At Sea with the 89th Congress: The United States Fisheries Zone

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HEADLINES of April 11, 1966 signalled the start of an unprecedented campaign for protection of the coastal fishery resources of the United States. The Soviet bottomfish fleet, operating sometimes less than twelve miles off the Oregon and Washington coasts, presented an immediate and serious threat of depletion to salmon, hake and other fish stocks. The next few months saw the introduction in Congress of no less than a dozen bills designed to establish an offshore area of exclusive United States fishing rights. Throughout the summer of 1966, Pacific Northwest interests pushed the fishery zone idea, and Congress responded. In mid-October, Public Law 89-658 declared a twelve-mile fisheries zone stretching uniformly along the United States coastline.

This law has been described as a "novel and dangerous proposal for review by the World Community". Faced with a conservation
crisis off its shores, the United States might be regarded as having taken a rather arrogant approach to the solution—unilaterally declaring ownership by the United States of all fish stocks within twelve miles from shore. Such action necessarily reduces the extent of the ocean’s bounty which is the common property of all nations. Public Law 89-658 is therefore a matter of international concern, and its propriety must ultimately depend on the status of the law of nations.

Considering the emotional atmosphere which engendered this statute, and the conspicuous lack of effective opposition to its enactment, it is appropriate to examine both the validity of this statute under international law, and the future which it portends. It is proposed to ascertain the nature of international understanding in this area and its bearing on the United States fisheries zone through (1) examination of the nature of jurisdictions in coastal waters; (2) analysis of the present significance of the question as to what distance from shore such jurisdictions may be extended; and (3) consideration of the fisheries zone statute in view of recent trends in the practice of nations.

JURISDICTION IN COASTAL WATERS

One fact is certain: the sovereign power of a state does not end conclusively at the water’s edge. Coastal states, in one manner or another, exercise degrees of “control” in areas adjacent to their coastlines. Such areas are termed “jurisdictions,” and are classified according to the nature and intensity of involvement within the jurisdiction by the coastal state. To fully understand the system of jurisdictions in coastal waters, it is necessary to examine briefly its historical bases.

The oceans of the world have long served as the very embodiment of freedom. While less creative men simply mused and versified about the sea and the unfettered spirit, early lawyers, notably those of Rome, established the principle that the sea itself was free and incapable of appropriation. “For centuries, because of the vastness of the sea and the limited relations between States, the use of the sea was subject to no rules; every State could use it as it pleased.”

The initial Roman concept did not, however, withstand the ebullience of the European nation-states of the 15th and 16th centuries.

7 An example is the Greek poet Moschus (250 B.C.), whose *Idyl V* begins:

“When gently skims the breeze the waters blue,
High swells my heart and kindles at the view;
The dull unmoving land delights no more,
The halcyon calm allures me from the shore.”
(Milman translation).

8 Jessup, *Territorial Waters and Maritime Jurisdiction* 3 (1927) [hereinafter cited as Jessup].

Not only did sovereigns announce claims to exclusive property in coastal waters, but entire expanses of ocean were soon subjected to assertions of national control. Venice claimed the Adriatic; Spain forbade others from navigation in the western part of the Atlantic, the Pacific and the Gulf of Mexico; Portugal reserved the southern Atlantic and the Indian Ocean. The sea was fast becoming as much the subject of dominion as the continents.

This milieu inspired the 1609 publication of Hugo Grotius’ *Mare Liberum*—a stringent plea for freedom of the seas “for the innocent use and mutual benefit of all.” *Mare Liberum* was the wellspring of the now-axiomatic doctrine of the freedom of the seas. It was a distinguished Dutch jurist’s reinterpretation of earlier Roman analysis: possession is the *sine qua non* of property; the oceans, like the celestial bodies, cannot be occupied, and therefore must remain *res communis*.

The nations of Europe embraced Grotius and his principles, but nevertheless were hesitant to release the sea from all coastal restraints. Each nation found it difficult to accept the proposition that all sovereignty ceased where the ocean washed the beach. Accordingly, marginal seas remained subject to varying degrees of control by coastal states. Three centuries of evolution produced an assortment of precisely defined jurisdictions on the oceans. They are: inland waters, the territorial sea and the high seas.

**Inland Waters**

International law is settled as to the validity of exclusive state sovereignty over inland waters. Within this zone are features such as enclosed seas, rivers, harbors and bays. In addition, utilization of a straight baseline system may classify significant areas of coastal sea as inland waters. The distinctive feature of inland waters is that the extent of jurisdiction is as comprehensive as that over the land itself.

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12 *Meyer, op. cit. supra* note 11, at 23.
14 See *Jessup 7*.
15 The territorial sea is measured from a baseline which ordinarily follows the low-water edge of the coast. In special situations of gross coastal irregularity (the Norwegian coast is an example), international law allows a nation to disregard the sinuosities of the coastline and to measure the territorial sea from a straight baseline drawn across the mouths of indentations—so that the territorial sea takes on a more uniform shape as a consequence. Waters which lie to the inland side of a straight baseline are inland waters. See Sorensen, *Law of the Sea*, 520 Int’l Conc. 195, 236-40 (1958); Anglo-Norwegian Fisheries Case, [1951] I.C.J. Rep. 116.
16 2 O’Connell, *op. cit. supra* note 13, at 669.
Territorial Sea

Stretching along the coastline is a strip of ocean described as the territorial sea, over which a coastal nation claims territorial rights. Within this marginal zone, "a state may exercise any jurisdiction and do any act which it may lawfully do upon its own land territory." In this respect, the nature of territorial sea jurisdiction is as comprehensive as that of inland waters. However, the territorial sea is subject to an important international servitude called the right of innocent passage. Thus, a foreign vessel may proceed in an "innocent" manner through a coastal state's territorial sea, providing the vessel meets any requirements exacted by local laws for the protection of interests such as navigation and customs.

