

ERIK BRÜEL

INTERNATIONAL STRAITS

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STRAITS COMPRISED BY POSITIVE
REGULATIONS

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part of the historical development, immediately prior to the outbreak of war, belongs to the history of the position of the Straits immediately before the War and will therefore be dealt with later. In the following chapter we shall deal with the legal status of the Straits at the outbreak of the War.

CHAPTER II.

THE LEGAL STATUS OF THE STRAITS AT THE OUTBREAK OF THE WAR 1914—1918.

Section 4.

The extent of territorial waters in the Straits.

Like that of other international straits the legal status of the Danish Straits is principally determined by two factors: On the one side the extent to which they form territorial waters of the coastal state or states and on the other the restrictions laid upon the coastal state for the reason that they are international straits. The former will form the subject of this section.

As pointed out in Section 3 both shores of all three straits lay within the boundaries of Denmark at the time when she appeared in history as a united realm. This fact meant that the Straits were considered simply as forming a part of Danish territory and as occupying the same position as any other part of it. In other words they were originally subject to the ownership (dominium) (1) and later to the sovereignty (imperium) of the Danish King. This condition of affairs gradually altered, first as far as the Sound was concerned, by the cession of the Scanian provinces, and later, when the international rules relating to territorial waters were developed, as far as the Belts were concerned as well. Therefore, at the outbreak of the War the position was that both Denmark and Sweden in principle reckoned that their territorial waters in the Straits were of the same extent as those of the rest of their coasts i. e. Sweden maintained territorial waters of 1 geographical mile (7420 m) or at any rate 4 nautical miles (7408 m) (2), calculated from the land or from the rocks farthest from the land which were not continually washed over by the sea, while Denmark must be assu-

(1) A relic of this was that until 1816 the Sound tolls were paid into the royal coffers.

(2) Flottans Neutralitetsvakt p. 9: Utredning 1930: 6 p. 139 and p. 305.

med to have adhered to the limit, maintained by Great-Britain and other states, of 3 nautical miles (5556 m) reckoned from the furthest limit where the land is dry at low water and, in the case of bays, from a line drawn right across the bay at the point where it is no more than 10 nautical miles wide, although possibly in relation to Sweden (and Norway) she still reckoned 4 nautical miles (in the sense of one-fifteenth of a degree or 7420 m) (1). However, whether the distance is taken as being 3 or 4 nautical miles is immaterial as far as the legal status of the Straits as international straits is concerned for in either case vessels cannot pass through without touching Danish or — in the case of the Sound — Danish or Swedish territorial waters. In other words the conflict between the interest of the coastal state in being able to exercise control over those parts of its territorial waters, which come within international straits, as freely as over the other parts of them, and the interest of shipping in being able in principle to use those parts of territorial waters for navigation as freely as they utilise the seas or the portions of the seas which the straits unite, which must be held to be the principal conflict of interests in the case of international straits, exists in the case of all three straits.

If the ordinary rules as to the extent of territorial waters are applied to the Danish straits the result is as follows. Until 1864 the *Little Belt* formed Danish territorial waters from shore to shore for the whole of its length with the exception of a short stretch in the southern part of the Belt where it was wider than twice 3 nautical miles and where therefore, on the assumption that Danish territorial waters in 1914 were taken as 3 nautical miles, a wedge of open sea was driven into the Belt. After the Treaty of Vienna of October 3rd 1864 the Belt was divided between Denmark and Prussia (Germany) by the middle line from the point where the Dano-German frontier reached the coast i. e. from the middle of Hejlsminde Bay to the southern outlet of the Belt while in its northern portion the Belt still remained Danish territorial waters from shore to shore(2).

The northern part of the *Great Belt* is so wide that a wedge of open sea is driven into it to the point where the territorial waters stretch northwards round about Sprogö. On the line Fyen—Sprogö

(1) Matzen S. I. p. 35—36, Berlin I. p. 83—84. Möller I. p. 115 Note I, cf. Direktiv for Sikringsstyrken of 31st July 1914.

(2) Cf. Gazette for July 22nd 1865 Sections 1 and 10 for the alterations made on the return of North Slesvig to Denmark see post Chapter IV.

