

CHAPTER 5

Offshore Islands Problem

In the case before the Special Master (*see* 2111), the Supreme Court directed that a recommendation be made as to the status (inland waters or open sea) of the channels and other water areas between the mainland and the islands off the southern California coast. This was a crucial question in the *California* case, for if the areas were declared to be inland waters it would automatically have eliminated all the bays within that area from operation of the Court's decision.¹

In the consideration of this overall question two subordinate questions had to be dealt with: (1) the effect of the presence of islands at varying distances from the coast on the drawing of the baseline for the marginal belt, and (2) the status of the channel areas. These two aspects of the question posed by the Supreme Court, but framed in somewhat different contexts, were considered by the International Court of Justice, during the pendency of the proceedings before the Special Master, in the *Anglo-Norwegian Fisheries* case,² and in the *Corfu Channel* case.³ Inasmuch as both cases were invoked in the *California* case to support the respective contentions of the parties,⁴ and because of their impact on recent developments in the international law of the sea, these cases, particularly the *Fisheries* case, will be dealt with in some detail.

1. California had contended that the area enclosed by a line running from Point Conception around the seaward side of all the islands to Point Loma was inland waters (*see* fig. 13) and that the 3-mile marginal belt should be measured from that line as a "political" or "exterior" coastline, rather than from the physical coastline along the mainland. The significance of this was obvious, for practically all the producing oil wells along the California coast were within these limits. This area was referred to as the "overall unit area." (Two alternate lines, more restrictive than the first, were also contended for by California.)

2. *United Kingdom v. Norway*, Judgment of Dec. 18, 1951: I.C.J. Rept., 1951, p. 116 (hereinafter cited as the *Fisheries* case or as *Judgment*).

3. *United Kingdom v. Albania*, Judgment of Apr. 9, 1949: I.C.J. Rept., 1949, p. 4 (hereinafter cited as the *Corfu Channel* case).

4. California relied on the *Fisheries* case as conclusive that the marginal belt should be drawn from the outermost points of the islands along the coast, while the United States relied on the *Corfu Channel* case to uphold its contention that the channel areas are international straits and therefore cannot fall within the category of inland waters.

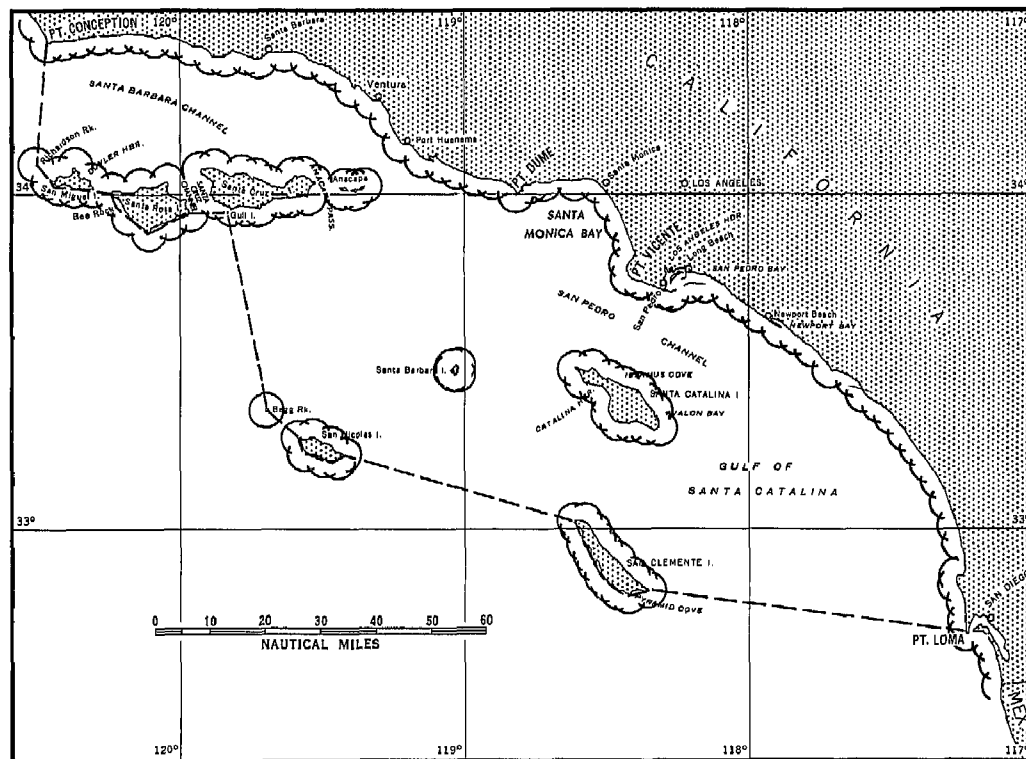


FIGURE 13.—Overall unit area contended for by California and delimitation of 3-mile marginal belt in vicinity of islands contended for by the Government.

