CHAPTER 3

Applicable Principles of International Law

Before considering the Special Master's findings and the bases for his conclusions, certain historical developments in the law of the sea will be examined. Terminology is important. Neither the Supreme Court in the three cases nor the Special Master in his final report specifically defined the technical terms used. Since the Court's finding was based upon national external sovereignty, these terms must be considered against the backdrop of applicable principles of international law and in their relation to the seaward boundaries of a littoral nation.

31. THE THREEFOLD DIVISION OF THE SEA

It is now generally agreed that the navigable waters of the world may be classified under three broad heads, each with its own significance in point of control which a coastal nation may exercise over it. The classification begins from the land outward and comprises inland waters, the marginal sea, and the high seas.[1] (*See* fig. 2.)

311. Inland Waters

The inland or internal waters include all bodies of water within the land territory, such as rivers and lakes, as well as bodies of water which open on the coast and fall within the category of "true" bays. Along a generally straight coast, without major indentations, it would also include the area subject to the flux and reflux of the tide, that is, between high-water mark and low-water mark.

1. Smith, The Law and Custom of the Sea 6 (1950).

The common legal feature of all inland waters is the complete sovereignty which a nation exercises over them, the same as it exercises over its land territory. This sovereignty includes the right of exclusion of foreign vessels.[2]

This physiographic concept of the limits of inland waters should not be confused with the lines established by the United States Coast Guard to separate the areas where the Inland Rules of the Road apply from those to which the International Rules apply. These lines are established for administrative purposes and have been held to have no application other than the specific purpose of determining what rules of navigation are to be followed.[3]

Once the limits of inland waters of a nation are established then its seaward boundaries become automatically fixed by the width of its marginal sea.

312. The Marginal Sea

Seaward of the inland waters of a nation is the marginal sea, also called the "territorial sea," the "marine belt," and the "3-mile limit." This forms part of the national territory of the coastal nation, but foreign merchantmen, and perhaps foreign warships in time of peace, have the right of innocent passage through them.[4] The enjoyment of this right may be conditioned upon the observance of special regulations laid down by the coastal nation for the protection of navigation and for the execution of municipal laws relating to customs, quarantine, and other local interests. This privilege is in the nature of a concession which leaves the general principle of sovereignty intact, and within the limits of the marginal belt the jurisdiction of the coastal nation is as exclusive as is its jurisdiction over the land itself.

Along a straight coast, the marginal sea extends seaward of the low-water mark; along an indented coast it begins at the seaward limits of inland waters. The landward limit of the marginal sea is thus conterminous with the seaward limits of inland waters. The term "territorial waters" is frequently used to designate the water area comprising both the inland waters and the territorial sea.

2. *Research in International Law,* 23 American Journal of International Law (Special Supplement) 262 (Apr. 1929). The advent of straight baselines in the law of the sea has created another category of water areas, which while assimilated to inland waters is nevertheless subject to the right of innocent passage of foreign vessels (*see* 312), if such water areas were formerly part of the territorial sea or of the high seas (*see* Part 3, 2216).

3. *United States* v. *Newark Meadows Improvement Co.,* 173 Fed. 426, 428 (1909).

4. Innocent passage (including stopping and anchoring) has been defined as that passage through the territorial sea for the purpose of either traversing it without entering inland waters, or of proceeding to inland waters, or of making for the high seas from inland waters, so long as the ship does not commit any acts prejudicial to the security of the coastal nation or contrary to the rules of international law (*see* Part 3, 2214).

313. The High Seas

Seaward of the marginal sea lie the high seas. Freedom is their principal characteristic, which means they are not subject to the sovereignty of any one country, but every country has equal rights of user in them. This freedom of the high seas with its concomitant manifestations of free navigation and free fisheries is today a dominant principle of maritime law, although as will be seen it is being modified to an extent by the new continental shelf doctrine (*see* Part 2, 223 and Part 3, 222).

The high seas are often referred to as the "open sea," but in the context of the submerged lands cases, open sea refers to all the water area seaward of the inland waters.

