particular stock in a certain area, that State is obligated to take conservation measures when necessary (Art. 3). But where two or more States fish the same stock in an area, they must, at the request of one of them, enter into negotiations with a view to agreeing upon a program of conservation (Art. 4).[126] Once such a program has been adopted other States subsequently fishing in the area for the same stock must accept the measures in force or reach an agreement to adopt new measures (Art. 5).

(*b*) *Special Status of Coastal States.*—The convention recognizes a special interest of a coastal State in the conservation of the living resources in the high seas adjacent to its territorial sea, even though its nationals do not fish there, and may therefore take part in any system of research and regulation for purposes of conservation (Art. 6). The coastal State may, if negotiations with the interested fishing States have not led to agreement within 6 months, unilaterally adopt conservation measures, provided an emergency exists and the regulations are not discriminatory against foreign fishermen (Art. 7).[127] States which do not fish a particular area, but have a special

125. This is defined in Art. 2 as "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products."

126. If nationals of different States fish different stocks in the same area, the convention does not apply. The Conference believed that a provision covering such a situation would be far-reaching and cumbersome. Sorensen, *supra* note 31, at 221.

127. According to Prof. Sorensen, chairman of the Danish delegation, this provision is a triumph of States with less-developed fisheries over States practicing high seas fishing on a large scale. But it leaves open some questions, for example, How far from the coast can such measures apply? No measure is indicated and the answer must be inferred from the scientific considerations that justify the conservation measures. *Id.* at 223.

interest in conservation of that area, may request the State or States whose nationals do fish in that area to adopt a program. Failing such agreement the interested State may initiate arbitration procedures as provided in the convention (Art. 8).[128]

A special provision (Art. 13) is made for the regulation by the coastal State of fisheries conducted by means of equipment embedded in the floor of the sea adjacent to its territorial sea. This is defined as "those fisheries using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently, or if removed, restored each season on the same site." Such fisheries may be regulated by the coastal State if they have been maintained and conducted by its nationals over a long period, and, except where fishing has been exclusively conducted by such nationals, nonnationals must be allowed to participate in such activities on an equal footing. The general status of the area as high seas is not affected by such regulations.[129] These fisheries are not to be confused with "sedentary" fisheries, which are regulated by Article 2 of the Convention on the Continental Shelf (*see* 2222A, and note 99 *supra*).[130]

(*c*) *Arbitral Procedures.*—This convention is unique in that it is the only one of the four adopted at Geneva that provides for a built-in compulsory-settlement-of-disputes procedure.[131] Failing in the voluntary agreement provided for in the several articles of the convention, Articles 9–11 provide for a compulsory and speedy settlement of disputes by a special commission composed of five members who must be specialists in matters relating to fisheries and may not be nationals of the States involved in the dispute. Criteria to be applied by the commission in the settlement of disputes are set out in Article 10.

128. The United States advocated the inclusion in the convention of the doctrine of "abstention," which is to the effect that where a State has developed a fishery in a particular area, States which have not formerly fished that stock, or have not contributed to the development of the area, should abstain from fishing there in the future. But this failed to receive the necessary votes. Dean, *supra* note 11, at 626. However, ratification of the convention by the United States will not be construed as impairing the applicability of the principle of abstention. It leaves the United States completely free to press for its inclusion in fishery agreements. This understanding was recommended by the President to the Senate and was incorporated by the Senate in its ratification of the convention (*see* text at note 147 *infra*). Message from the President, *supra* note 121, at 2. *See* also *Hearing, supra* note 31, at 87 (Questions 16 and 17).

129. This article is the same as Art. 60 of the draft rules of the International Law Commission, except for the definition and the exception regarding non-nationals of the coastal State, which were added by the Conference. Report of the ILC (1956), *supra* note 7, at 38.

130. The ILC in commentary (1) to Art. 60 notes that although fisheries are described as sedentary either by reason of the species caught (*see* note 99 *supra*), or by reason of the equipment used, it decided to apply it to the first type only which it dealt with in its articles on the continental shelf. The second type of fishery covers species that are mobile and therefore cannot be regarded as natural resources of the seabed in the sense that the term is used in connection with the continental shelf. *Ibid.*

131. For the other three conventions, there is an "Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes" (*see* 225).

Its decisions are binding on the States concerned, and Article 94 of the Charter of the United Nations is made applicable to those decisions (Art. 11).[132]

225. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes

Apart from the Convention on Fishing (*see* 2242(*c*)), no other convention adopted at Geneva provides for a method of settlement of disputes arising under the convention. Instead, the Conference adopted an "Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes."