Beyond the territorial sea lie the high seas, which are free and open to navigation by all states. The high seas are the legacy of Grotius and the Romans, conceived to remain inviolate and receptive to even the weakest of nations. Although it has been observed that no nation may have "preferential rights" to the high seas, modern practice is to the contrary. Through two recent jurisdictional innovations—the continental shelf and the contiguous zone—coastal states are carving out choice preferential rights from the high seas sector. The nature and extent of these two jurisdictions are quite unsettled, but their presence demands their examination.

Continental Shelf

The continental shelf jurisdiction achieved prominence with the Truman Proclamation of September 1945, wherein the United States declared the resources of the continental shelf subject to this country's

17 Jessup xxxiv. For an analysis of the claims to authority in the territorial sea, see McDougal & Burke, The Public Order of the Oceans 179-83 (1962).


19 The question as to whether warships are entitled to exercise this servitude is discussed briefly infra; amplification may be found in Slonim, Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea, 5 Colum. J. Transnat. L. 96 (1966).

20 "The enjoyment of this right (innocent passage) may be conditioned upon the observance of special regulations laid down by the littoral state for the protection of navigation and the execution of municipal laws" Fenwick, op. cit. supra note 13, at 468.

21 Meyer, op. cit. supra note 11, at 3. "As the open sea is not under the sway of any State, no State can exercise its jurisdiction there." 1 Oppenheim, International Law 330 (Lauterpacht, 8th ed. 1955).

"jurisdiction and control." Although the United States subsequently disclaimed any pretense of extending "sovereignty" over the continental shelf, the avowed purpose of the proclamation was to permit exclusive extraction of seabed natural resources. This is, at least, "sovereignty" over such resources. The draftsmen of the Proclamation took precautions to make it clear that superjacent waters were to remain high seas; navigation on the surface of the waters above the continental shelf was to continue unimpeded; free-swimming fish in these waters remained common property The concept of continental shelf jurisdiction was thus formulated, and the United States declaration was duplicated by other countries. The 1958 Geneva Conference on the Law of the Sea resulted in the Convention on the Continental Shelf, which went into effect after sufficient ratification on June 10, 1964. The Convention stipulates that the term "continental shelf" refers to the seabed between the outer limit of the territorial sea and the 200-meter depth contour line. Actually, the 200-meter line is only the minimum outer limit, because the continental shelf is defined as extending beyond that limit where the coastal state finds itself equipped to harvest the seabed resources at deeper levels. It is therefore to be expected that the continental shelf will proceed seaward as time progresses and technology improves. Coastal states therefore have sovereign rights to all the natural resources of the continental shelf, a zone which may, in practice, extend hundreds of miles from shore.

23 For discussion see Fenwick, op. cit. supra note 13, at 448.
25 "Is a claim to sovereignty over the shelf equivalent to inclusion of the shelf within the national boundary, so that it becomes the public domain and property of the sovereign? When, by design, a claim is tantamount to an exercise of the incidents of ownership, it seems highly artificial to erect a distinction between imperium and dominium." 1 O'Connell, op. cit. supra note 13, at 575.
26 See Fenwick, op. cit. supra note 13, at 448; 1 O'Connell, op. cit. supra note 13, at 574.
29 Convention on the Continental Shelf, supra note 27, art. 1.
30 "Resources" includes not only mineral substances and vegetation, but also sedentary organisms "which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." Id. art. 2, para. 4. Abalone, clams and oysters fit this description; shrimp and lobster do not.
31 Technically, the Convention on the Continental Shelf binds only those countries which are parties to the Convention. The persuasiveness of the Geneva conventions results from the widespread international acceptance of the documents through ratification. The conventions are, therefore, the most authoritative formulations of international law in this area. See note 54 infra.
Contiguous Zone

The territorial sea must not be confused with the jurisdictional province termed the "contiguous zone." Customary international law permits a coastal state to exercise certain "police measures" of "domestic concern" in an area beyond the limit of the territorial sea. Thus, where the breadth of the territorial sea has proved too narrow for the purposes of controlling smuggling, immigration, and other activities regulated by local law, the contiguous zone has provided the coastal state with jurisdictional justification on the high seas. The Geneva Convention on the Territorial Sea and the Contiguous Zone provides that the coastal state may exercise control within a twelve-mile zone for "customs, fiscal, immigration or sanitary" purposes. Since the breadth of the contiguous zone is to be measured from the same baseline which demarcates the inner boundary of the territorial sea, it is obvious that the contiguous zone may exist only when the territorial sea is less than twelve miles wide.

It has been shown that there are two "buffer zones" between the territorial sea and the high seas. Theoretically, the outer limit of the territorial sea is also the commencement of the high seas. The high seas remain the common property of all nations; but, like the landowner who has conveyed away his mineral rights and granted easements to his neighbors, the international community has lost much of its propri-


34 Id. pt. II, art. 24, para. 1. It should be noted that the Convention limits contiguous zone regulation to four specific objectives; exclusive fishery control is not mentioned. The 1958 Geneva Conference instead relegated the fisheries issue to a separate instrument, the Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. No. A/CONF.13/L.54 (1958). This instrument was the last of the four to enter into force when the Netherlands became the twenty-second nation to ratify on Feb. 18, 1966. Commercial Fisheries Review, June 1966, p. 47. See note 54 infra. As its title suggests, this document embodies a plan for the rational, shared harvest of the living resources of the high seas. It makes no attempt to establish limits to jurisdictional encroachment upon the high seas. Its terms can properly apply only to those seas which have heretofore been common property and therefore subject to the collective acts of resource-depletion of all nations. This Convention thusly has no direct bearing upon the legality of the fisheries zone. It is, however, an initial step toward the shared conservation of the oceans—a goal which would eliminate the economic "necessity" which moves nations to extend jurisdictional limits.