5I. ANGLO-NORWEGIAN FISHERIES CASE

The *Fisheries* decision will probably rank as one of the important judgments ever to be pronounced by an international tribunal on matters dealing with delimitation of the territorial sea. Cognizance was taken of its findings by the International Law Commission (*see* Part 3, 1311) and by the United Nations Conference on the Law of the Sea (*see* Part 3, 2211 A(b)).

5II. THE FACTS

The *Fisheries* case was instituted on September 28, 1949, by the United Kingdom against the Government of Norway, in which it sought to have the International Court of Justice lay down the principles of international law applicable in defining the Norwegian fisheries zone off her northern coast north of latitude 66°28'48" N., that is, north of the Arctic Circle.

The occasion for invoking the jurisdiction of the Court was the issuance of the Norwegian Royal Decree of July 12, 1935, as amended by a Decree of December 10, 1937, in which Norway laid down a series of straight baselines along the seaward projections of the outermost of the numerous islands, islets, and rocks that constitute the *skjaergaard* (literally, rock rampart) from which was delimited an exclusive fisheries zone of 4 miles.⁵ (In one case (base point 21) the baseline was drawn to a rock bare only at low tide.) The points connected by the baselines were 48 in number, beginning at the final point of the Norwegian-Russian boundary in the Varangerfjord and extending northward around the North Cape and thence down the northwest coast to Traena, near the entrance to the Vestfjord. The water areas traversed by the baselines differ in dimensions, but in at least 11 instances the open distance between fixed points is 18 miles or more, the maximum distance being 44 miles across Lophhavet. (See fig. 14.) The enforcement of this Royal Decree, beginning in 1948, had resulted in the arrest and condemnation of British fishing vessels.

512. PRINCIPAL LEGAL ISSUES

The basic issue before the Court was, therefore, the validity under international law of the Norwegian method of drawing straight baselines for defining a fisheries zone.⁶ The United Kingdom's contention in summary was that international law does not give each State a right to choose arbitrarily the baselines for its territorial waters; that the main rule was that territorial waters were to be measured from the actual coastline (the low-water mark on permanently dry land); and that cases where a departure from the coastline is permitted are exceptions to the main rule, strictly limited by international law (e.g., a bay, when it follows the proper closing line of inland waters). The last takes into account the 10-mile limitation on nonhistoric bays (*see* 43).

Norway, on the other hand, contended that no general rule existed in international law that required the baseline to follow the coastline throughout;

5. Norway's 4-mile limit goes back to the middle of the 18th century when a 4-mile league was in use in Scandinavian States, about half a century before the 3-mile limit (1 marine league) entered international practice as the neutrality limit of the United States. For the purpose of the litigation, Great Britain acquiesced in Norway's 4-mile limit as a historic limit older than the customary 3-mile limit. Waldock, *The Anglo-Norwegian Fisheries Case*, 28 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 114, 126 (1951).

6. The decision of the Court, however, does not limit itself to questions of fisheries zones only, for the Court said that "Although the Decree of July 12, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea. That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision." *United Kingdom v. Norway*, *supra*, note 2, at 125.