Article I of the protocol provides that disputes arising out of the interpretation or application of any convention shall lie within the compulsory jurisdiction of the International Court of Justice. Such jurisdiction may be invoked by any party to the dispute who is also a party to the protocol.

Other articles permit the parties to resort to an arbitral tribunal (Art. III) or adopt a conciliation procedure (Art. IV) before resorting to the Court. The protocol, like the four conventions adopted, is subject to ratification (Art. V).

226. Resolutions Adopted by Conference

Besides the four conventions and the Optional Protocol, the Conference adopted a number of resolutions (nuclear tests, pollution, conservation conventions, etc.), chief among which were a resolution on the Regime of Historic Waters and a resolution on Convening of a Second United Nations Conference on the Law of the Sea.[133]

The resolution on historic waters calls for the General Assembly of the United Nations to arrange for the study of the juridical regime of historic waters, including historic bays (*see* Part 1, 45), and to communicate the results to all States Members.[134]

The resolution on a second conference—the most important of all—was adopted with a view to reaching agreement on the unresolved problems of the width of the territorial sea and the width and rights in the contiguous, exclusive,

132. Art. 94 relates to the decisions of the International Court of Justice and provides that "if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

133. 38 Dept. State Bulletin 1124–1125 (1958).

134. The International Law Commission in its draft articles did not provide for the regime of historic waters. In its article on bays, "historic" bays are specifically excluded. Report of the ILC (1956), *supra* note 7, at 15.

coastal fishing zone (*see* 2217). The resolution recites the agreements that have been reached in the several areas of the law of the sea and recognizes the desirability of making further efforts to reach agreement on those questions which have been left unsettled. To this end, it requests the General Assembly to study the advisability of convening a second international conference of plenipotentiaries.

227. Provisions for Signature, Ratification, and Operation

All the conventions adopted contain procedural articles relating to signature, ratification, and operation. All are identical except that the Convention on the Continental Shelf and the Convention on Fishing and Conservation provide for the right of States to make reservations to certain articles at the time of signature, ratification, or accession.[135]

The conventions were open for signature until October 31, 1958, by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly to become a party to a convention. As of that date, the Convention on the Territorial Sea and the Contiguous Zone had been signed by 44 States, the Convention on the Continental Shelf by 46 States, the Convention on the High Seas by 49 States, and the Convention on Fishing and Conservation of the Living Resources of the High Seas by 37 States.[136]

The signatures alone do not make the conventions operative. Each convention, as well as the Optional Protocol, is subject to ratification, without a time limit, and is open for accession by any State who could have signed the convention.[137] The conventions come into force on the 30th day following the date of deposit with the Secretary-General of the United Nations the

135. Art. 12 of the Convention on the Continental Shelf allows reservations to any of the substantive articles of the convention other than Arts. 1 to 3, inclusive. These latter pertain to the definition of the shelf, the sovereign rights of the coastal State, and the status of the waters over the shelf. Art. 19 of the Convention on Fishing and Conservation allows reservations to articles other than Arts. 6 and 7, and 9 to 12, inclusive. The first two deal with the special status of coastal States, and the last four pertain to the settlement of disputes.

136. The names of the States that signed the various conventions are given in Message from the President, *supra* note 121, at 21–60. The Optional Protocol is open for signature (without a time limitation) by all States who become parties to any of the conventions adopted. As of Nov. 6, 1958, 30 States had signed the Protocol. *Id.* at 62–66.

137. See, for example, Arts. 9 and 10 of the Convention on the Continental Shelf. After the closing date for signature, eligible States may accede to a convention. The distinction between ratification and accession in international law is that *ratification* applies to the approval of an act which has already been taken by an agent (for example, the signature called for in the text accompanying note 136 *supra*), whereas *accession* applies to a situation where one power becomes a party to an engagement already effected between other powers.

22d instrument of ratification or accession.[138] At the end of 5 years after a convention becomes operative, a request for revision may be made at any time by any of the parties thereto, provided the Secretary-General of the United Nations is so notified. The Secretary-General has the duty to inform all States regarding signatures, ratifications, accessions, reservations, the date on which a convention comes into force, and requests for revision.