—Zealand the Belt forms territorial waters for the whole of its width and since the same applies to the line Gulstav Flak — the coast of Lolland i. e. on the line separating the Belt from the Baltic, vessels passing through the Belt must at any rate at these two places pass through Danish territorial waters and this applies to the whole of that part of the Belt which is usually known as the Langeland Belt, if the territorial waters in the latter are reckoned — as is the case — from the line referred to in Section I which separates the bay of Smaalandshavet from the Belt(1). Apart from the smaller enclaves of open sea, which exist on the line Agersö — the coast of Fyen (north of the northern point of Langeland) where the Belt is about 23 km wide, the Belt thus forms Danish territorial waters from shore to shore from the line to which the territorial waters about Sprogö stretch northwards to its southern outlet.

Finally with regard to the *Sound* the fact that in former times the Straits were considered as forming an integral part of Danish territory made it more natural than we would now think it to be for the Danes, on the cession of the Scanian provinces to Sweden in 1658—1660, to hold the view that only the *land* east of the Sound had been ceded while the Sound itself, with the exception of harbours and those parts of the sea which were considered as belonging to the coast itself, remained to Denmark. In those days there was no such thing as territorial waters which automatically went with the land when this was transferred. The Sound was a part of Denmark in the same position as all the other parts of Denmark and therefore could not, any more than the latter, be held to have been ceded by any treaty in the absence of any express provision to that effect and there were no such provisions either in the Treaty of Roskilde of 1658 or in the Treaty of Copenhagen of 1660.

The Swedish view on the other hand was that a partition of the Sound had been intended(2). This view was based i. a. upon

(1) The fact that Smaalandshavet is thus classified as a closed bay although it forms a passage between two parts of the sea is not really open to criticism since as a passage it is only of local interest. And in view of the existing uncertainty in the calculation of territorial waters in bays (see Möller I. p. 112) it is impossible to criticise the fact that the line is drawn across the "bay" at a point where it is 12 nautical miles wide. And in any event Denmark's delimitation of Smaalandshavet and its inclusion in Danish internal territorial waters is justified according to the rules relating to "historic bays."

(2) This view found support in the treaty of November 18th 1343 between Valdemar Atterdag and Magnus Eriksson which speaks of "ultra dimidium passagii Oere-

the negotiations preceding the conclusion of the Treaty of Roskilde(1), and upon the provisions contained in the Treaty of Copenhagen relating to the passage of warships and transports through the Sound and the obligation of Danish ships to salute Hälsingborg.

The Swedes also on this ground claimed that the Sound was to be divided for the whole of its length equally between the two countries by a line drawn everywhere at the same distance from the shores of Zealand—Amager and Scania respectively. As this would divide the islands of Ven and Saltholm, the line was however to deviate outside these islands so that each island would go with that "half" of the Sound to which it was nearest: Ven to Sweden and Saltholm to Denmark.

However in the period prior to the outbreak of the War, Denmark had so far abandoned the point of view referred to as to recognise that in places where the Sound was not wide enough to allow each of the two countries to have territorial waters to the full extent the boundary should follow the middle line. But Denmark would not reckon this as being a line drawn through the whole of the Sound but as a line drawn through each of the *channels* where one shore was Danish and the other Swedish. Since Sweden maintained that the Sound formed a whole, a disagreement arose between the two countries with respect to Flinterenden (the waterway between Saltholm and the Swedish coast) since Denmark took the middle line in Flinterenden as the basis while Sweden wished to have the boundary (i. e. the middle line in the *whole* of the Sound) curving just east of Saltholm, which gave Denmark no right to further territorial waters outside Saltholm. This disagreement, which has now found a *modus vivendi* in the Declaration of January 30th 1932, see post, still existed at the outbreak of the War in 1914 since Denmark maintained that half Flinterenden including half the channel was Danish(2).

sundh" i. e. the middle line as the boundary. The treaty will be found in Hildebrand Sv. Diplomatarium V. p. 204. See Matzen S. I. p. 39. Berlin I p. 86.