35 Sorensen, supra note 15, at 241. "It is therefore implied that the maritime area which is subject to the sovereignty of the State may be coterminous with the area in which it may take certain steps to protect itself from certain threatened injuries, despite the fact that the latter area is described as one contiguous to the territorial sea and is conceived of as a part of the high seas." Jessup, The United Nations Conference on the Law of the Sea, 59 Colum. L. Rev. 234, 244 (1959).
etary interest in the high seas through the devices of the continental shelf and the contiguous zone.

**THE QUESTION OF JURISDICTIONAL EXTENT**

As has been explained, proper analysis of the United States fisheries statute requires two preliminary undertakings. The initial step—that of examining the established categories of jurisdictions—must now be supplemented with consideration of the question which overshadows the validity of the fisheries zone: to what breadth may a nation extend its jurisdictional zone?

Of all the maritime zones, the territorial sea is by its very nature the most significant. Its outer limit is both the termination of absolute sovereignty and the commencement of the free highway of nations. Although the continental shelf and the contiguous zone blur somewhat the seaward boundary of coastal control, the concern of nations remains fixed upon the frontier of the territorial sea, at which ceases the cherished freedom of navigation. The jurisdictions which have extended beyond the territorial sea have not directly affected the two interests which have the most at stake in navigational freedom: the military and merchant shipping.

The servitude of innocent passage is an “inseparable concomitant” of the territorial sea. It has never been disputed that innocent passage comprehends foreign merchant ships—but the question of extension of this right to foreign warships has not been as settled. The Convention on the Territorial Sea and the Contiguous Zone provides that passage shall be considered innocent “so long as it is not prejudicial to the peace, good order or security of the coastal State.” No distinction is made at this point between warships and merchant vessels; however, a special provision requires submarines “to navigate on the surface and to show their flag.” Such lack of distinction—which was a considerable concession to the maritime powers—is hedged by further articles which provide, in general, that traversing vessels must comply with laws and regulations enacted by the coastal state. Article 23, the only specific treatment on warships, provides:

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.

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36 O’Connell, op. cit. supra note 13, at 688.
37 Ibid. See Jessup 5; Meyer, op. cit. supra note 11, at 445.
40 Id. para. 6.
41 Arts. 17, 19, 20, 22.
It must be remembered that the Convention is binding only upon parties to it; refractory nations are committed to the position that warship passage can never be innocent. Moreover, certain parties to the Convention have made reservations to the effect that the coastal state may nevertheless arbitrarily determine when a warship may pass.

This should serve to dispel any impressions that the right of innocent passage effectively saves to foreign vessels in the territorial sea all privileges of high seas navigation. Indeed, the possibility of a general extension of territorial sea boundaries poses serious threats to the free movement around the world of military and commercial craft, both on the sea and in the air. For although the international law of the sea reserves to surface vessels the right of innocent passage, aircraft have the benefit of no such servitude. The right to overfly a nation's sovereign territory depends entirely upon treaty. Thus, where widening territorial waters remove from the high seas heavily traveled narrows such as the Strait of Gibraltar, not only must ocean vessels be subjected to coastal restraints in order to pass from one part of the high seas to another, but the air corridors superjacent to such areas are closed pending agreement on rights of overflight. These considerations account for the gravity and immediacy of the issue of permissible territorial sea boundaries. All these contingencies are bottomed in the last analysis on the one crucial inquiry which pervades the entire international law of the sea: how far does international law permit a state to extend its territorial sea?

Background

It is sufficient for the purposes of this comment to state in few words the progression of international understanding in this area prior to the 1958 and 1960 Geneva Conferences. It is not disputed that a marginal sea three miles in width had become common international practice by the middle of the nineteenth century. The United States

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42 See note 54 infra.  
44 "In addition, the maritime states are seriously concerned that any extensions of the territorial sea and regulation therem by coastal states could easily make surface sea voyages or commercial aircraft flights much more lengthy and costly, and, in many cases, commercially unfeasible or unprofitable." Dean, supra note 18, at 755. See McDougall & Burke, op. cit. supra note 17, at 174-75; Dean, supra note 32, at 611.  
45 Dean, supra note 32, at 612. See Lawrence, Military-Legal Considerations in the Extension of Territorial Seas, 29 Mil. L. Rev. 47, 93 (1965).  
47 For comprehensive treatment of the historical background of the territorial sea, see Jessup and Meyer, op. cit. supra note 11.  
49 "Consistent with its support of the principle of the freedom of the seas, the
and Great Britain have been champions of the three-mile limit for more than a century and a half. However, the opposition to such a limited territorial sea has never allowed the matter to go unchallenged. In 1930, the Hague Conference for the Progressive Codification of International Law adjourned leaving undecided the issue of permissible width of territorial waters. No agreement having decided to the contrary, the maritime powers continued to consider as unchanged the historic validity of the three-mile limit. Nevertheless, the trend toward wider territorial seas did not abate. Nations which broadened their territorial waters by unilateral declaration justified such action on grounds of security or requirements calling for preservation of offshore fishery resources. In its eighth session in 1956, the International Law Commission reported the situation:

The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea. International law does not permit an extension of the territorial sea beyond twelve miles. The Commission notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

Such were the conditions when the Conference on the Law of the Sea convened in Geneva in February 1958. The Conference set out to accomplish that which stymied the Commission; but, despite successes in less controverted areas, the overriding issue was not resolved. So apparent was it that a three-mile agreement had no hope of success that the United States and the United Kingdom offered a

United States has always adhered to the 3-mile rule. From the time of Jefferson, the principle that the marginal belt extends one marine league (3 geographical or nautical miles) from the low-water mark has been supported by the State Department, by court decisions, and by treaties.” Phleger, Recent Developments Affecting the Regime of the High Seas, 32 DEP’T STATE BULL. 934, 935 (1955).