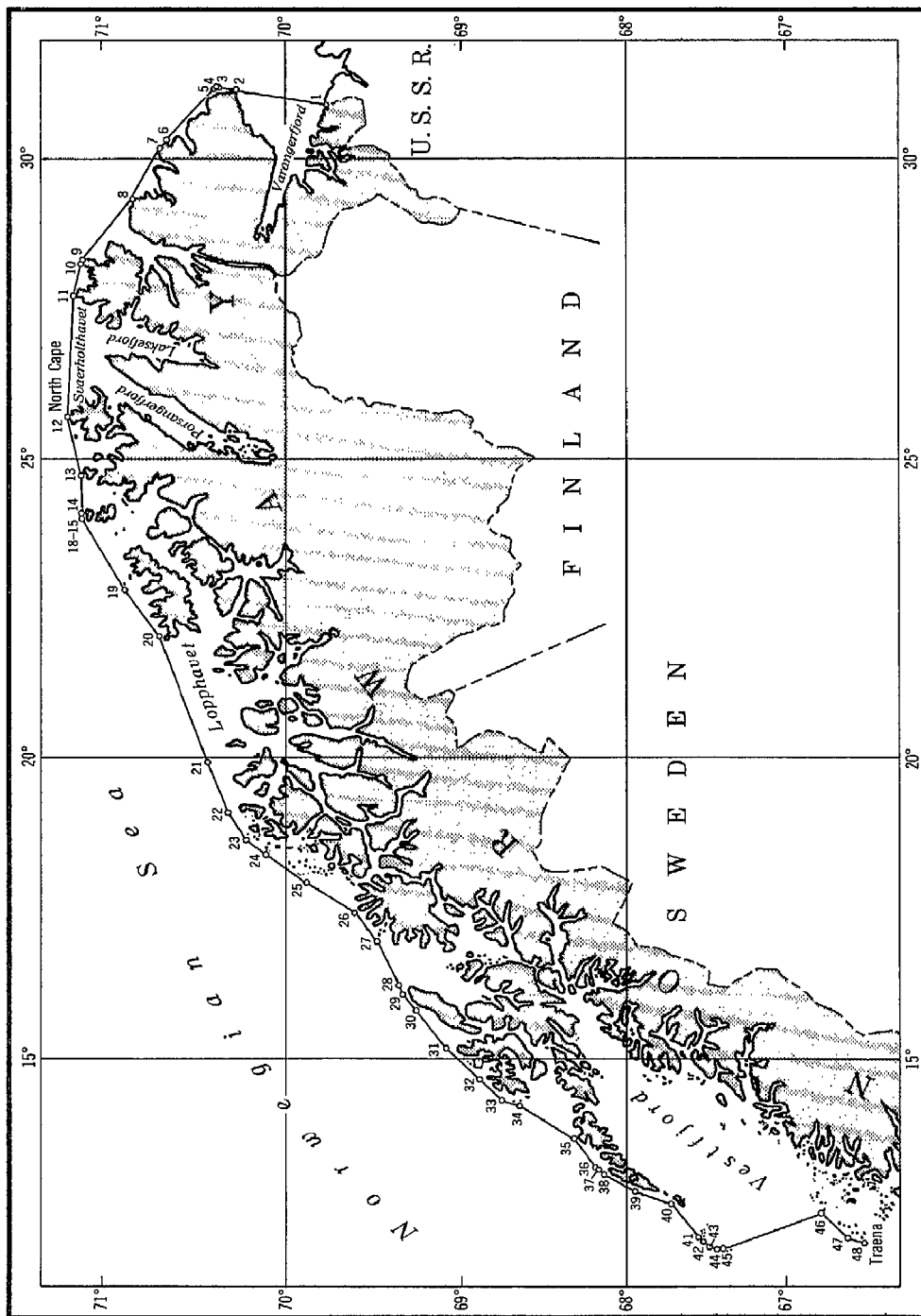


FIGURE 14.—Straight baselines laid down by Norway along its skjargaard coast under decree of July 12, 1935.

that if such a rule did exist, it could not bind Norway, which had consistently refused to accept it; and that international law did not prohibit a coastal State from drawing straight baselines for its territorial waters from "headland to headland."

513. JUDGMENT OF THE COURT

By a vote of 10 to 2, the International Court upheld Norway's method of drawing straight baselines on the ground that it was part of a traditional Norwegian system which had been applied, without protest, to parts of the south coast of Norway in earlier decrees, beginning in 1812, and that this system was entitled to "reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States."⁷

The Court had no difficulty in finding that "for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which had generally been adopted in the practice of States."⁸ But its application to a coastline came in for some significant modifications.

Insofar as the locus in question was concerned (the northern coast of Norway), it seems clear that the Court rejected the "coastline rule." This is implicit from the following passage, which in point of scope is probably one of the most vital in the *Judgment*: "Where a coast is deeply indented and cut into . . . or where it is bordered by an archipelago such as the 'skjaergaard' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast; the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast."⁹

But the decision cannot be interpreted as giving nations *carte blanche* authority to use straight baselines for drawing the outer limits of their territorial

7. *Id.* at 138. "The general toleration of foreign States with regard to the Norwegian practice," the Court said, "is an unchallenged fact."

8. *Id.* at 128. This, the Court said, "is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory."

9. *Id.* at 128-129. The last three sentences of the quoted portion of the *Judgment* are from the Report of the International Law Commission, covering its Eighth Session (1956), Supplement No. 9 (A/3159), p. 14, which was provided by the Registry of the International Court of Justice from the authoritative French text. The translation in the printed English text became somewhat distorted by printing errors.

seas. On the contrary, the Court carefully circumscribed the conditions under which straight baselines may be drawn. For example, it said: (1) "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast"; (2) "the real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters"; and (3) "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage," should not be overlooked.¹⁰

Throughout the *Judgment*, the Court laid great stress upon the geography of the Norwegian coast, which it considered exceptional. "Since the mainland is bordered in its western sector by the 'skjaergaard,' which constitutes a whole with the mainland" (emphasis added), the Court said, "it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities."¹¹

The skjaergaard coast of Norway ends at North Cape. Eastward of the cape the coast is broken by large and deeply indented fjords. One of these is the sector of Svaerholthavet between basepoints 11 and 12, a distance of 38.6 nautical miles. From the head of the Svaerholthavet, a peninsula juts out for more than two-thirds of the penetration of the indentation to form two fjords (see fig. 14). The United Kingdom objected to drawing a straight baseline between points 11 and 12 on the ground that only fjords which fall within the concept of a bay as defined in international law could be claimed as internal waters on historic grounds. From the baseline to the tip of the peninsula is 11.5 miles as against 38.6 miles across the entrance—this the United Kingdom asserted does not have the character of a bay. But the Court held that "the fact that a peninsula juts out and forms two wide fjords . . . cannot deprive the basin of the character of a bay. It is the distances between the disputed baseline and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth." (*Judgment*, at 141.)