These conventions and the Optional Protocol are now pending before the congresses and parliaments of the world, awaiting ratification or accession. (*See* 2272.)

2271. *Action by the United States*

The conventions were dated at Geneva as of April 29, 1958. Subsequently, on September 15, 1958, the chairman of the U.S. delegation signed all the conventions, including the Optional Protocol, in behalf of the United States.[139] On September 9, 1959, the President of the United States, with a view to receiving the advice and consent of the Senate to ratification, sent to that body a message transmitting the four Conventions on the Law of the Sea and the Optional Protocol adopted at Geneva.[140]

A hearing on the conventions was held on January 20, 1960, before the Committee on Foreign Relations of the Senate.[141] The principal witness was the chairman of the U.S. delegation at Geneva, who submitted a prepared statement explaining the conventions. One of the important points brought out at the hearing was that the conventions are intended to affect the rights of the United States as a sovereign with respect to the rights of other sovereign States, and would not apply to relations under our Constitution between the rights of the several states and the Federal Government.[142]

At the close of the hearing, the committee submitted a list of 30 questions to the witness on which it desired answers in writing. This list together

138. See, for example, Art. 11 of the Convention on the Continental Shelf. After the deposit of the 22d instrument, States may still ratify or accede, but as to them the convention becomes operative on the 30th day after their deposit of the instruments of ratification or accession. There is no time limit for ratification or accession.

139. Message of the President, *supra* note 121, at 27, 41, 51, 59, and 66.

140. *Id.* at 2. Included in the Message was a report by the Acting Secretary of State to the President, enclosing the following: commentaries on the conventions; certified copies of the agreements of Apr. 29, 1958; certified copy of final act of the Conference, together with annexed resolutions. *Id.* at 2–5.

141. *Hearing before Committee on Foreign Relations on Executives J to N, Inclusive,* 86th Cong., 2d sess. (1960).

142. *Id.* at 19. This is in consonance with the holding in *United States* v. *Louisiana et al.*, 363 U.S. 1 (1960), in which the Court held the Submerged Lands Act to be a domestic matter and not controlled by international considerations (*see* Part 2, 1541(*b*)).

with answers prepared by the Department of State on March 2, 1960, are included in the printed record of the hearing.[143] The final question of the committee related to the benefits that would accrue to the United States if the conventions came into force. The Department of State replied comprehensively to this question, enumerating not only the benefits of a general nature—for example, those that flow from agreement on the rules of international law to which the United States can subscribe, and, as a principal maritime and naval power, those that accrue to it from having international agreement on the law of the sea—but also some of the more specific benefits that will ensue. In summary, these are: a marked advance in the content and formulation of international law through the adoption of the articles on straight baselines, innocent passage, and the contiguous zone, in the Convention on the Territorial Sea;[144] an endorsement of numerous principles in the Convention on the Continental Shelf, which the United States has been following since they were first enunciated in the Truman Proclamation of 1945 (*see* Part 2, 2221);[145] a codification of existing principles of international law in the Convention on the High Seas, thereby providing stability and avoidance of disputes in this field; and a comprehensive treatment for the first time in international law of the problems relating to the conservation of maritime resources in the Convention on Fishing and Conservation of the Living Resources of the High Seas.[146]

The Committee on Foreign Relations reported the conventions to the Senate with the recommendations that the Senate give its advice and consent to the ratification of the conventions and the Optional Protocol, and that it include in its resolution of ratification an understanding on the prin-

143. *Hearing*, *supra* note 141, at 82–93. Some of the answers being of a clarifying nature have been incorporated in appropriate sections of this text, *supra*. The record of the hearing contains a table showing the status of the conventions, as of Feb. 11, 1960, with regard to action taken by the various States. *Id.* at 94. For status of ratification, *see* 2272.

144. *Id.* at 92–93. By restricting the use of straight baselines to certain exceptional geographic situations, its indiscriminate use to reduce to internal waters large areas heretofore regarded as territorial waters or high seas is prevented. Defining passage as innocent as long as it is not prejudicial to the peace, good order, or security of the coastal State furnishes a clear and precise definition, something which has not heretofore existed in international law. The article on the contiguous zone confirms the practice followed by the United States of exercising customs jurisdiction over a zone, outside its territorial sea, the outer limit of which is 12 miles from the coast. *Id.* at 93.