As the Conference opened, 23 nations claimed territorial seas of 3 miles; 17 states claimed 4-6 miles; 13 claimed 7-12 miles; and 9 claimed the sea above the continental shelf. Remaining states gave no indication of their limits, or claimed territorial seas “in accordance with international law.” Sorensen, supra note 15, at 244.


The United States Senate advised and consented to the ratification of all four conventions on May 26, 1960. 106 CONG. REC. 11196 (1960). The conventions were ratified by the President on March 24, 1961. 44 DEP’T STATE BULL. 609 (1961).
compromise—later narrowly defeated—which proposed a territorial sea of six miles coupled with an additional six-mile exclusive fishery zone. The most zealous advocates of the three-mile rule conditionally abandoned their position for the purpose of achieving some stability on the issue of territorial waters.

A small achievement of the 1958 Conference may be found in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone. As has been seen, this article expressly limits the width of the contiguous zone to twelve miles, measured from the baseline of the territorial sea. Since the contiguous zone necessarily merges into the territorial sea, the immediate implication of this provision is that the territorial sea cannot exceed twelve miles: the contiguous zone is a "residue" of jurisdiction beyond the total sovereignty of the territorial sea, and a limit upon the former must of necessity restrict the latter. However, the great controversy centers on the area between three and twelve miles, so this provision has done nothing more than spotlight the arena of contest.

The proximity of success at the 1958 Conference promoted enthusiasm for one more chance to settle the outstanding problems of the width of the territorial sea and fishery zones. The United Nations General Assembly responded by convening the 1960 Geneva Conference on the Law of the Sea in March 1960. Again, the United States, this time jointly with Canada, proposed a "six and six" plan which failed by only one vote to gain adoption. The Conference accordingly ended one vote short of success.

The failure common to both conferences was practically assured by the political jousting which supplanted deliberate, temperate negotiation. The maritime nations, including the United States, Great Britain,

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55 McDougall & Burke, op. cit. supra note 17, at 529. "The position adopted by the United States was this: Although it believed the three-mile limit firmly established in international law, and although it regarded that limit as a proper compromise between the interests of the coastal states and the principle of freedom of the seas, it was willing to explore other proposals in the hope of achieving agreement." Dean, supra note 32, at 614.

56 McDougall & Burke, op. cit. supra note 17, at 451.

That is, the United States made it clear that it was not implying a recognition that international law sanctioned a territorial sea beyond the three-mile limit. See testimony of Arthur H. Dean, Chairman of the United States delegations, in Hearing on Executives J, K, L, M, N, Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 9 (1960).


Japan, France, West Germany, Holland, Belgium and Greece,\(^{59}\) directed their efforts toward conserving what remained of the three-mile limit. In the words of Arthur Dean, chairman of the United States delegations to the conferences, the United States maintained its position "for compelling military and commercial reasons."\(^{60}\) Strategic interests also moved the Soviet Union to consider nothing less than twelve miles as customary international law.\(^{61}\) Many erstwhile colonies refused to see the three-mile rule as anything but closely associated with economic subjugation by the maritime powers.\(^{62}\) Indeed, there were very few countries which were not burdened with motives paramount to the matter of finally codifying the breadth of the territorial sea. Furthermore, the addition of the question of fishery limits only tended to confuse the discussions. Compromises aimed at the simultaneous satisfaction of the military and fishing interests of the requisite number of nations necessary for a two-thirds majority were predestined to fail. The success of the United States-Canadian proposal would have been little more than balm on a festering wound. Since the law of nations is consensual, no nation can legislate for another, and "no rule of customary international law can exist save by the universal assent of the nations."\(^{63}\) If the deciding vote had been cast at the 1960 Conference, the extent of ratification of the convention would have been much less than "universal." Those nations which would not have considered themselves bound by its terms would have been considerably greater in number than the nations similarly disposed to the four conventions produced at the 1958 Conference. The Soviet Union and its satellites, for example, would certainly have regarded the "six and six" arrangement as insufficient even in compromise.\(^{64}\) Thus, had the Conference succeeded where it barely failed, the East-West disagreement over the width of territorial waters would have been left unresolved. But this is not to say that success would have been a totally "illusory triumph."\(^{65}\) The position of the maritime powers would have been strengthened by whatever certainty would have attached to the issue of territorial sea breadth. It is uncertainty which prevents the classification of conduct into that which is "legal" or "illegal", and, as has been explained supra,\(^{66}\) the degree of uncertainty surrounding this issue in

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\(^{59}\) Dean, supra note 32, at 610.

\(^{60}\) Ibid.

\(^{61}\) See statement of Soviet Delegation Chairman Gregory Tunkin in Lawrence, supra note 45, at 57. "The USSR bloc was insisting, for military reasons, on a twelve-mile or greater territorial sea. " Dean, supra note 32, at 608.

\(^{62}\) McDougall & Burke, op. cit. supra note 58, at 535.