- (1) As to this See C. G. Weibüll: *Freden i Roskilde* in *Historisk Tidsskrift for Skåneland* 3 Vol. 1908—09 p. 1. et seq.
- (2) The width of the passages is as follows — Helsingör—Hälsingborg 4,000 m: Zealand—Ven 8,300 m: Ven—the Swedish coast 4,500 m: Amager—Saltholm 4,700 m: Saltholm—the Swedish coast 8,000 m. Twice the width of the territorial waters is 14,840 m. if we take twice 4 nautical miles, 12,976 m. if we take 3 + 4 nautical miles and 11,112 m. if we take twice 3 nautical miles so that all the passages form territorial waters from shore to shore whatever measurement is taken. If actual gun-range is taken, the Sound forms territorial waters *in its*

In connection with the extent of territorial waters in the Sound we may also mention that Denmark feels obliged, in view of the security of the capital, to give to the roadsteads of Copenhagen an extensive meaning so that both Kongedyb and Hollaenderdyb and Drogden come within the roadsteads and over these Denmark exercises exclusive control. The usual justification for this is that the passages are immediately adjacent to the sea forts but this is not very convincing since no state can alter the legal status of a part of an international strait by surrounding it with fortifications. On the other hand the position must be held to be justified since considerations of the safety of the capital are more important than that the warships of belligerent powers should be able to use just these very channels which are so especially dangerous for Denmark. This applies all the more since this procedure has been followed for a long time without protest and also for reasons similar to those upon which the special status accorded to historic bays is based(1).

Section 5.

The right of passage in the Straits I.

The right of passage of merchant vessels during the period ending with the Treaty of March 14th 1857.

According to the view held in earlier times, the fact that the Straits formed a part of the Kingdom of Denmark and as such were subject to the exclusive sovereignty of the King of Denmark

entirely from shore to shore. The same applies if we accept the Swedish point of view already referred to and take the two countries as being entitled to divide the Sound between them. The two countries have in a number of cases either tacitly or by express agreement established joint control e. g. with respect to *pilotage* (Ordinance August 15th 1873) *fishing* (agreement of July 14th 1899, see now convention of December 31st 1937, cf. Ordinance No. 228 of June 21st 1933. LA 1933 A, p. 860) *ice-breaking* (agreement of November 25th 1929) and *smuggling of spirits* (not with particular reference to the Sound but including it) (Convention of August 19th 1925 Ordinance No. 150. May 20th 1926 A p. 666). Joint control with respect to patrol service in the Sound was also introduced to a certain extent on the conclusion of the War. See Flottans Neutralitetsvakt p. 27.

- (1) In other places as well attempts have been made to remove the risk of capitals being situated immediately on international straits by making the area of harbours very extensive, see Rapport de la Commission des Détroits 1926, p. 53—61 (also printed in later Reports) where the Regulations of October 17th 1926 for the harbour of Constantinople (Istanbul) fix the limits of the harbour in such a way as to include the whole of the Bosphorus cf. also ante I Section 16 and post II, 4.

naturally meant that they could only be used for fishing, passage or for any other purpose with the permission of the King of Denmark, which permission might naturally be given subject to conditions.

From about the year 1430 one of these conditions was the imposition of a certain due on every merchant vessel passing through the Sound, the so-called Sound dues which were later extended to include the Belts(1). The Hanseatic towns at once protested against these dues, maintaining that the Sound was a free and open stream, to which the King of Denmark (Erik of Pomerania) replied that by claiming the Sound dues he was doing no more than what many "lesser Princes and Lords" were doing within their own territories. Whether King Erik thereby had in mind the claims put forward by Venice with respect to the Adriatic or the Rhine dues which has been claimed from the time of Charlemagne is uncertain. On the other hand what is certain is that the recognition, both express and tacit, which the dues acquired in a relatively short time and through which they gained a solid basis in law(2) must be viewed in the light of the fact that according to the view prevailing at that time passage dues such as these were a natural result of the fact that the Straits occupied the same position as other parts of the territory.

The alteration of the dues from dues on vessels to dues on cargo greatly increased their value to Denmark, but also increased the irritation of the other powers not least owing to the formalities in connection which the investigation into the nature and origin of the cargo involved. This irritation was further increased when the Danish Kings and in particular Christian IV raised the dues as soon as they were lack of money. Apart from the Western powers, at first the Netherlands and later England as well,

(1) For the history of the Sound dues reference may be made to the excellent survey in Rubin: *Sundtoldens Aflösning* in *Historisk Tidsskrift* 7 Raekke VI (1906), to the authors there cited and to Hill's more detailed work *The Danish Sound Dues and the Command of the Baltic*, Durham 1926 with extensive bibliography and reference to sources. The classical work on the history of the Sound dues is H. Scherer: *Der Sundzoll*, Berlin 1845.