10. *United Kingdom v. Norway*, *supra* note 2, at 133. The Court found these criteria to be present in the case of the skjaergaard coast of Norway (comprising about 120,000 islands, islets, and rocks), and therefore held that Norway's method of drawing straight baselines did not violate international law.

11. *Id.* at 128. The Court thus makes the unity of the islands with the mainland the determining factor. That is, while the Court also invoked economic considerations for the justification of the Norwegian baselines, it is evident that economic interests alone would not justify the application of the method of straight baselines where the geographic conditions are not satisfied. This paramountcy of the latter is the interpretation placed upon the *Fisheries* case by the International Law Commission (see Part 3, 2211 A(b)).

The point of importance is that the Court in holding the Svaerholthavet to have the character of a bay did so on the basis of its penetration into the land, in relationship to the distance across the mouth. This is the essence of the semicircular rule but somewhat differently applied and without regard to the 10-mile limitation (*see* 421). It should also be noted that the straight baselines east of North Cape are part of a whole system; it does not follow that if only that type of coast were considered the answer would necessarily be the same.

Besides the basic legal decision that the baseline need not follow the sinuosities of the coast, the Court made other pronouncements which modified to an extent previous understandings of the international law of the sea, among which were the following:

(a) *The 10-Mile Rule for Bays*.—The Court held that the 10-mile rule for bays had not acquired the authority of a general rule of international law (*Judgment*, at 131). In its view, there is no legal limit to the length of the baselines, and it accepted as valid a baseline 38.6 miles long across the Svaerholthavet on the ground that it had the character of a bay (*Judgment*, at 141). As a corollary to this major finding, the Court also held that where the conditions satisfied the criteria for straight baselines, they could be drawn across other sea areas, such as between the mainland and the islands and between the islands themselves without regard to length, provided there is no excessive deviation from the general principle.

(b) *Delimitation of the Maritime Belt*.—Although not directly involved in the case, since the issue was one of baselines, the Court, nevertheless, discussed at some length the methods available for delimiting the outer rim of the maritime belt. The conclusions of the Court in this regard are therefore in the nature of *dicta* and of persuasive authority only.¹²

The Court rejected the *tracé parallèle* method (following the coast in all its sinuosities) of delimiting a sea boundary as inapplicable to a coast like Norway, although it noted that the method might be applied to an ordinary coast without difficulty.¹³

As for the “arcs of circles” method, the Court said that while it is “constantly used for determining the position of a point or object at sea, it is a new technique in so far as it is a method for delimiting the territorial sea.” (*Judgment*, at 129.)

12. *Id.* at 128–129. But it should be noted that once a system of straight lines is adopted as the baselines from which the maritime belt is to be measured, then any method of delimiting this belt must necessarily result in a straight line outer limit. Methods such as *tracé parallèle* or “arcs of circles” come into play only where the baseline follows the sinuosities of the coast (*see* Part 2, 1621).

13. *Id.* at 128. The *tracé parallèle* is also referred to as a replica line and is discussed in Part 2, 1621(a).

As with *tracé parallèle*, the Court did not hold it illegal, but merely that it was not obligatory by law and therefore not binding on Norway.¹⁴

5131. *Commentary*

In summary, it can be stated that the net effect of the *Fisheries* decision is to hold the method of straight baselines, used by Norway for delimiting its fisheries zone, as not contrary to international law. As a corollary to this holding, the Court found the coastline rule, or rule of the tidemark (*see* 331), that takes into account the sinuosities of the coast, not applicable to a coast like the northern coast of Norway, the geography of which is unique, if not exceptional.

While the decision is binding on the party litigants, it does not establish a precedent which other nations must follow. This is so because international law does not recognize the principle of *stare decisis* (let the decision stand), and Article 59 of the Court's Statute provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case."¹⁵ Yet, the Court does lay down certain principles of delimitation for the use of straight baselines, which could be highly persuasive in other situations. But, the decision does not stand for the doctrine that the coastline rule and the 10-mile limitation for bays are contrary to international law; rather, it leaves the choice of method of delimitation, under certain criteria recognized in international law, to the national State. This is implicit in the Court's statement that "the coastal State would seem to be in the best position to appraise the local conditions dictating the selection" (*Judgment*, at 131). It follows, *a fortiori*, that any method that exhibits a more liberal approach to the problem of baselines, *vis-a-vis* the family of nations, would not infringe the general law.¹⁶

The limitation which the Court placed on straight baselines, even in the case of a unique coast such as Norway's, is that they "must not depart to any appreciable extent from the general direction of the coast." (*Judgment*, at

14. The Court's observation that the arcs-of-circles method is a *new technique* would seem to imply a certain relativity to the word "new." The arcs of circles (also referred to as an envelope line) was embodied in the proposal of the United States delegation at the 1930 Hague Conference for the Codification of International Law, but this was not the origin of the method. It was well known long before 1930. In 1928, Great Britain suggested its use in connection with proposals for an agreement with Norway regarding territorial waters (23 AMERICAN JOURNAL OF INTERNATIONAL LAW (Special Supplement) 256 (1929)), and prior to that, in 1911, it was used for delimiting a 3-mile belt in The Firth of Clyde (FULTON, THE SOVEREIGNTY OF THE SEA 719 (1911)). The envelope line method of delimiting a seaward boundary and its geometric basis is discussed in Part 2, 1621(c).