\(^{63}\) Jessup, Territorial Waters & Maritime Jurisdiction 8 (1927).

\(^{64}\) See note 61 supra.

\(^{65}\) See note 61 supra.

\(^{66}\) For speculation on this point, see Economist, April 30, 1960, p. 403.
1958 and 1960 was high indeed. Nations could be forgiven for choosing to satisfy pressing domestic needs by extending the territorial sea, when the only alternative was deference to a rule of international law growing in disrepute. As to those nations least cowed by Eastern virulence, the “six and six” agreement could have been a forceful precept—even outside the ranks of parties to the convention—in its formulation of a standard out of what had been hopeless disarray. Speculations such as these make more understandable the decision by the United States to forfeit its rigid three-mile position in favor of the compromise proposal.

Developments Since the 1960 Conference

The collapse of the 1960 Conference was a virtual invitation to those nations eager to extend jurisdiction outward from the shore. The United Kingdom was destined to suffer the brunt of these initiatives. The movement actually began two years earlier, only two months after the 1958 Conference, when Iceland (to no one’s surprise) declared a twelve-mile fishing zone effective September 1, 1958.67 Iceland offered no saving measure for historic fishing rights. At the Conference, Iceland had scorned the “six and six” compromise as an offer of “six and minus six.”68 Britain refused to recognize the validity of Iceland’s extension,69 and deployed gunboats to protect British trawlers fishing inside the twelve-mile zone.70 It was only after prolonged tension and sporadic violence that a settlement of the situation was attained by an exchange of notes on March 11, 1961.71 The United Kingdom agreed that it would “no longer object”72 to the twelve-mile zone; Iceland reciprocated by promising to permit British fishing within the outer six miles of the zone in specified areas and at certain times during the year, such privilege to expire March 11, 1964.73 A similar agreement concerning the Faroe Islands had been signed by the United Kingdom and Denmark on April 27, 1959.74 There was, however, no provision for the eventual withdrawal of British boats from the outer six-mile zone; instead, it was stipulated that, after April 27, 1962, either party could denounce the agreement on giving one year’s notice.75 On April

67 Dean, supra note 32, at 615.
69 The British realized that Iceland had every intention of eventually claiming the continental shelf as the limit; for this reason, Britain balked at recognizing any unilateral declaration by Iceland. Ibid.
70 Dean, supra note 32, at 615 n.25.
72 Johnson, supra note 58, at 592.
73 Ibid.
74 Johnson, supra note 71, at 49.
75 Id. at 49 n.4.
28, 1962, appreciating the Anglo-Icelandic settlement as an example of what persistence could accomplish, Denmark announced its intention to dissolve the 1959 Agreement as of April 27, 1963.\(^7\) Denmark's new policy was later made clear: a twelve-mile exclusive fishing zone with no historic exceptions would apply to the Faroes as of March 12, 1964 (corresponding to the date set in the Anglo-Icelandic settlement) In addition, a twelve-mile fishing zone would encircle Greenland, with British vessels allowed to fish in the outer six-mile zone until 1970.\(^7\)

Meanwhile, the United Kingdom had concluded an agreement with Norway on November 17, 1960, in which the parties avowedly followed the pattern of the United States-Canadian compromise. Norway's exclusive fishing zone was extended to twelve miles; the United Kingdom was granted the right to fish in the outer six-mile zone until October 31, 1970.\(^7\)

These fishing developments came as a flurry of small disasters to the British fishing industry While some of the most bountiful cod and herring fisheries were suddenly inaccessible to British offshore fishermen, the inshore industry complained that foreign fleets were heedlessly over-fishing British coastal waters.\(^7\) It seemed an ironic effrontery that Britain, subjected to twelve-mile fishing zones by her neighbors, had no such zone of her own.\(^8\) Britain succumbed to this sentiment, but refused to make a unilateral declaration. Instead, London sponsored the European Fisheries Conference from December 1963 to March 1964. Sixteen nations participated: Iceland, Ireland, Spain, all seven members of the European Free Trade Association, and all six members of the Common Market.\(^8\) All delegations shared the common interest in restricting foreign fishermen off their home shores.\(^8\) In addition to three resolutions touching on conservation and trade practices, the Conference produced a Fisheries Convention adopted by all the delegations except Iceland, Norway and Switzerland.\(^8\) Denmark refused to accept the provisions of the Convention as respects Greenland or the Faroes.\(^8\) Again, the general scheme of the "six and six" compromise was utilized: each contracting party obtained exclusive fishing rights in a six-mile zone,\(^8\) with the belt between six and twelve miles to be shared with the contracting parties having historic rights

\(^7\) \( Id.\) at 50.
\(^7\) \( Id.\) at 51.
\(^7\) Johnson, \textit{supra} note 58, at 590.
\(^8\) Johnson, \textit{supra} note 71, at 57.
\(^8\) \( Id.\) at 55.
\(^8\) Economist, May 4, 1963, p. 442.
\(^8\) For the text of the Convention, see Johnson, \textit{supra} note 71, at 75-83.
\(^8\) \( Id.\) at 58; Economist, March 7, 1964, p. 884.
\(^8\) Art. 2.
in that area. The historic rights were given no life span, but a provision was made for any party to renounce the Convention after twenty years from its effective date.

Since a common apprehension among the parties to the Convention was the recurring "invasion" of efficient fleets of trawlers owned by the Soviet Union—not a party to the Convention—it was reasonable to expect enforcement of the twelve-mile zone against non-parties. The British made their policy clear almost immediately with the enactment of the Fishery Limits Act, 1964, which went into effect on September 30, 1964. By its provisions, the fishery limits of the British Islands were extended to twelve miles; designated vessels of foreign registration were to be permitted to fish in the outer six-mile zone in order to give effect to "any Convention, agreement or arrangement."