145. The United States is one of the principal countries making use of the natural resources of the continental shelf. The convention reflects for the first time international agreement on the rules governing the exploration and exploitation of this vast submerged area of the world. *Ibid.*

146. The United States, as one of the leading fishing nations of the world, has far-flung and highly diversified high seas fisheries interests. With the advent of modern-day fishing vessels, equipment, and techniques, stocks of fish are more than ever vulnerable to over-exploitation. If this is to be avoided, nations concerned need to agree upon appropriate conservation regimes along rational lines. *Ibid.*

ciple of abstention (*see* note 128 *supra*). The conventions were debated in the Senate on May 26, 1960, at which time it consented to their ratification, after incorporating an understanding on the principle of abstention. A separate vote on the protocol failed to receive the concurrence of two-thirds of the Senators present and voting.[147]

2272. *Status of Ratification or Accession*

As of March 27, 1962, various conventions had been ratified or acceded to by the following countries: [148]

Convention on the Territorial Sea.—Byelorussia, Cambodia, Czechoslovakia, Haiti, Hungary, Israel, Malaya (Federation of), Nigeria, Rumania, Senegal, Sierra Leone, Ukraine, U.S.S.R., United Kingdom, United States, and Venezuela.

Convention on the Continental Shelf.—Byelorussia, Cambodia, Colombia, Czechoslovakia, Guatemala, Haiti, Israel, Malaya (Federation of), Rumania, Senegal, Ukraine, U.S.S.R., United States, and Venezuela.

Convention on the High Seas.—Afghanistan, Byelorussia, Cambodia, Czecholslovakia, Guatemala, Haiti, Hungary, Indonesia, Israel, Malaya (Federation of), Nigeria, Rumania, Senegal, Sierra Leone, Ukraine, U.S.S.R., United Kingdom, United States, and Venezuela.

Convention on Fishing and Conservation of the Living Resources of the High Seas.—Cambodia, Haiti, Malaya (Federation of), Nigeria, Senegal, Sierra Leone, United Kingdom, and United States.

Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes.—Haiti.

147. 106 CONG. REC. 11187–11196 (1960). The rejection of the Optional Protocol had for its background the Connally Reservation that was adopted under Senate Resolution 196 of 1946, in which the United States accepted generally the compulsory jurisdiction of the International Court of Justice but reserved the right to decide whether a certain matter is a domestic problem of the United States and not a matter upon which the Court has the power to act. It was stated in the Committee on Foreign Relations that none of the conventions contained any provision that had the effect of superseding domestic legislation in the United States, either federal or state. It was pointed out that if the United States assented to the Optional Protocol, there would be no reservation such as the Connally Amendment, unless the Senate chose to incorporate it. Disputes arising out of the interpretation or operation of any of the four conventions would come under the jurisdiction of the International Court whose decisions would be binding upon the States concerned. *Hearing, supra* note 141, at 75–76, 88–89 (Question 20). It was believed by some, who voted against ratification, that the protocol should be ratified, but with a reservation to protect the domestic jurisdiction of the United States. 106 CONG. REC. 11195–11196 (1960).

148. Information furnished by the United Nations office at New York, Mar. 27, 1962. *See also,* Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas,* 54 AMERICAN JOURNAL OF INTERNATIONAL LAW 772 (1960).

23. THE SECOND GENEVA CONFERENCE (1960)

The Second Conference on the Law of the Sea was convened at Geneva on March 17, 1960, pursuant to the resolution of the General Assembly of the United Nations of December 10, 1958.[149] In contrast with the multinature of the First Conference, the Second Conference was limited by the terms of the resolution to two specific questions: the breadth of the territorial sea, and fishery limits. These two matters were intimately bound together. Since under traditional international law, the coastal State has exclusive fishing rights in the territorial sea (*see* Part 1, 312), the desire for extending such rights seaward could be met in two ways: by extending the territorial sea, or by creating a contiguous fishing zone beyond the territorial sea.

Although the United States has throughout its history consistently followed the 3-mile limit for the territorial sea and considers that this is the limit sanctioned by international law, there has been a growing defection from this principle in recent years by other countries. When the First Conference convened at Geneva in 1958, 21 nations claimed a 3-mile territorial sea, 17 claimed 4 to 6 miles, 13 claimed 7 to 12 miles, and 9 nations claimed the sea above the continental shelf for varying distances.[150] The problem of reconciling these differences was one of the tasks of the Second Conference on the Law of the Sea.