15. Johnson, *The Anglo-Norwegian Fisheries Case*, 1 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 179 (1952).

16. From the standpoint of the international community and the freedom of the seas, the use of straight baselines is the least liberal, for it tends to assimilate the greatest sea area into the regime of internal waters.

133.) This is an important finding and is the principal criterion which the Court applied in justification of the Norwegian system. Its underlying rationale is expressed by the Court to be that "the delimitation of sea areas has always an international aspect" and while "the act of delimitation is necessarily a unilateral act . . . the validity of the delimitation with regard to other States depends upon international law." (*Judgment*, at 132.) But the Court gives no guidelines for determining when a baseline conforms to this test. This is perhaps a basic weakness in the general-direction-of-the-coast principle. The Court recognized this in its observation that "however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone." (*Judgment*, at 141-142.)¹⁷

Geographically and cartographically, the application of the general-direction-of-the-coast rule becomes a matter of opinion and interpretation. It is doubtful whether two experts would interpret the phrase "to any appreciable extent" in the same way in applying the rule to a specific coastal situation. Even the term "general direction of the coast" is uncertain. Does it mean direction as determined by a stretch of coastline 1 mile, 2 miles, 5 miles, or more, in length? The Court's observation that reliance should not be placed upon "the impression that may be gathered from a large scale chart" would seem to infer that the geographical test is a subjective one, and that in appraising a particular situation a small-scale chart should be used so that the "impression" of the deviation from the general direction of the coast will be more favorable to the coastal State.¹⁸

In contrast to the rule laid down by the Court, the coastline rule, or rule of the tidemark, whether applied to a mainland coast or to an island coast, has the advantage of legal certainty and is susceptible of definite ascertainment,

17. The last clause of the above quoted passage is opposed to the statement of one of the majority judges (in a separate opinion) that the principle of conforming to the general direction of the coast should be "interpreted in the light of the local conditions in each sector with the aid of a relatively large scale chart." *United Kingdom v. Norway*, *supra* note 2, at 155.

18. Theoretically, the deviation of the outer line of a group of islands or rocks, or a single island or rock, from the general direction of the coast, is the same no matter what the scale of the chart is, because the direction and distance to such features from points on the coast would be the same, if the charts are accurately constructed. But the "impression" of deviation that one obtains from a small-scale chart would certainly be less pronounced than it would be if a large-scale chart of the same area were to be examined. One need but to examine various scale charts along the Atlantic or Pacific coasts, where off-shore islands are located, to verify this.

albeit the delimitation of the outer rim of the maritime belt may be of a more complex nature.¹⁹ On the other hand, the straight baseline rule is subject to interpretation in different situations.

Finally, the Court's discussion of the *tracé parallèle* and "arcs of circles" methods of delimiting the maritime belt seems irrelevant to an issue involving only baselines. The Court, at times, refers to "this method of the *tracé parallèle*" as if synonymous with a baseline that follows the sinuosities of the coast. This is confusing because they represent two different concepts. What the Court seems to have done was to use these methods of delimitation as a means of rationalizing its rejection of the coastline rule and its substitution of the straight baseline rule.²⁰

52. CORFU CHANNEL CASE

The *Corfu Channel* case, *supra* note 3, arose out of damages sustained by two British warships which struck mines in 1946 while proceeding through the North Corfu Channel at a point within the territorial waters of Albania. Great Britain sued Albania in the World Court. The geographic circumstances of the case are important.

The strait of Corfu is approximately 40 nautical miles long and, with the exception of a few miles along the Albanian coast, is situated between the Greek Island of Corfu and the Greek mainland. (See fig. 15.) It has two narrow channels at its extremities, between which is a wider area. The North Channel is 1 mile wide at its narrowest point and less than 6 miles wide at other points. The South Channel is less than 5 miles wide. The strait is a link between the Adriatic and the Ionian Seas, although not the principal one. The incident occurred within the narrow North Channel.

The Court found Albania responsible for the damages sustained. In upholding the claim of Great Britain, the Court held that the North Corfu Channel

19. With its "Reply," the United Kingdom filed as Annex 35 a set of charts of the coast of northern Norway showing its conception of the coastline rule for the delimitation of the maritime belt by the arcs-of-circles method, due account being taken of those historic claims of Norway which the United Kingdom was prepared to concede.

20. *United Kingdom v. Norway*, *supra* note 2, at 129. The Court first equated the coastline rule with *tracé parallèle*. Finding the latter inapplicable to a coast like Norway, it substituted the straight baseline rule for the coastline rule. It next considered the "arcs of circles" method, the purpose of which it found to be to "secure the application of the principle that the belt of territorial waters must follow the line of the coast." But having rejected the latter, it was precluded from accepting the arcs-of-circles method. The first effect of the *Fisheries* decision occurred on July 18, 1952, when Norway extended the system of straight baselines to the remainder of its coast. ALEXANDER, A COMPARATIVE STUDY OF OFFSHORE CLAIMS IN NORTHWESTERN EUROPE 195 (1960) (sponsored by Research Foundation of the State University of New York and the Office of Naval Research).