(2) England recognised the dues by the treaty of 1490, and the Emperor (Charles V) by the agreement of Speyer in 1544. The latter recognition was especially important both because it included the Netherlands who at that time had the greatest Baltic trade of all non-Baltic powers and because the toll was recognised "wie von alters hero" and thus acquired an air of antiquity which made it appear, as Rubin has said at p. 3, as if it had been "created at the same time as the Sound." The Hanseatic cities recognised it in principle by the agreement of Odense in 1560.

Sweden was particularly irritated by the dues. Sweden had indeed enjoyed freedom from Sound dues both in respect of *Swedish* vessels and Swedish goods but since the greater part of her trade was carried in foreign ships the difficulties in establishing the place of origin of the commodities placed a great burden upon Sweden, particularly as Denmark did not recognise Sweden's freedom from dues as far as the new Swedish possessions on the shores of the Baltic are concerned. This question together with Christian IV's repeated raising of the dues and his prohibition not merely against the passage of vessels of war and troops but also against the passage of supplies of war through the Sound (see as to the latter point in Section 7) resulted in Sweden's renewing the criticism of the dues on the same ground of principle which the Hanseatic cities had already invoked when the dues had been introduced. — but with widely greater effect since this was now in agreement with the legal views of the period. During the negotiations at Stade in 1641 the Netherlands whose chief representative was Wilhelm Boreel, had maintained that the Sound dues were contrary to international law(1) and this argument was again put forward by Sweden with a reference, which has a modern ring about it, to what has been called earlier in this book the geographical function of the Sound and in addition during the peace negotiations leading up to the Treaty of Brömsebro in 1645 Sweden based her claim for freedom of navigation in the Sound on international law(2). In face of these new ideas which, as has been pointed out, reflect the struggle during that period for the freedom of the sea(3) Denmark could only rely upon the antiquity of the existing legal position, an argument which experience shews is weak when faced with the vitality of progressive ideas, Sweden also obtained by the peace treaty considerable concessions in the matter of the Sound dues(4) while the war led to a general reduction in them by the Christianopel tariff of 1645(5).

(1) As to these negotiations see Hill: p. 129—131.

(2) God and nature have by the means of the Sound bound the North Sea and the Baltic together and many peoples and nations, which without it could not communicate with each others "Oxenstiernas skrifter och brevväxling Vol. I. 2. p. 686 and Hill p. 141.

(3) Utredning 1930: 6 p. 75.

(4) Treaty in Sveriges Traktater V. 2. p. 595. There is an interesting provision that letters from the Queen of Sweden or her subjects, passing through the King of Denmark's territory via Helsingör on their way to Hamburg, should be exempt from retention or search — i. e. they should pass through in what we would nowadays call "free transit" see Hill: p. 148.

(5) An attempt to redeem the dues by the payment of a fixed sum was made in respect

The cession of the Scanian provinces to Sweden was only of small importance as far as the Sound dues are concerned. Denmark's right to these dues was moreover if only by implication recognised in Article 6 of the Treaty of Copenhagen 1660 which stated that *Sweden* was not entitled to claim dues in the Sound(1). The small amount of Swedish shipping(2) is the explanation of why in the Treaty of Frederiksborg in 1720 in return for other political advantages (the return of Danish conquests during the war) Sweden agreed to give up completely her ancient freedom from tolls in the Sound and to content herself with being placed on an equality with the most favoured foreign nation(3). After this the dues became higher than ever. All states were now subject to them and the dues were recognised by treaty in the case of the most important states, and in the case of the rest by custom. Thus their original legal basis, which was no longer accepted, changed to the secure one of positive law.

Thus the position remained for about 100 years. An attempt to bring the matter before the Congress of Vienna was rejected(4) and it was only during the great increase in trade and commerce which set in at the conclusion of the 1820's that the dues again attracted more attention. Prussian complaints and threats at the termination of the Prusso-Danish commercial treaty of 1838 were turned aside by a personal letter from Frederick VI to the King of Prussia in which the Danish king referred to his advanced age and to the many difficulties he had had to cope with and asked the King of Prussia not to press the question of the Sound dues too strenuously.