32. DEVELOPMENT OF THE MARGINAL SEA CONCEPT

As a legal concept, the marginal sea is closely related to the doctrine of freedom of the high seas. The early Roman jurists looked upon the sea as common to all mankind. Theirs was the doctrine of *mare liberum,* or free sea. With the development of commerce in the late Middle Ages, maritime nations began to claim exclusive control over parts of the open sea adjacent to their territories. These claims reached their height of extravagance toward the end of the 15th century when Spain claimed exclusive rights of navigation in the Pacific Ocean, the Gulf of Mexico, and the western Atlantic; and Portugal asserted a similar right in the Atlantic south of Morocco, and in the Indian Ocean. There was little law recognized in this matter and each nation asserted such claims as seemed warranted in its own eyes, and obtained recognition of them in proportion to its power to defend them. This was the doctrine of *mare clausum,* or closed sea.[5]

By the close of the 17th century, there was a reversion to the Roman doctrine of freedom of the seas, and the right of free navigation won general acceptance. With this right to navigate the Seven Seas came an unwillingness on the part of nations to say that the free seas touched their very shores. The need for a maritime nation to exercise jurisdiction over the waters along its coasts, to some distance from shore, seemed a logical development in the interest of self-defense, or for the protection of neutral shipping in time of war. The early jurists were unable to agree on an exact distance because they failed to perceive any specific guiding principle. Some asserted it should

5. Fenwick, International Law (3d ed.) 417 (1948).

extend for a distance of 100 miles from the coast, others that the distance should be as far as one could sail in a certain number of days, or as far as one could see, etc. Finally, the "cannon-shot" rule was hit upon, that is, the distance from shore that a nation could defend was the distance to which a cannon shot could be fired, and should be a measure of its jurisdiction. This seemed to capture the imagination of many 18th century publicists and jurists, and was generally adopted. Since at that time the range of cannon was approximately a marine league, or 3 nautical miles,[6] this distance became the limit to which a coastal nation could exercise territorial jurisdiction. And thus originated the doctrine of the "3-mile limit." [7]

321. The 3-Mile Limit

The 3-mile rule became fairly well fixed in European jurisprudence, and during the 19th century Great Britain and the United States became the chief protagonists of the doctrine. Other maritime countries claimed wider belts—Norway and Sweden 4 miles, Spain 6 miles, Mexico 9 miles, and the Soviet Union 12 miles.[8] Thus far no international agreement has been reached on a uniform distance (*see* Part 3, 232). In the establishment of a rule of international law, two major principles must be respected: (1) the sovereignty of the coastal nation, and (2) the freedom of the high seas. The reconciliation of these two principles has been the stumbling block thus far. Perhaps the one point of agreement by all nations is that 3 miles is the minimum breadth,

6. The statute or land mile is equal to 5,280 feet or 1,609.35 meters. The nautical mile equals 1.151 statute miles, and a marine league equals 3.453 statute miles. The nautical mile—also called the sea mile or geographic mile—is the length of a minute, or 1/21,600, of a great circle of the earth. But since the earth is not a perfect sphere, several different values were used. In the United States, it was formerly 6,080.20 feet, or 1,853.248 meters, but on July 1, 1954, the international nautical mile of 6,076.10333 feet, or 1,852.0 meters, was adopted, following the proposal of the International Hydrographic Bureau in 1929. *Technical News Bulletin,* National Bureau of Standards (Aug. 1954). For a discussion of the genesis of the present accepted values of the statute and nautical miles, *see* Thomas, *Linear Measures in the Evolution of the Mile,* 4 Journal, Coast and Geodetic Survey 12 (1951).