It will be recalled that at the First Conference, the United States had sponsored a proposal for a 6-mile territorial sea and a 6-mile fishing zone beyond, subject to historic fishing rights in the outer 6 miles which could be perpetual (*see* 2217). While the failure of this proposal left intact the traditional position of the United States with respect to the 3-mile limit,[151] it realized the necessity of international agreement on the breadth of the territorial sea and on fishing rights in order that a regime of law might be effected. The take-off and limiting point for the Second Conference

149. U.N. Doc. A/Res/1307 (XIII) (1958); 1958 U.N. Yearbook 381–383. Eighty-eight nations participated in the Second Conference. Dean, *Notes and Comments,* 55 AMERICAN JOURNAL OF INTERNATIONAL LAW 680 (1961).

150. Sorensen, *supra* note 31 (Table III), at 244. This is a summary table based on U.N. Doc. A/Conf.13/C.1/L.11/Rev. 1, and Corrs. 1 and 2 (1958). A synoptical table was prepared by the U.N. Secretariat in Feb. 1960 (U.N. Doc. A/Conf.19/4), just before the Second Conference convened, giving the breadth and juridical status of the territorial sea and adjacent zones (*see* Appendix J).

151. The chairman of the U.S. delegation, in a closing address to the Conference on Apr. 28, 1958, made the following statement: "Our offer to agree on a 6-mile breadth of territorial sea, provided agreement could be reached on such a breadth under certain conditions, was simply an offer and nothing more. Its nonacceptance leaves the preexisting situation intact." 38 DEPT. STATE BULLETIN 1110–1111 (1958).

was therefore the "6-plus-6" formula, the United States being convinced that 6 miles was the outer limit consistent with national security.[152]

231. Proposals for Breadth of Territorial Sea

Although various proposals were made, in the final analysis they resolved themselves, as at the First Conference, into the 6-milers and the 12-milers. The principal sponsors of the 6-mile category were the United States and Canada. Originally, separate proposals were made by each. The United States proposal was essentially the same as at the First Conference—a 6-mile territorial sea with an additional 6-mile partially exclusive fishing zone—but a limitation was placed on historic rights in the fishing zone to the extent that any State whose vessels had fished in the outer 6-mile zone of another State during the 5 years preceding January 1, 1958, could continue to fish within that zone for the same groups of species and to an equivalent yearly extent as were taken during the 5-year period.[153] The Canadian proposal was also essentially the same as its proposal at the First Conference and provided for a territorial sea up to a maximum of 6 miles and an *exclusive* fishing zone up to a maximum of 12 miles from the coast.[154]

Later, both States withdrew their separate proposals and on April 8, 1960, agreed on a joint compromise proposal, the essence of which was a suspension of the coastal State's exclusive fishing jurisdiction in the outer 6 miles during an interim period of 10 years from October 31, 1960, if other States could show that their fishing vessels had fished in the outer 6 miles for the 5-year base period immediately preceding January 1, 1958. The compromise lay in the introduction of the idea that the historic rights should be enjoyed for a defined period and not in perpetuity. After the 10-year period, the coastal State's fishing rights in the outer 6-mile zone would become exclusive. Where no practice of fishing could be shown the coastal State could immediately claim a 12-mile fishing jurisdiction.[155]

152. During the period between the two Conferences, representatives from the Navy and from the Department of State visited nations all over the world to muster support for the compromise proposal. Powers and Hardy, *How Wide the Territorial Sea?*, 87 U.S. Naval Institute Proceedings 70 (1961).

153. Dean, *supra* note 148, at 774. The U.S. proposal at the First Conference did not limit the historic right to fish to the same groups of species or to an equivalent amount (*see* 2217).

