# CASE NOTES

## A TWELVE MILE TERRITORIAL SEA

*International law—Breadth of the territorial sea—United States diplomatic moves—United Nations initiates new conference on the law of the sea.*

### *Introduction*

In international law cases are few. For this reason diplomatic moves and international conferences to a large extent assume the role of stating and developing the law which is the function of cases in our municipal law. Hence the appearance as a case note of this examination of recent developments relating to the breadth of the territorial sea under international law.

### *History of the Problem*

From the late Middle Ages many countries laid claim to vast tracts of ocean. By the eighteenth century these claims had disappeared, to be replaced by a claim on the part of all states to a marginal belt of water along their coasts. This body of water became known as the territorial sea. Because the justification of this claim was invariably expressed in terms of national security, it was not long before it became accepted (by all but the countries of Scandinavia) that the extent of the territorial sea should be determined by the range of gunfire. The Scandinavian states favoured a more precise measurement. By the end of the eighteenth century, the cannon-shot rule was itself being standardized at three miles and by the mid-nineteenth century the three mile rule was almost universally accepted.

However, at the Hague in 1930 and again at Geneva in 1958 and 1960, international conventions codifying the law of the sea were unable to agree on the limit of the territorial sea. Prior to the 1960 conference a list compiled by the United Nations Secretariat yielded the following analysis of the major participating countries[1]:

| Breadth Claimed | Number of Claimants |
|---|---|
| 3 miles | 22 |
| 4 miles | 3 |
| 5 miles | 1 |
| 6 miles | 10 |
| 9 miles | 1 |
| 10 miles | 1 |
| 12 miles | 13 |
| 50 kilometres | 1 |
| 200 miles | 1 |

At the two Geneva conferences, the three mile limit was not even put to the vote. The twelve mile limit proposed by the Soviet and Arab blocs was defeated. A joint United States—Canadian proposal of a six mile territorial sea with a twelve mile exclusive fishing zone and vested distant water fishing interests being phased out over ten years, was accepted in committee but failed by one vote to secure the requisite two-thirds majority at the plenary meeting. Therefore no provision is to be found in the Geneva conventions on the extent of the territorial sea. It is possible to mount a strong argument that by limiting the contiguous zone to twelve miles[2] the states by implication restricted the territorial sea to the same maximum. However plausible that argument might be, it has had little or no effect in practice.

[1] *Geneva Conference Records* (1960) 157-63.

In the most recent survey available, about thirty countries now claim a three mile limit, fifteen countries claim between four and ten miles, forty countries claim a twelve mile limit and many countries claim up to two hundred miles of territorial sea.[3] The Australian Minister for National Development, Mr Swartz, acknowledged that, '[a]t present, 12 miles seems to be the most widely favoured breadth'.[4]

*The New Developments*

There is now fresh hope that agreement might soon be reached on a twelve mile all-purposes limit. In February 1970, President Nixon said that '[t]he most pressing issue regarding the law of the sea is the need to achieve agreement on the breadth of the territorial sea, to head off the threat of escalating claims over the ocean'.[5] Two months later the United States Secretary of State, William Rogers, announced:

> We are supporting measures at the United Nations for the preparation and conclusion of two supplementary law of the sea conventions. One would set the breadth of the territorial sea at 12 miles, with guaranteed rights of free transit through and over international straits and carefully designed preferential fishing rights for coastal states in the high seas adjacent to their territorial seas. The other would define the outer limit of coastal states' sovereign rights to exploit the natural resources of the seabed and would establish an international regime governing exploitation of seabed resources beyond that limit.[6]

Press reports in London indicated that diplomatic moves being made by the United States toward this end were being actively supported by the Soviet Union. An interesting by-product of this co-operation is the new Soviet-American treaty to ban nuclear weapons from the seabed *beyond a twelve mile coastal strip.* On 7 December 1970 a resolution came before the General Assembly of the United Nations supporting the treaty. That resolution was carried by 104 votes in favour to two against with two abstentions. It is relevant to note that the two countries which voted against the resolution (Peru and El Salvador) are both nations which have made claim to huge territorial seas. They stated as the reason for their vote that the United States and the U.S.S.R. were using the treaty to promote a twelve mile territorial limit.

The next development also took place at the United Nations. A number of draft resolutions were put forward in favour of a new conference on the law of the sea to be held in 1973. All but one of these draft resolutions envisaged that the new convention would cover the breadth of the territorial sea and even the one that did not expressly mention it could be interpreted as having included it by implication. The draft resolution which the first committee (which is a committee of the whole) eventually recommended to the General Assembly:

[2] *Convention on the Territorial Sea and Contiguous Zone* (1958) art. 24. The contiguous zone is a zone of the high seas contiguous to its territorial sea, but not extending more than twelve miles from the baseline from which the territorial sea is measured, over which the coastal state may exercise certain controls enumerated in art. 24.

[3] These figures given by Starke, 'Impending Demise of the Three Mile Limit' (1970) 44 *Australian Law Journal* 239, 240.