7. The name of Cornelius van Bynkershoek, a Dutch jurist, is perhaps most frequently associated with the cannon-shot rule, and is attributed to a treatise published in 1702, in which he expressed the legal principle that "the territorial sovereignty ends where the power of arms ends." Recent research indicates, however, he was not the actual originator of the rule, but was, perhaps, the earliest jurist to record the existence of the rule and to popularize it. Walker, *Territorial Waters: The Cannon Shot Rule,* 22 The British Year Book of International Law 210 (1945). *See also* Kent, *The Historical Origins of the Three-Mile Limit,* 48 American Journal of International Law 537 (1954). There is also some question as to what the actual range of cannon was during the 17th and 18th centuries. Estimates range from about a mile and a half to about two and one-half miles. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas,* 54 American Journal of International Law 759 (1960).

8. For a recent compilation (Feb. 8, 1960) of the various claims of nations to a marginal sea and to contiguous zones, *see* "Synoptical Table Concerning the Breadth and Juridical Status of the Territorial Sea and Adjacent Zones" (U.N. Doc. A/Conf. 19/4). (*See* Appendix J.)

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or, stating it differently, 3 miles is the one distance on which there is complete unanimity of opinion.[9]

It is sometimes stated that developments in the science of ballistics have outmoded the 3-mile limit for the marginal sea. But this seems to overlook the important historical fact that the marginal sea concept was carved out of the free seas doctrine. Whether it arose as a principle of defense or of neutrality, it crystallized as a limitation on the freedom of the seas doctrine, rather than as a residuum of the closed sea doctrine.[10] If technological developments are to be the criteria for the width of the marginal belt then it would be necessary to establish a belt so wide as to constitute a serious encroachment on the high seas, and we would soon be reverting to the medieval doctrine of the closed sea, not to mention the international complications that would ensue from perfection of continental and intercontinental ballistic missiles. In any case, the width of the belt has not kept pace with the increased range of coastal batteries nor with other modern implements of warfare, which would seem to support the presumption of its independent development through the years as a belt of limited width with economic and political origins rather than military.[11]

The doctrine of the free seas has been one of the keystones of American foreign policy. It is implicit in the position taken by Thomas Jefferson as early as 1793 when, as Secretary of State, he put forward the first official American claim for a 3-mile zone as the territorial limits of the United States.[12] This position has never been departed from. It has been reaffirmed on numerous occasions, and the United States has uniformly protested encroachments on this doctrine through extensions of the marginal belt, whether arrived at unilaterally or multilaterally.[13]

9. The International Law Commission, in its final report on the law of the sea, recognized the wide diversity of opinion that exists among governments respecting the breadth of the territorial sea. While several proposals were considered by the Commission, no single one received majority approval, and the Commission had to content itself with merely noting some of the difficulties that stand in the way of adopting a uniform distance (*see* Part 3, 1313).

10. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 3–5 (1927).

11. Dean, *supra* note 7, at 761. Citing Walker, *supra* note 7, at 231, he states that "The modern 3-mile limit sprang from 'pacific and economic roots' and thus in the nineteenth century came to supplant the 'old war rule' of cannon range, which was always linked to the law of prize rather than to issues such as the right of passage and fishing."

12. In *United States* v. *California*, 332 U.S. 19, 33 (1947), the Court cited the statement of Secretary of State Jefferson to support the holding that the Thirteen Original Colonies never acquired ownership of the submerged lands under the 3-mile belt.

13. For a reaffirmation of this doctrine by the Department of State during the Submerged Lands Act hearings (*see* Part 2, chap. 1), *see* Tate, *Tidelands Legislation and the Conduct of Foreign Affairs*, 28 DEPT. STATE BULLETIN 486 (1953). See also *Notes Verbale* of Feb. 3, 1955, and Mar. 12, 1956, from the permanent delegation of the United States to the United Nations. Although the United States proposed a 6-mile territorial sea at the 1958 and 1960 Conferences on the Law of the Sea (*see* Part 3, 21, 23),