FIGURE 15.—The Corfu Channel separates the Greek Island of Corfu from the mainland and connects the Adriatic Sea with the Ionian Sea.

was not part of the inland waters of Albania and stated the law thus: "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*."²¹

It was Albania's contention that while the North Corfu Channel was a strait in the geographical sense, it was not an international highway because of its secondary importance and because it is used almost exclusively for local traffic. But the Court said that the test was not to be found in the volume of traffic passing through the strait nor in its greater or lesser importance for international navigation. The decisive criterion, it held, was "its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."²²

21. *United Kingdom v. Albania*, *supra* note 3, at 28.

22. *Ibid.* The decision in the *Corfu Channel* case was not overruled by the *Fisheries* case. Although it was contended by the United Kingdom that the Indreleia, a sailing route between the mainland of Norway and certain of its offshore islands, was a strait that constituted territorial waters, the International Court, without referring to the *Corfu Channel* case, held the Indreleia not to be a strait, "but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway." *United Kingdom v. Norway*, *supra* note 2, at 132.

53. OPPOSING VIEWS OF THE PROBLEM

California relied heavily on the *Fisheries* case to show the development of international law in this field and to show the validity of using straight baselines for the overall unit area (*see note 1 supra*) from which the 3-mile belt should be measured. It also contended that it would be in the national interest to place the international domain as far seaward as possible.²³ As for the *Corfu Channel* decision, California contended that if Corfu Island had been part of Albania, the North Corfu Channel could have been declared inland waters.

The burden of the Government's contention was that the past position of the United States was to measure its marginal belt from the physical shore of the mainland and, in the same manner, around each offshore island; and 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.²⁴

As opposed to California's view regarding the implication of the *Fisheries* case, the Government introduced the letter of February 12, 1952, from the State Department (*see Appendix D*), in which it was stated that the *Fisheries* decision had not altered the position of the United States with respect to the delimitation of its territorial waters, as set forth in its letter of November 13, 1951. In its view, the decision did not indicate that other methods of delimitation, such as those adopted by the United States, were not equally valid in international law, and that the decision left the choice of method, within the criteria set forth by the Court, to the national State.²⁵

23. California introduced expert testimony to show that at sometime in the geologic past, perhaps 25 million years ago, the islands were connected to the mainland; that wave refraction tends to give the channel areas a sheltered character; and that historically (from the early 16th century) the use and development of the areas showed their protected nature.

24. In support of this position, the Government introduced the letter of Nov. 13, 1951, from the State Department (*see Appendix D*), which it contended was conclusive on the courts, in accordance with the well-established principle of American constitutional law that courts will accept executive determinations in the field of foreign affairs, determinations of territorial sovereignty being of that nature (citing *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948) and other cases). The Government also invoked the *Corfu Channel* decision, as dealing with an analogous geographic situation of a strait connecting two parts of the high seas.

25. To further offset the implication of the *Fisheries* decision, the Government introduced, in rebuttal, three charts of the World Aeronautical Chart series, chart 404 covering the lower California coast and charts 52 and 90 the skjaergaard coast of Norway. This was an impressive exhibit because the charts were on the same projection (Lambert conformal conic) and on the same scale (1:1,000,000), so that a visual comparison was sufficient to show the geographic difference between the two areas (*see fig. 16*). Oral testimony brought out the fact that the ratio of land to water area on the Norwegian coast (within the scope of the *Fisheries* decision) was 1 to 3½, whereas on the California coast (covering the area of the offshore islands), it was 1 to 29 (*see 2112(h)*).