Since the close of the 1960 Conference, the twelve-mile fisheries zone has become not only the trend in international practice; it has become the rule. By May 1966, nations with coastlines were distributed as follows: fifteen claimed exclusive fishery jurisdiction three miles from the coast; twelve claimed from four to ten miles; at least sixty asserted twelve miles; eleven declared zones in excess of twelve miles.

These statistics effectively demonstrate the balance of world opinion. It is not unrealistic to observe that the twelve-mile fisheries zone "is rapidly becoming a fact of life."

Thus, although the Convention on the Territorial Sea and the Contiguous Zone omits fishing as a subject of control within an area contiguous to the territorial sea, it is obvious that the contiguous fishing zone has nevertheless assumed a position of importance within

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86 Art. 3.
87 Art. 15.
88 The upshot of the Convention has been handily described by Professor D. H. N. Johnson:

[It is a six-mile fisheries limit that the Contracting Parties will be applying inter se, although they may be applying a twelve mile fisheries limit _vs-à-vs_ other countries. This apparently is the intention, notwithstanding that "the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline" of the territorial sea of the coastal State _under the Convention_ (see Article 2 thereof). If it is intended to keep the fishermen of States not parties to the Convention out of the "outer six" zone, coastal States will have to make unilateral claims to that effect, relying for the legality of such claims on developments in customary international law. Johnson, _supra_ note 71, at 63.

89 Economist, _supra_ note 82.
89 1964 c. 72.
90 Section 1.
91 Derived from State Dep't synoptical table, _Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries_, 89th Cong., 2d Sess., ser. 24, 275-77 (1966) [hereinafter cited as _House Hearings_].
92 Evaluation by Congressman Hastings Keith. _Id_. at 269.
the group of maritime jurisdictions. Furthermore, this development has taken place largely within the past decade. "There are thirty-nine countries that have gone to twelve miles either by extending their territorial sea or by extending their fisheries zone to twelve miles since the 1958 Conference." In 1964, the position of the United States Department of State was that customary international law did not recognize extension of fishing jurisdiction beyond three miles; an indication of how quickly the law has changed is found in the State Department’s support of the 1966 twelve-mile fisheries zone. When asked by a House Subcommittee for an explanation, the State Department appropriately replied "(T)imes change."

THE UNITED STATES FISHERIES ZONE

It cannot be disputed that the new United States fisheries zone does not exceed the limits of customary international law. Public Law 89-658 established a contiguous fisheries zone initiating at the edge of the territorial sea and concluding at a boundary line "drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary." There is no description of the zone in "twelve-mile" terms. Instead, the zone is conceived as a belt of water nine miles in breadth and adjacent to the territorial sea. The zone will therefore remain a "twelve-mile" zone so long as the territorial sea of the United States remains at three miles. This delimitation has been criticized as allowing for uncertainty by establishing no definite boundary measured from the baseline of the territorial sea. The most that can be said for this argument is that it is technically correct, but quite unrealistic. It is true that the boundary of the fisheries zone is flexible because of its fixed relation to the outer limit of the territorial sea, which has the possibility of expansion. The draftsmen must have considered the possibility of such an extension and the merger which would result to a zone affixed to the baseline: no legislator wants that destroyed which he has sacrificed so much to enact. But it is another matter to say that this flexibility impugns the zone’s validity under international law. Except for the compromise proposals offered at the

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93 Testimony of Raymund T. Yingling, Assistant Legal Adviser, Dep’t of State. Id. at 281.
95 House Hearings 282.
96 Section 2.
97 House Hearings 313 (testimony of August Felando).
Geneva conferences, the United States has never suggested an extension of the territorial sea. No serious statesman can question the stability of the three-mile limit of the United States. For all practical purposes, the boundary of the three-mile limit is as secure as the baseline itself. It is therefore not improper to use the outer limit of the territorial sea as a monument from which to measure the fisheries zone.

There is no question that the prohibitions of the statute lie well within customary international standards. Unlike the European Fisheries Convention and some past unilateral declarations, the United States fisheries zone follows no "six and six" arrangement. The law provides simply:

The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

The only possible interpretation of this provision is that the United States claims sole dominion over fishery resources and control over fishing activities within the nine-mile contiguous zone. Traditional fishing rights are to be recognized "within this zone" the entire nine-mile belt is therefore subject to historic rights. This generous concession is certainly not commanded by international law, since those nations which have established twelve-mile fishing zones subject to any historic rights at all have usually followed a "six and six" formula which recognizes no traditional rights within the inner six-mile belt. Public Law 89-658 permits foreign fishermen who have established traditional rights to fish within three miles of the coast. Another contingency is provided for in section 3, which empowers the President to alter the seaward boundary of the zone whenever he "determines that a portion of the fisheries zone conflicts with the territorial waters or fisheries zone of another country.

The Fisheries Zone and the Territorial Sea

Examination of this new legislation must ultimately include its effect on international understanding regarding the breadth of the territorial sea. To any nation determined to preserve the freedom of the seas—likewise to those states intending to destroy that concept—the immediate response to any extension of maritime jurisdiction is an evaluation of its territorial sea consequence: does the extension sanction claims of territorial sovereignty beyond the three-mile limit?

98 "This 'six plus six' proposal has been adopted by Senegal, South Africa, Tunisia, Turkey, and Uruguay. Lawrence, Military-Legal Considerations in the Extension of Territorial Seas, 29 MIL. L. REV. 47, 51 (1965). See note 91 supra.