3211. *Departures From 3-Mile Limit*

While adhering to the doctrine of freedom of the seas, maritime nations have quite generally, if not universally, exercised some authority on the high seas adjacent to their territorial waters. Such extended or extraterritorial jurisdiction is manifested principally in the fields of law enforcement and national security. Thus, in the United States, Congress, as early as 1799, passed an act directing revenue officers to board vessels bound for a United States port when within 4 leagues (12 nautical miles) of the coast (known as "customs waters"), to determine the character of the cargo.[14] This extended jurisdiction was also invoked in connection with enforcement of the National Prohibition Act, and a number of treaties were negotiated with foreign powers which provided for search and seizure of foreign vessels beyond the 3-mile limit.[15] And, in the Declaration of Panama, the United States, together with other American Republics, proclaimed a security zone 300 miles wide for the protection of neutral commerce of the Americas during World War II.[16]

These special cases of jurisdiction beyond the nation's territorial waters are but qualified departures from the 3-mile rule, and leave intact the two basic tenets of the freedom of the seas doctrine—the right of free navigation and the right of free fishing on the high seas. These rights are inviolate and belong to the peoples of all nations.

33. BASELINE IN INTERNATIONAL LAW

The threefold classification of the sea requires the determination of two boundary lines—the line that divides the inland waters from the marginal sea,

the proposal was made in the interest of reaching a compromise. Failure of the Conferences to reach agreement on any breadth of the territorial sea left the preexisting position of the United States intact (*see* Part 3, 233).

14. Act of Mar. 2, 1799 (1 Stat. 668). The Act of Aug. 4, 1790 (1 Stat. 156), also had a 4-league provision, but this applied only to vessels belonging in whole or in part to citizens or inhabitants of the United States. The Anti-Smuggling Act of 1935 (49 Stat. 517) enlarged this jurisdiction by providing for "customs-enforcement areas," not more than 50 miles from customs waters, which may be so designated by the President upon a finding that violations of American customs laws are taking place.

15. In 1924, the United States entered into a convention with Great Britain which allowed United States officials to board private British vessels outside the 3-mile limit for the purpose of ascertaining "whether the vessel or its personnel were endeavoring to import alcoholic beverages into the United States." But such rights could not be exercised at a greater distance from the coast than could be traversed in 1 hour by the suspected vessel. 43 Stat. 1761 (1924).

16. For a consideration of Public Law 212 (The Outer Continental Shelf Lands Act) as an exercise of extraterritorial jurisdiction by the United States, *see* Part 2, 21. For a discussion of the convention adopted at Geneva in 1958, recognizing a coastal State's jurisdiction in a zone contiguous to its territorial sea, *see* Part 3, 2215.

and the line that divides the marginal sea from the high seas. The first is known as the "baseline" and is not only the dividing line between inland waters and the marginal sea, it is also the line from which the outer limits of the marginal sea (*see* Part 3, 2211 B), the inner and outer limits of the contiguous zone (*see* Part 3, 2215(*a*)), and the inner limits of the continental shelf and the high seas are measured (*see* Part 3, 2225 and 223(*a*)).[17]

The fixing of a baseline is fundamental in determining how far seaward a coastal nation may exercise a given form of jurisdiction, be it in the realm of complete sovereignty or in the area of extraterritorial jurisdiction it may exercise in the regulation of its customs or in preventing infringement of its laws.

The normal baseline follows the sinuosities of the low-water mark, except where indentations are encountered that fall within the category of "true" bays, when the baseline becomes a straight line between the headlands (*see* 421). Such a line is to be distinguished from straight baselines (*see* 333 and fig. 24).

331. Rule of the Tidemark

Where the coastline is relatively straight, or where slight curvatures exist, there is general agreement that the baseline follows the sinuosities of the coast as defined by a tidal plane. This is known as the "rule of the tidemark" and has been traditionally followed by the United States in its international relations (*see* Part 3, 2218(*a*)). As opposed to the "headland theory" (*see* 332), this is the primary question involved. But the rule also raises a secondary question, namely, whether it follows the high-water mark or the low-water mark. And if the latter is assumed, is it to be determined by the spring tides, the neap tides, or the mean of all the tides?