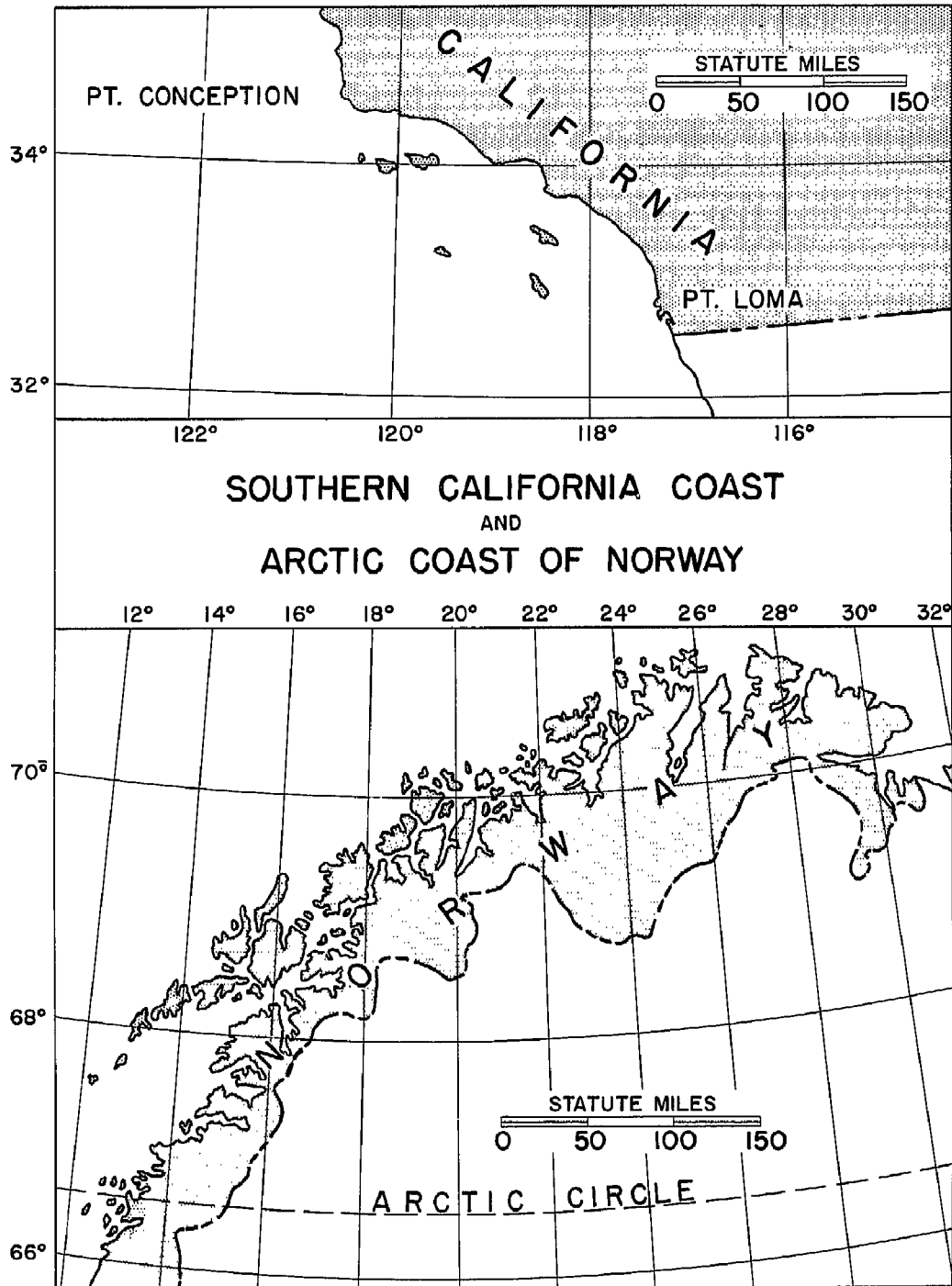


FIGURE 16.—Geographic comparison between the southern California coast and the Arctic coast of Norway.

54. FINDINGS OF THE SPECIAL MASTER

Such was the international law background and the contentions of the litigants which the Special Master had to consider in determining the status of the channel areas between the California mainland and the offshore islands.²⁶ He agreed with the Government's view that "the channels and other water areas between the mainland and the offshore islands . . . are not inland waters" and that "they lie seaward of the baseline of the marginal belt of territorial waters, which should be measured in each instance along the shore of the adjoining mainland or island, each island having its own marginal belt."²⁷

He predicated this finding, first upon an absence in international law of any generally accepted rule fixing the baseline of the marginal belt; and, second, upon the traditional position of the United States that the baseline follows the sinuosities of the coast, except where interrupted by deep indentations.²⁸ He noted that this rule "in itself excludes the idea of drawing the coastline from headland to headland around offshore islands," as contended for by California, and he stated that placing a 3-mile marginal belt around each offshore island goes naturally with the fact that the "islands are part of the territory of the nation to which the mainland belongs."²⁹

As to the effect of the *Fisheries* decision on the traditional position of the United States, the Special Master cited the supplementary letter from the Sec-

26. The islands are separated from the mainland by distances of 10 to 60 nautical miles, with depths in between as great as 1,000 fathoms (6,000 feet) (see Coast Survey chart 5101). Recommended sailing lines for seagoing vessels pass between the mainland and the islands. PACIFIC COAST PILOT 159, U.S. COAST AND GEODETIC SURVEY (1951).

27. Report of Special Master 2, 29, United States v. California, Sup. Ct., No. 6, Original, Oct. Term, 1952 (cited hereinafter as Final Report of Special Master). This view is supported by JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 66-67 (1927). In *United Air Lines, Inc. v. Public Utilities Commission of California*, 109 F. Supp. 13, 16 (1952), a three-judge Federal court awarded a declaratory judgment and injunction against the Utilities Commission on the ground that under the Civil Aeronautics Act, the Civil Aeronautics Board and not the Commission had exclusive jurisdiction to regulate transportation activities of airlines between Santa Catalina Island and the mainland (see fig. 13) because "a substantial portion of these 30 miles lies over the high seas and is not within the State of California." On appeal to the Supreme Court, the decision was reversed on the ground that the case was not ripe for a declaratory judgment, but the high seas issue was not reached. *Public Utilities Commission of California v. United Air Lines, Inc.*, 346 U.S. 402 (1953).