99 Section 1.
There are two apprehensions that this effect might actually result. The first is that the United States declaration will accelerate the trend toward the universal twelve-mile zone, and that zealous nations will move to protect offshore fishing by extending their territorial seas in lieu of creating new contiguous zones. The usual reasons advanced by countries extending territorial seas have not involved questions of security, control of navigation or the like: nations have very often asserted the needs of conservation and increased seafood requirements as compelling a wider territorial sea. Indeed, almost fifty per cent of the countries which exhibit twelve-mile fishing limits have such boundaries only because their territorial seas are twelve miles wide. Many of these nations broadened their territorial waters at the insistence of national fishing interests. It must be remembered, however, that most of these states augmented their territorial waters when the validity of the contiguous zone alternative was as much in issue as that of the twelve-mile territorial sea. The chances were good that either course would have been condemned as illegal under customary international law, so a nation cannot be blamed for having chosen the course offering the more attractive reward of an extended national boundary. But the disreputable contiguous fisheries zone of yesterday has become predominant international practice; concurrence by the United States was all that was needed to punctuate its respectability. It is to be expected, therefore, that the contiguous fisheries zone will stand as a more attractive alternative than in the past. If the fisheries zone does not become the option of a greater percentage of nations seeking to protect their fisheries, it will be because the twelve-mile territorial sea has also become more respectable than previously, not because the United States has created a fisheries zone. If anything, it would appear that the fisheries zone alternative will detract from the reputation of the extended territorial sea as the only solution.

The second possibility is that the international community will misconstrue the United States legislation as a total abandonment of the three-mile limit. Countries searching for precedent to support their twelve-mile territorial seas might be expected to allege that the United States now maintains "sovereignty" to such extent. Today, such assertions would be unfounded. Grotius himself considered the freedom of the seas largely a function of the freedom to fish on the high

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100 McDougall & Burke, op. cit. supra note 58, at 453.
101 See State Dep't synoptical table in House Hearings 275-77.
102 Writers were having no difficulty in concluding that the "question of exclusive fishing rights within the contiguous zone has never been sanctioned by international law." Yalem, The International Legal Status of the Territorial Sea, 5 Vill. L. Rev. 206, 211 (1960). See Lawrence, supra note 98, at 51; Comment, 62 Mich. L. Rev. 848, 864 (1964).
It was this historical sentiment which caused the dual consideration of the territorial sea and the contiguous fisheries zone at the two Geneva conferences. Nations had not yet developed an ability or a willingness to compartmentalize the analysis: the questions of the breadth of territorial waters and that of the fisheries zone were repeatedly bonded together in compromise proposals. At that time, it was no small accomplishment for the delegations to examine the contiguous fisheries zone at all, let alone accord it the higher recognition of a separate convention. Entangled as the two issues were, it was inevitable that failure to solve one would frustrate solution of the other. It should be apparent from what has been covered to this point that such a confused approach has nothing in the law of maritime jurisdiction as support. However, it may have been the past relation between exclusive fishing and the territorial sea, contemporary practice has come to treat the two as severable. Exclusive fishery control is much less than territorial sovereignty, and nations can expect no respectable support in refusing to recognize the distinction between the two. The conclusion follows that the United States fisheries zone will receive a generally sympathetic reception by the world community.

Nations and Interests Particularly Affected

It is doubtful that enforcement will cause specific disagreements with nations whose vessels have fished within this twelve-mile zone. The Soviet Union\(^\text{104}\) and Canada\(^\text{105}\) have twelve-mile zones of their own, so they will not be heard to complain. Korea claims the continental shelf, which means 200 miles in some areas.\(^\text{103}\) The only other nation involved is Japan, which claims a three-mile fishing limit\(^\text{107}\) and works intensively in the fishing grounds off our Pacific shores. Upon learning of the impending fisheries limit, Japan formally notified the United States of its reservation of fishing rights.\(^\text{108}\)

Although Japan has been as yet the only country to make it an issue, the inaugural difficulty with this legislation will probably be the

\(^{103}\) "Grotius viewed interference with the freedom to fish as an even more serious offense than the blocking of navigation." Svarlien, Territorial Sea: A Quest for Uniformity, 15 U. Fla. L. Rev. 333, 346 (1962).

\(^{104}\) For a thorough account of Russia’s history in this regard, see Johnston, The International Law of Fisheries 212 (1965).

\(^{105}\) It is interesting to note that the Canadian zone is also measured from the boundary of the territorial sea. Territorial Sea and Fishing Zones Act, 13 Eliz. 2, c. 22 (1964); likewise, the New Zealand act describes a nine-mile zone measured from the boundary of the three-mile territorial sea. Territorial Sea and Fishing Zone Act 1965 (1965, No. 11). Perhaps the draftsmen of our statute were inspired by recent Commonwealth practice.

\(^{106}\) House Hearings 276.

\(^{107}\) Ibid.