[4] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 16 April 1970 1278.

[5] *Report to Congress* 18 February 1970.

[6] Rogers, *The Rule of Law and the Settlement of International Disputes,* an address delivered to the American Society of International Law at New York 25 April 1970.

> Decides to convene in 1973 . . . a conference on the law of the sea which would deal with the establishment of an equitable international regime—including an international machinery—for the area and resources of the seabed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of preferential fishing rights of coastal states) the preservation of the marine environment (including, *inter alia,* the question of pollution) and scientific research.[7]

There are several important matters to note about this. The question of the breadth of the territorial sea is only a small part of the proposed ambit of the conference. It will be, however, an essential part. The United States and the Soviet Union are anxious to have the question settled. It also stands to reason that if international machinery is to be set up to govern exploitation of resources 'beyond the limits of national jurisdiction' then a precise definition of the continental shelf and the territorial sea will be imperative.

It is at once interesting and confusing that the Soviet Union was one of the very few countries to vote against the resolution. The reason for this is unclear. Whatever the reason, however, it would not affect the Soviet attitude to the territorial sea question as the U.S.S.R. itself sponsored the motion to have the matter of the territorial sea put on the agenda.

The reference to the matter of international straits should also be noted. To adopt a universal twelve mile territorial sea would have the effect of turning many international straits into territorial waters. To avoid this result it has been recognized that special provision will have to be made for such areas.

Furthermore the scope of the proposed conference reveals another possible reason for the new United States approach. It is likely that the United States is making concessions in relation to the extent of the territorial sea in the hope that this will help achieve agreement on the other more far-reaching matters to be dealt with at the conference. Security factors have changed a great deal since 1960. Space age technology has shifted much of the emphasis from sea warfare and hence nations are more likely to be prepared to compromise on the extent of the territorial sea.

Yet another reason for the change in United States' policy was that given by President Nixon of de-escalating claims over the ocean and this leads us to consider the results that can be expected from the conference.

From what has already been said it seems very likely that the vast majority of states will agree to accept a twelve mile limit. This, however, will not of itself create general international law.

At the 1960 conference, when it looked as though the United States—Canadian proposal would be adopted, the delegate from Iran was quick to point out, '[w]hatever codification might result from the vote would not be binding on the states unless they signed and ratified the instrument embodying the codification'.[8] The Saudi Arabian delegate said, '[a] convention rooted

[7] *Official Records of the General Assembly* 25th Session A/8097, 16 December 1970 34.

[8] Quoted in Oda, *International Control of Sea Resources* (1963) 105.

in such origins could never become general international law but would remain a simple contract binding only on the signatories'[9]. These statements are unfortunate but true.

Similarly any codification of a twelve mile limit in 1973 will only be binding on those countries that sign and ratify the convention. The attitude already displayed by such countries as Peru and El Salvador makes it unlikely that these countries would accept such a convention. It is possible, of course, that if offered benefits under the resources exploitation scheme, they could be 'persuaded' to change their minds. Whether that eventuates or not, it would seem almost certain that by the end of 1973 the nations of the world will have reached substantial agreement on a twelve mile limit for measuring the extent of their territorial seas.

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## PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED v. ROBERTS[1]

*Settlements—Proper law—Construction and interpretation—Whether gifts to 'children' confined to legitimate children.*

Substantially similar settlements were made in 1955 and 1956 by the father and the sister of one Mona Lech in favour of Mona and her children. The 1955 settlement was constituted by shares in companies registered in Victoria, that of 1956 by £1,250 in Australian currency. The settlors believed Mona to be lawfully married to Zbigniew Lech. The marriage was, however, declared a nullity, Zbigniew having been already married at the time of the ceremony with Mona. Thus their two children, Anna and Robert, were illegitimate at common law. A third child, Elizabeth, also illegitimate, was born later and adopted by Mona. Mona subsequently migrated to Victoria from England with her children.

An Originating Summons was taken out by the trustees to determine whether these children were 'children' within the meaning of the settlements. This required consideration of the appropriate law to apply—English or Victorian. The settlors were presumed to be domiciled in England for the purposes of the proceedings but the trust deeds and assets were situated in Victoria and administered by the plaintiffs, a Victorian company. The place of execution of the 1955 settlement was unknown. The 1956 settlement was probably executed by the settlor in England and by her brother in Pakistan. The plaintiffs executed both deeds in Victoria.

McInerney J., noting the paucity of settled law in this area of voluntary settlements, held Victorian law applicable to the deeds of settlement. The decision in *Lindsay v. Miller*[2] indicates that the tests used to determine the proper law governing voluntary settlements are the same as those used to ascertain the proper law of a contract. In the absence of an express intention the proper law is ascertained by determining the system of law with which each deed of settlement has the most real and substantial connection. To discover the settlor's 'constructive' intention consideration should be given to the settlor's domicile, the place of execution, the location of the

[9] *Ibid.*

[1] [1970] V.R. 732. Supreme Court of Victoria; McInerney J.

[2] [1949] V.L.R. 13.