There was a sharp exchange of views with Sweden in the years 1839—40 when Sweden quite rightly maintained that it was "un-

of the Netherlands by the so-called redemption treaty of 1649 by which the latter in return for an annual payment of 350,000 guilders purchased freedom from the dues as far as Dutch vessels and goods carried in these were concerned. However the treaty did not answer expectations and was terminated 1653.

(1) As to this see Matzen: S. I. p. 34.

(2) It appears from Nina Bang: *Tabeller over Skibsfart og Varetransport gennem Oresund 1497—1660* (Vol. I. Copenhagen 1906 p. 286—314) that the average number of Swedish ships which passed through the Sound in the 10 years 1630—1639 was only 64 out of an average total of 3,383.

(3) Hill p. 211. The treaty is in Du Mont Corps Universel Vol. VIII 2.

(4) Rubin p. 25—26. It is undoubtedly true, as Hill p. 222 points out, that the acceptance by the Congress of Vienna of the principle of the freedom of navigation in international rivers was an important factor in the opposition to the tolls which continually increased from the 1820's until their final abolition.

heard of" for a country to pay dues in respect of shipping along its own coasts without so much as being asked to help in interpreting the treaties relating to the matter. When Denmark replied that this was in return for the conquered territories restored in 1720 Sweden replied sharply that she refused to regret that she had not "at an earlier period, when the fortunes of war were in our favour omitted to deal with this matter in such a way that further disputes would be impossible." In other words Sweden reminded Denmark that a conquest of the western shore of the Sound during the Napoleonic wars or at any rate the termination of the Sound dues by the treaty of Kiel had been within the bounds of possibility(1). The interests of Great-Britain both political and mercantile in the Baltic were also on the increase and she began to get restive.

Just as Denmark had succeeded by the issue of a new tariff in 1842 (replacing the Christianopol tariff of 1645) in remedying the worst complaints of European powers the question was raised as a matter of principle by the United States. As a result of their great industrial prosperity during the first half of the 19th century their interest in the Baltic trade had become considerable. During the campaign which they started towards the middle of the century to remove obstacles to the extension of their trade and shipping wherever these existed, the Sound dues naturally came under consideration. Certainly according to the Danish view the States had themselves recognised the tolls through their commercial treaty with Denmark in 1826 but the Americans held that this was merely a recognition of the tariffs themselves not of Denmark's *right* to levy the dues. It was this right which the States disputed(2). In the note sent to the United States' diplomatic representative in Copenhagen, Mr. Flenniken, on October 14th 1848 the latter was instructed to raise the question as a matter of principle. The in-

(1) Rubin p. 23. As to the legal basis of the Swedish complaints see ante I Section 9 where Pufendorf's attitude to the legal status of straits is dealt with.

(2) At an earlier period when the United States were taking action (1843) rumours appeared in the German press that the United States would have their ships conveyed to the Sound by warships which would force the Sound without the payment of any tolls. Even if such a "demonstration in American style" (Rubin), which would have found a parallel to the one which the States later adopted towards Japan when the latter closed the Straits of Shimonoseki, was denied by the Americans, the possibility of such a demonstration showed how weak Denmark's position really was if any great power absolutely refused to pay the dues.

structions say as to this (quoting the American international lawyer Wheaton):

“Under the public law of nations, it can not be pretended that Denmark has any right to levy duties on vessels passing through the sound from the North Sea to the Baltic. Under that law, the navigation of the two seas connected by this strait is free to all nations; and therefore the navigation of the channel by which they are connected ought also to be free. In the language employed by Mr. Wheaton, even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon-shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait cannot be extended to the seas thus connected. But the sound is not bounded on both its shores by Danish territory, nor has it been since the treaty of Roeskild, in 1658, by which all the Danish provinces beyond the sound were ceded to Sweden. So that even this pretext for levying the sound dues have ceased to exist for nearly two centuries.”

Nor were the Americans impressed by the antiquity of the tolls. With reference to this the note says:

“It is true that for several centuries Denmark has continued to levy these dues; and she now claims this as a right, upon immemorial prescription, sanctioned by a long succession of treaties with foreign powers. But the foundations of this claim were laid in a remote and barbarous age, even before the discovery of America; and the reasons which are now alleged in its support have no application whatever to the United States. They apply exclusively to the nations of Europe.”