154. This exclusion of historic rights in the outer 6-mile fishing zone was the reason for the disagreement between the United States and Canada at the First Conference. *Ibid.*

155. The U.S.-Canadian proposal, as introduced in the Committee of the Whole, was as follows:
"1. A State is entitled to fix the breadth of its territorial sea up to a maximum of six nautical miles measured from the applicable baseline.
"2. A State is entitled to establish a fishing zone contiguous to its territorial sea extending to a maximum limit of twelve nautical miles from the baseline from which the breadth of its terri-

Within the 12-mile category there were originally several proposals,[156] which later merged into an 18-power proposal and provided for a flexible territorial sea up to 12 miles, with an exclusive fishing zone of 12 miles measured from the applicable baseline. Under this proposal, any State which had fixed the breadth of its territorial sea or contiguous fishing zone at less than 12 nautical miles would have been entitled, *vis-a-vis* any other State with a wider delimitation thereof, to exercise the same sovereignty or rights up to a limit equal to the limits fixed by the other State.[157]

2311. *Implications of a 12-Mile Limit*

As has been heretofore pointed out, the territorial sea is the belt of water running along the coast over which the coastal State exercises sovereignty, subject to certain limitations imposed by international law. The United States has always favored a 3-mile limit for its territorial sea, believing this to be most consistent with the principle of freedom of the seas. Any extension of this limit cuts down the freedom of other nations to sail on, fly over, or lay submarine cables in what was formerly the high seas. And even though under the Convention on the Territorial Sea and the Contiguous Zone, adopted at the First Geneva Conference, warships have a right

torial sea is measured, in which it shall have the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea.

"3. Any State whose vessels have made a practice of fishing in the outer six miles of the fishing zone established by the coastal State, in accordance with paragraph 2 above, for the period of five years immediately preceding January 1, 1958, may continue to do so for a period of ten years from October 31, 1960.

"4. The provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas, adopted at Geneva, April 27, 1958, shall apply *mutatis mutandis* to the settlement of any dispute arising out of the application of the foregoing paragraphs." Bowett, *The Second United Nations Conference on the Law of the Sea*, 9 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 426 (July 1960). See also U.N. Doc. A/Conf.19/C.1/L.10 (1960).

This compromise proposal was characterized by the chairman of the U.S. delegation as "sincerely designed to find a rule acceptable to the Conference, though admittedly at considerable expense to U.S. fishing interests . . . The sacrifice inherent in the joint proposal was offered in the hope of achieving agreement at the Conference on a territorial sea limited to 6 miles without increasing the contiguous zone beyond 12 miles, while protecting American fishing vessels against unilateral claims for at least 10 years." Dean, *supra* note 148, at 775, 776.

156. A proposal by the U.S.S.R. provided for a permissive 3- to 12-mile zone of territorial waters, with provision that any State choosing less than a 12-mile zone could add the remaining area up to 12 miles as an exclusive fishing zone. A Mexican proposal also provided for a 3- to 12-mile zone but with a sliding scale of fishing zone bonuses if the territorial sea was kept narrow. Thus, where the breadth of the territorial sea is from 3 to 6 miles the fishing zone could be extended up to a limit of 18 miles; for 7 to 9 miles it would be up to 15 miles; and for 10 to 11 miles it would be up to 12 miles. There was also a 16-power proposal which was substantially the same as the later 18-power proposal, *supra*. None of these proposals survived the Committee of the Whole. *Id.* at 774, 775.

157. *Ibid.* and U.N. Doc. A/Conf.19/C.1/L.2/Rev.1 (1960).

of innocent passage through the territorial sea (*see* 2214(*b*)), the freedom of transit through this zone cannot be considered the same as on the high seas where the right is absolute. This view was expressed by some of the delegations at the Second Conference.[158] Furthermore, Article 17 of the convention specifically provides that foreign ships exercising the right of innocent passage "shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law."

It was for this reason that the United States adopted as its first goal in the Conference the preservation of the traditional limit of the territorial sea at 3 miles. A widened territorial sea—for example, 12 miles—would therefore, in the view of the United States, have a serious impact on freedom of navigation. It would also have an impact on the responsibilities of a coastal State for safeguarding its sea lanes by establishing and maintaining appropriate systems of aids to navigation and by providing adequate nautical charts of its coastal areas.