28. As expressed in its diplomatic correspondence, the position of the United States relative to islands and straits may be summarized as follows: (1) Where islands or groups of islands lie off the coast, irrespective of their distance from the mainland, each island is to be surrounded by its own marginal belt; (2) where a strait between the mainland and offshore islands connects two seas having the character of high seas, the waters of the strait are not to be considered as inland waters and the marginal belt is to be measured as described under (1); and (3) where a strait is merely a channel of communication to an inland sea, the rules regarding bays apply (see 421 and 43). Letter of Nov. 13, 1951, from Acting Secretary of State to Attorney General (see Appendix D).

29. Final Report of Special Master, *supra* note 27, at 26-27. Although the outer rim of the marginal belt was not involved in this litigation, the Government introduced in evidence six Coast and Geodetic Survey nautical charts, covering the disputed areas, on which the federal-state boundary was delineated according to the Government's contention, and on which the 3-mile limit was delineated by the "arcs of circles method" in order to show the relationship of territorial waters to the high seas.

retary of State, dated February 12, 1952 (*see* Appendix D), in which it was stated that the decision of the World Court does not require the United States to change its position, and that the principles advanced by it in its international relations are not in conflict with the criteria set forth in the decision of the World Court (*see* text at note 25 *supra*).

Regarding the *Corfu Channel* decision, the Master held that the situation there cannot be distinguished from the California situation on the ground that different countries border the North Corfu Channel because the criterion is the geographical situation of the channel as connecting two parts of the high seas and the fact that it is a useful route for international maritime traffic.³⁰

Finally, the Special Master considered the contention of California that the criteria it proposes for the overall unit area would best serve the national interest by placing the baseline as far seaward as possible.³¹ He rejected that argument because, first, it was a question of foreign policy which belongs "in the domain of political power not subject to judicial intrusion or inquiry" (citing *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948)); second, there was no evidence presented by California to show that such policy would be for the best interest of the United States; and, third, the Department of Defense had stated that by having the outer limits of territorial waters follow closely the sinuosities of the coastline, greater freedom and range of its warships and aircraft are secured and thus better protects the security interests of the United States.³²

Therefore, on the whole case as submitted, the Special Master recommended to the Court that "in its answer to *Question 1* it should find that, subject to the special case of historical waters, the channels and other water areas between the mainland and the offshore islands lying off the southern coast of California are not inland waters."³³

30. Final Report of Special Master, *supra* note 27, at 29.

31. California also urged this with respect to the seaward boundaries of bays and the use of the mean of the lower low tides. Final Report of Special Master, *supra* note 27, at 40.

32. *Id.* at 40, 41. This statement was made in a letter, dated Apr. 25, 1952, from the Department of the Navy, on behalf of the Department of Defense, to the Chairman of the House Judiciary Committee, commenting upon H.J. Res. 373, 82d Cong., 2d sess. (1952) and strongly recommending against its enactment. Letter printed in Reply Brief for the United States before the Special Master, 80-84 (June 1952), *United States v. California*, Sup. Ct., No. 6, Original, Oct. Term, 1952. The resolution would have declared "the boundaries of the inland waters of the United States to be as far seaward as is permissible under international law, and providing for a survey of such boundaries to be made by the United States Coast and Geodetic Survey in the light of the Anglo-Norwegian Fisheries Case." Extensive comments on the resolution were made by the Coast Survey. The resolution was never enacted into law.

33. Final Report of Special Master, *supra* note 27, at 29. Whether the channel areas are part of the marginal sea or part of the high seas would automatically be determined by drawing the 3-mile belt along the mainland and around the offshore islands in accordance with adopted criteria. If the channel is less than 6 miles wide the waters in between would be part of the marginal sea; if greater than 6 miles, a strip of high seas would result. In no case could the area become inland waters except by arbitrary adoption.

On the matter of the overall unit area being inland waters on historical grounds, the same factual situation must be present as is required for historical bays, namely, an assertion of exclusive sovereignty over the waters by the coastal State and an acquiescence by foreign governments (*see* 45). The failure by California to establish the bays within the overall unit area as historic bays has already been discussed in 4542. For the same reasons, the Master found the channel areas not to constitute historical waters. And he noted that the first explicit assertion by California over these water areas was made in 1949—2 years after the decision of the Court in the *California* case—which could not be controlling in the present litigation.³⁴

34. *Id.* at 39. Much of the testimony presented by California in the proceedings before the Master dealt with the geography, the history, and the economic importance of the water area in dispute. This testimony, the Special Master held, “would in general be relevant to the question whether these areas present special characteristics such as would justify in international law an assertion of exclusive sovereignty.” But since there had been no assertion by or on behalf of the United States, such testimony, he held, was “irrelevant to any issue here presented.” *Ibid.*