In spite of all this reference to principle the practical common sense of the Americans remained for Mr. Flenniken was instructed, if no other means were possible, to pay 250,000 dollars if it was thereby possible to get out of the dues immediately without first having to terminate the treaty of 1826. However by making play of the difficult political conditions in 1848, Denmark was once again able to avert the storm. But in the summer of 1853 the American minister in Copenhagen (now Mr. Bedinger) was instructed to raise the matter once more. As to the right of the United States to utilise the sea as “the highway of commerce” it was stated:

“Nothing has been more remote from the purpose of our Government, from the day on which it was ushered into existence, than of surrendering to any power its right of using the ocean as

the highway of commerce. This right it claims, and will use all proper means to secure to itself the full enjoyment to in every quarter of the globe”(1).

There was no longer any mention of compensation and as an expression of their wish “to press the subject of the sound dues to a conclusion” the States gave notice terminating the treaty of 1826 from April 14th 1856.

The situation then was that it was no longer possible to assume that after that date American ships would agree to pay the dues. If attempts were made to force them to do so, there was a risk, if not of war with the United States, at least that the Danish West Indies might be seized as reprisals. Under these circumstances Denmark sent out invitations in October 1855 (i. e. during the Crimean War) to a conference to discuss the question of the commutation of the dues but *not* of Denmark’s right to levy them. The European powers agreed to a conference on these lines but the United States refused to take part in any conference, which was not to deal just with the question of Denmark’s right, lest their participation in it should be construed as being a recognition of this right which might create difficulties for them in the case of other straits. But the States did declare their willingness in the event of the Conference deciding upon the commutation of the dues by the payment of a lump sum, to furnish their share of it by a special agreement with Denmark(2). Thus the Conference came to consist of Belgium, Russia, Spain, Sweden-Norway and Austria. It held its first meeting on January 4th 1856 when the delegate of the Danish government M. Bluhme, director of the Sound Customs, put forward a proposal for the commutation of the Sound dues by the payment of a fixed amount. A more detailed

(1) Br. and Foreign State Papers loc. cit. Moore loc. cit. Cf. the Instructions of January 8th 1879 to the American Minister at Santiago with reference to the Straits of Magellan, already mentioned ante in Section 17. “The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan.” Moore loc. cit. p. 664.

(2) The refusal of the United States to take part in any conference, which was not to deal with Denmark’s right to levy the dues, was based upon a message to Congress in which the President had expressed the desire to terminate the treaty of 1826 in stating, in a manner which was not very flattering to Denmark, that just as they would not have agreed to pay tribute to the Barbary States for permission to sail in the Mediterranean and if this had been insisted upon would have preferred to go to war, so they would not be forced to pay tribute to Denmark for permission for their ships to navigate or to pay for a tax which Denmark had no right whatsoever to levy.

description of the often difficult discussions at the Conference falls outside the scope of this work. The question of Denmark's right to subject the passage of merchant vessels through the Sound and the Belts to a tax was not really dealt with. The Conference kept to the purely practical question of the commutation of the dues in return for the payment of a fixed sum(1).

The Conference held its last meeting at 9 p. m. on March 14th 1857 when a "treaty for the commutation of the Sound and Belt dues" was signed, commuting the dues by the payment of 30.476.325 Riksdaler, something more than 60 Million Danish crowns or £ 3 Million at the present rate of exchange. A separate treaty was concluded with the United States(2).

The termination of the Sound dues was a real success for the straits policy of Denmark. By — at any rate formally — agreeing to meet the changing conditions of the times and to give up the dues, Denmark obtained a large sum of money in return for giving up a right which in the first place she did not presumably possess, and which in the second place she would probably have been compelled before long to give up *without* getting anything in return(3).

Section 6.