\(^{108}\) Per Raymund T. Yingling, id. at 281.
determination of historic fishing rights. The President may make exceptions for "traditional" fishing rights; this determination is a factual one,\textsuperscript{109} and decisions regarding each of the four countries concerned might be expected to vary. The matter is largely analogous to the law of prescriptive rights, and the duration, frequency, and nature of the fishing activity would have to be basic considerations. Korea, it seems, has nothing upon which to claim an exception; Korean vessels have only recently entered the affected waters.\textsuperscript{110} Quite to the contrary is the situation of Canada. The United States and Canada have fished in each other's coastal waters for many years. Canada has allowed United States vessels to continue traditional fishing within its new twelve-mile zone.\textsuperscript{111} There is no question that the United States will reciprocate by allowing Canadian craft to fish within three miles of the United States coast.\textsuperscript{112} Between these two extremes, however, lie the cases of Japan and the Soviet Union, both of which began accelerated programs of fishing in our coastal waters during the 1950's.\textsuperscript{113} It is not proposed to examine the probable outcome of this historic rights question. It would seem evident that Japan has a political edge over its contender.\textsuperscript{114}

The fisheries bill was endorsed by every department called upon for opinion.\textsuperscript{115} The bill was challenged by the single voice of the Pacific tuna fleet, operating chiefly out of Southern California ports. The tuna interests were concerned that our unilateral extension would add credence to the exorbitant 200-mile claims of Chile, Ecuador and Peru,\textsuperscript{116} off whose coasts the tuna fleet operates. The imaginative arguments against the twelve-mile bill were properly downplayed by Con-

\textsuperscript{109} Id. at 283.
\textsuperscript{110} See Pacific Fisherman, Sept. 1966, p. 22.
\textsuperscript{111} See Johnston, op. cit. supra note 104, at 205; House Hearings 302.
\textsuperscript{112} The Department of the Interior has reported that "substantial fishing operations by foreign fishermen over a long period of years" can be found only in favor of Canadian fishermen. House Hearings 283.
\textsuperscript{113} Testimony of Harold E. Lokken, manager, Fishing Vessel Owners' Ass'n of Seattle, in House Hearings 306.
\textsuperscript{114} On February 13, 1967, the United States and the Soviet Union signed a treaty giving fishing rights to the Soviets within the twelve-mile zone off certain parts of the coast of Alaska. Loading operations, but not fishing rights, were allowed in the zone off the Oregon and Washington coasts. N.Y. Times, Feb. 16, 1967, § C, p. 18, col. 6.
\textsuperscript{115} This included the Department of Defense. Rear Admiral Wilfred Hearn, Judge Advocate General of the Navy, told the House subcommittee that any extension beyond twelve miles would be illegal, however. U.S. Naval Institute Proceedings, Sept. 1966, p. 154; House Hearings 340.
\textsuperscript{116} At the Santiago Conference in 1952, Chile, Ecuador and Peru "made the 200 mile zone their common cause and reiterated their position that this area of the high seas, including the sea bed and its subsoil, is 'subject to the exclusive sovereignty' of these countries, only 'innocent and nonoffensive passage' excepted." BAYTCH, INTER-AMERICAN LAW OF FISHERIES 16 (1957).
gress. By its action, the United States has recognized only a contiguous fisheries zone of twelve miles; our tuna vessels will still have the support of the United States while working the waters beyond twelve miles off the South American coast. The United States has not recognized the exclusive competence of a state to determine its own jurisdictional limits. The twelve-mile law has simply brought the United States in line with what has become customary international law. The 200-mile claim continues as an oddity in international practice, and the position of the United States as to the illegality of such a claim remains quite sound.

If the 200-mile limit is anomalous today, it could become vogue tomorrow. The tragedy of the twelve-mile limit is that it will not do its job: the Soviet fleet took few fish within the twelve-mile zone; and, unless current discussions produce a workable conservation program, the threat of depletion to Pacific salmon stocks will not diminish. Indeed, it was recognized from the beginning that a twelve-mile bill would be but a token measure of protection. The twelve-mile limit, it must be remembered, was the least drastic of all proposals offered for solution. The salmon industry would have had us declare the continental shelf as the limit.

It is hoped that the United States will not be caught up in the frenzy of protectiveness which has compelled some states to make exaggerated unilateral claims. Our countervailing interest in the freedom of the seas will likely prevent such a development. But the issue of shared fishery exploitation will not disappear. The unabating quest for food will ultimately lead us to the ocean's bounty—and unless means are devised by which the harvest is allocated to all, it will unavoidably go only "to the most ruthless and the most powerful." The solution lies not in greater exclusive control of offshore fisheries; this has been recognized too often for further discussion. The course must be that of progressive multilateral agreement. The machinery

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119 Typical of the salmon interests was the Congress of American Fishermen, which called for a limit of 200 miles "or a limit to include the continental shelf, whichever is greater." Pacific Fisherman, June 1966, p. 25.
121 Id. at 453, 500. See Phleger, Recent Developments Affecting the Regime of the High Seas, 32 DEP'T STATE BULL. 934, 940 (1955), where it is stated: "The answer is not to be found in disregarding existing international law by unilateral extension. The alternative is a program of conservation of fisheries—the application by international agreement of control based on scientific principles." A political realist looks at the possibility of effective conservation programming in New Statesman, Aug. 23, 1958, p. 218.
of an enforceable\textsuperscript{122} conservation system of regional plans cannot be too idealistic for consideration.

CONCLUSION

The United States fisheries zone is a significant development in the law of jurisdiction in coastal waters. It does not transcend the present limits of customary international law, nor does it jeopardize the already stultified position of the United States on the three-mile territorial sea. Adamant interests in this country, as elsewhere, can be expected to demand expansions of the exclusive fisheries zone. The United States has now reached the outer limit permitted by international law, and therefore has both the position and the responsibility to work for international agreement on shared exploitation of the oceans.

\textsuperscript{122}Enforceability cannot be overlooked. Too many present conservation programs have no such feature. An example is the Inter-American Tropical Tuna Commission, which annually "recommends" catch limits to the tuna fleets. These quotas have never been followed in the Commission's 18-year history. Pacific Fisherman, June 1966, at p. 10.