(*a*) *Effect on Freedom of Navigation.*—The encroachment on the high seas by a widened territorial sea is best exemplified by the case of a single offshore rock of small extent that rises above the plane of high water. With a 3-mile limit, the rock would give rise to a territorial sea of 28 square miles; a 6-mile limit would result in a territorial sea four times the area, or 113 square miles; and a 12-mile limit would create a territorial sea of 452 square miles.[159]

Another effect of a 12-mile limit on the freedom of navigation is in relation to passage through international straits. These narrows lie athwart the great sea routes of the world. Converting even a part of them to territorial waters would adversely affect the free movement of merchant ships and naval vessels. It has been estimated that there are approximately 116 important international straits in the world, the free use of which would be

158. The Australian delegation expressed it in this way: "On the high seas, ships of all nations had an absolute and unqualified right of navigation, whereas on the territorial sea of a coastal State the right of innocent passage was qualified, since it might be suspended at the discretion of the coastal State if the latter deemed such action essential for its security." Bowett, *supra* note 155, at 419.

159. A widened territorial sea was also felt by the U.S. delegation to work to the disadvantage of the United States in time of war. The theory on which this is predicated is that submarines of a belligerent country that chose to disregard the neutrality of a non-belligerent State could find a relatively safe haven in the territorial waters of the latter without being detected and thus act as a prey on vessels of a nation which respected such neutrality. Such submarines could probably not operate effectively in a narrow zone because of the shallowness of the water. From statement by the chairman of the U.S. delegation to the Geneva Conference in *Hearing, supra* note 141, at 110.

affected by the choice of a 12-mile territorial sea. Of these, 52 would become subject to national sovereignties if a 6-mile limit were adopted.[160]

(*b*) *Effect on Navigational Aids and on Charting Programs.*[161]—The obligation which every nation has for protecting the lives and property of its nationals is an inherent responsibility and one that flows from nationhood and government. In the United States, Congress, which by judicial interpretation has control over navigable waters of the United States, has enacted basic laws for effectuating this responsibility.[162] This obligation of a nation towards its citizens has been carried over into the field of international responsibilities both as a matter of self-interest—for example, that its territorial sea be not infringed upon, particularly with regard to fisheries—and as a result of international conventions and agreements.[163]

The obligations towards national and international commerce and navigation manifest themselves in the establishment and maintenance of adequate systems of aids to navigation, and in the publication of nautical charts and related manuals.

In considering the effect of a 12-mile limit on existing navigational aids, it may be accepted as axiomatic that the farther from shore the territorial limits are placed, the more difficult it will be for a vessel to fix its position accurately in relation to those limits, if the identical aids to navigation are available. And accuracy of position is basic, particularly for foreign vessels engaged in fishing operations, since encroachment upon territorial waters by them is a grave offense. (It must also be assumed that foreign vessels generally, although in innocent passage, would have the right, if they so chose, to traverse the sealanes of the world outside the territorial limits.) The coastal State would therefore be under obligation to furnish an appro-

160. A further breakdown of the 52 straits that would be affected by a 6-mile limit indicated that only 11 would come under the sovereignty of nations which would appear likely to claim the right to terminate or interfere with the transit of our warships or aircraft, whereas under a 12-mile rule 18 straits would fall within this category. Denial of passage through these additional straits was considered "a completely unacceptable impairment of our defensive mobility and capability." *Ibid.*

161. This section is based on a memorandum prepared by the Bureau at the request of the Office of the Judge Advocate General of the Navy Department, and sent to the U.S. delegation at Geneva on Mar. 18, 1960. A portion of the memorandum was embodied in the chairman's opening statement to the Conference on Mar. 24, 1960.

162. Examples of these are the act which set up the Coast and Geodetic Survey to survey and chart the coastal waters of the United States; the act which created the old Lighthouse Bureau to establish and maintain an adequate system of aids to navigation in our coastal and inland waters (now lodged in the Coast Guard); and the act which placed the responsibility for keeping the navigable waters of the United States free public highways in the Corps of Engineers.

163. Among the latter may be mentioned the International Hydrographic Conferences that have been held periodically since 1921, under the aegis of the International Hydrographic Bureau, to coordinate the efforts of national hydrographic offices; and the International Meetings on Marine Radio Aids to Navigation, held in 1946 and 1947, for the purpose of standardizing radio navigational aids.

priate system of navigational aids by which these vessels could locate themselves accurately with respect to the territorial sea.

At a distance of 3 nautical miles from shore, the height of the navigator's eye need be only 7½ feet above the water level to see the shoreline, but at a distance of 12 miles, the height would have to be 110 feet above the water to see the shoreline. With a standard height of eye of 15 feet, any aid to navigation placed on shore would have to be at least 44 feet high in order to be seen at a distance of 12 miles. This would obtain under ideal conditions. In actual practice, the visibility would be reduced by adverse meteorological conditions so that the navigational structures would have to be at a higher elevation than theory indicates.