At the 1930 Hague Conference (*see* 421), the Second Sub-Committee recommended that "subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast."[18] This was qualified by the provision that the low-water mark is to be that indicated on the charts officially used by the coastal State,

17. In the submerged lands cases, the baseline only was involved because the boundary between federal and state jurisdiction was the low-water mark and the seaward limits of inland waters (*see* 112). In the Submerged Lands Act an outer limit (the seaward boundaries of the states) was also involved (*see* Part 2, 11 (text following note 1)).

18. This was also adopted at the 1958 Geneva Conference on the Law of the Sea (*see* Part 3, 2211 A (*a*)). Some early writers supported the high-water mark as the baseline for measuring the territorial sea. The basis for this was probably that the line of high water was the dividing line between land and water on the nautical charts and using it as a baseline represented the least encroachment on the freedom of the seas doctrine.

provided it does not appreciably depart from the line of mean low-water springs.[19]

332. The Headland Theory

Opposed to the rule of the tidemark is the "headland theory," in which a sort of fictitious coastline (sometimes referred to as a political coastline) is superimposed on the geographical coastline but having no contact with the actual coast except at salient points (*see* Chap. 5, note 1).

The headland theory, in its broad application to a coast, would in reality be a reversion to the "King's Chambers" doctrine, proclaimed by James I in 1604, by which England claimed jurisdiction over an area formed by squaring off the British Isles.[20] This doctrine has long been abandoned.

The United States has uniformly rejected the headland theory. This was effectively stated by Secretary of State Bayard in a letter to Secretary of the Treasury Manning, dated May 28, 1886, of which the following is a pertinent extract:

"We may therefore regard it as settled that so far as concerns the eastern coast of North America, the position of this Department has uniformly been that . . . the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign." [21]

This position of Secretary Bayard was reaffirmed in the letter of November 13, 1951, from the Acting Secretary of State to the Attorney General (*see* Part 3, 2218 (*a*) and (*d*)).

In its restricted sense, the headland theory is followed in the case of indentations in the coast that satisfy the criteria for a true bay (*see* 421 and 43). This

19. The Committee observed that different States employ different criteria to determine the line of low water on their charts but that these are slight and may be disregarded. However, in order to guard against abuse, the proviso was added.

20. Jessup (1927), *op. cit. supra* note 10, at 362. The chambers were formed by straight lines from one extreme landmark to another round the coast and not necessarily between the headlands of different bays.

21. I Moore, Digest of International Law 718–721 (1906). *But see* I Kent, Commentaries on American Law 30 (1832) where the following is stated: "Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi."

was adopted by the 1958 Geneva Conference on the Law of the Sea (*see* Part 3, 2211 c(*a*)).[22]

333. The Straight Baseline

The "straight baseline" is a new development in international law. It had its inception in 1951 with the decision in the *Anglo-Norwegian Fisheries* case (*see* 513) in which the International Court of Justice upheld Norway's method of delimiting an exclusive fisheries zone by drawing straight baselines along the Norwegian coast above the Arctic Circle, independent of the low-water mark. This established a new system of baselines from which the territorial sea could be measured, provided certain geographic situations obtained. This system with certain modifications was approved by the 1958 Geneva Conference on the Law of the Sea (*see* Part 3, 2211 A(*b*)).

The term baseline (*see* 33) has tended to become synonymous with straight baselines, but this is erroneous. Even where a straight line is drawn across an indentation it does not fall within the category of "straight baselines." Such a line, where applicable, applies to a single coastal configuration and may be encountered along any coast. Straight baselines, on the other hand, constitute a *system* that is permissible only where the unique geography of a coast justifies a departure from the rule of the tidemark.[23]

22. Apart from such use in international law, the headland theory has also been applied domestically to demarcate the boundary between a principal waterway and a tributary waterway. *Opinions and Award of Arbitrators of 1877*, Maryland and Virginia Boundary Line. (*See also* 48 note 75.)

23. Another distinguishing characteristic between the two types of baselines is that in the case of a bay the waters enclosed are allocated to the inland waters of the coastal State, whereas in the case of straight baselines the waters enclosed, while inland, are subject to the innocent passage of foreign vessels (*see* Part 3, chap. 2, note 18 and accompanying text).