Methods used in ordinary navigation, such as bow-and-beam bearings, cross-bearings, and the like, on distant lights, would no longer suffice. At a distance of 3 miles, the navigator could use many of the charted landmarks, such as tanks, water towers, etc., for accurate position fixing, whereas at 12 miles these would no longer be visible. The so-called international lights (defined by the International Hydrographic Conference of 1947 as those lights of international interest) would probably be found to be spaced too far apart to be of value for accurate position determination.[164] Secondary systems of lights and buoys are closer spaced but do not have the visibility of the international lights. An extension of the territorial limits to 12 miles might necessitate the reconstitution of a coastal State's entire system of aids to navigation (perhaps replaced by an electronic system) to meet the new conditions.

Existing charting programs would also be affected by an extension of the territorial sea to 12 miles. This arises from the provisions in the Convention on the Territorial Sea and the Contiguous Zone relating to the representation of various features associated with the territorial sea on *large-scale* charts—for example, normal baselines, straight baselines, and boundaries between the territorial sea of two coastal States (*see* 2213). These clearly indicate that the data necessary for a vessel to determine its position with respect to such features should be available on large-scale charts of the coastal State.[165]

164. Along the Atlantic coast of the United States, these lights are spaced 13 to 28 miles apart for the northern portion and 51 miles for the southern portion. The visibility averages from 10 to 21 miles.

165. Although "large-scale" is a relative term and is not defined in the convention, a scale of 1:80,000 (approximately 1 nautical mile to the inch) would probably be the upper limit of such classification.

It would be incumbent upon coastal States either to revise where necessary their existing series of large-scale charts (by extension or redesign), or, lacking such series, to provide a new series that would satisfy the intent of the convention.[166] Such programs would be costly to undertake and require years to complete.

232. Final Action by Conference

The joint U.S.-Canadian proposal with its 6-plus-6 formula was adopted by the Committee of the Whole and embodied in its report to the plenary session. In plenary, however, a 10-power proposal was introduced in the form of a resolution, which, while recognizing a 12-mile fishing zone, would have postponed the final determination of the breadth of the territorial sea to some undetermined future date. This resolution became the principal support of the 12-milers and the principal opposition to the 6-milers.[167]

When the final vote was taken in plenary session on April 26, 1960, the U.S.-Canadian proposal fell one short of the required two-thirds majority of those present and voting, the tally showing 54 nations in favor, 28 against, and 5 abstentions, out of a total of 82 nations voting. This was 9 more affirmative votes than the United States proposal received at the First Conference. The 10-power proposal, by contrast, received 32 affirmative votes, 39 negative votes, and 17 abstentions, thus falling short of even a simple majority.[168]

Thus, for the second time, the Geneva Conference on the Law of the Sea failed to reach agreement on the crucial question of the breadth of the territorial sea.

233. Present United States Position

The failure of the Conference to reach agreement reinstates the traditional position of the United States with respect to the 3-mile limit. This

166. In the case of the United States, for example, the Bureau would have to revamp its charting program, first, with respect to the existing large-scale series along the Atlantic and Gulf coasts where 35 of the present 74 affected charts of the 1:80,000 scale series would require reconstruction, to avoid impractical sizes, or an extension of their offshore limits; and, second, with respect to the Pacific coast where present continuous coverage is at a small scale (1:200,000 on the average) and would require a complete new series of approximately 50 charts. (For a 3-mile limit, many of the existing discontinuous large-scale charts would suffice.)

167. Bowett, *supra* note 155, at 431, and U.N. Doc. A/Conf.19/L.9 (1960).

168. Dean, *supra* note 148, at 776, 777. A subsequent motion to have the Conference reconsider the U.S.-Canadian proposal also failed to receive the required two-thirds majority.

position, the United States believes, is in accord with established international law and is the only breadth of territorial waters on which there has ever been anything like common agreement. At the close of the Second Conference, the chairman of the U.S. delegation stated that the offer to agree on a 6-mile territorial sea with an additional 6-mile fisheries zone had been made only in the hope of achieving agreement at the Conference; rejection of the offer left the pre-existing situation intact.[169]

169. *Id.* at 788, and U.N. Doc. A/Conf.19/Sr.14, at 6 (1960).