*The right of passage of merchant vessels through the Straits II.
Interpretation of the provisions in the treaty of
14th March 1857 relating to the right of passage.*

The treaty of 14th March 1857(4) states its object to be "to facilitate and to increase the commercial and maritime relations at present existing between the contracting states or through them,"

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- (1) The discussions of the Conference were greatly complicated by the question of the transit dues on river (canal) ways and on land transport from the North Sea to the Baltic through Slesvig.
 - (2) To avoid using the same proportions as the "European Concert" in which the United States were at such pains not to become involved, they would even have paid about 3,000 rixdollars *more* i. e. 720,000 instead of 717,829 than these proportions worked out at, Rubin p. 123. But they finally accepted the same proportions as the powers taking part in the Conference.
 - (3) Rubin loc. cit. calculates that the commuted sum corresponds to what the dues would have brought in in the course of 16 years. But it would hardly have been possible to maintain them for so long and Denmark therefore undoubtedly gained on the business apart altogether from the fact that she got rid of the risk of continual disputes with important shipping nations.
 - (4) The text of the treaty will be found in Martens NRG. II. Series Vol. 16. p. 345 et seq.

inter alia by "the complete and permanent removal of all dues levied on foreign ships and their cargoes on their passage through the Sound and the Belts."

It is next laid down in Article 1, paragraph 1 with respect to passage, that the King of Denmark undertakes not to levy any customs or tonnage dues, light or lighthouse dues, moorage dues or any other ship or cargo dues whatsoever on ships passing through the Belts or the Sound on their way from the North Sea to the Baltic or vice versa whether they only sail through Danish waters or whether the conditions of the sea or commercial operations render it necessary for them to drop anchor or enter port. It is then categorically stated "No ship for the future shall under any pretext whatsoever be seized or subjected to any stoppage on its way through the Sound and the Belts." This applies also to the vessels of powers which are not parties to the treaty since it is provided that the King of Denmark may by special conventions, in which it is not permitted to precribe that ships are to stop, regulate the customs treatment of the vessels of these powers(1). The second paragraph of the Article follows with a list of provisions aimed at preventing the re-imposition of the newly abolished dues in any indirect way.

Article 2 lays down that it is the duty of the King of Denmark not merely to maintain but also in certain circumstances to improve the lighting and marking of the waters without any charge whatsoever on foreign shipping and in the future as hitherto to watch the pilotage service the utilisation of which in the Kattegat, the Sound and the Belts shall be voluntary and carried out in return for a moderate charge, the same for Danish and foreign ships(2). The payment of the commuted sum is for the purpose of indemnifying the King of Denmark and as compensation for the sacrifices which these obligations impose upon him cf. Article 4.

The treaty is to be understood as terminating particular rights: in other words: It places the Straits in the future beyond the ordinary rules of international law relating to international straits(3).

(1) It was chiefly the United States which the parties had in mind.

(2) No reference is made here to the provision in Article 2, para. 4 dealing with the right of foreign entrepreneurs to station tugs in the Straits, a provision of great practical importance in 1857 but nowadays of no importance, nor to the provisions dealing with transit dues on transport by roads and canals between the North Sea and the Baltic.

(3) This is the view of Matzen S. I. 1916 p. 54, F. p. 76 Berlin: Den danske Statsforfatningsret I. 1916 p. 98—99. Möller I. p. 223, Cohn: Færdselsretten i

If the treaty is interpreted strictly according to its object viz: — to abolish passage dues on merchant vessels, which were no longer considered to be compatible with the control exercisable by a coastal state on international straits, the inference must be drawn that *warships fall outside the scope of its provisions*. It is quite true that literally they come within the wide expressions used in Article 1, paragraph 1, 2nd sentence of the Treaty, cf. the expression “no ship.” On the other hand the passage of warships had never been subject to the payment of any tax so that on that ground there was no need to include it in the treaty and further the clauses when read together seem only to refer to merchant vessels, cf. the phrase “cargoes” and “commercial operations” in Article 1, para. 1, at the end of the first sentence(1).

What is more doubtful is whether it is possible to interpret the treaty in such a strict way that it does not apply at all to *time of war*, in other words that even its provisions as to the passage of *merchant vessels* should not apply in time of war, neither when Denmark is a belligerent nor when she is neutral. It is undoubtedly correct that the treaty must be interpreted with a reservation in favour of the “law of war”(2) in the event of Denmark being a belligerent. The expressions used in the treaty are sufficiently wide to cover this case as well, but in the first place it is *prima facie* unlikely that in a treaty entered into for the purpose of removing a passage tax on merchant vessels Denmark should have accepted such a considerable restriction of her rights as a belligerent state

Stræderne in Juridisk Tidsskrift 1927, p. 40 as well as of all foreign writers of importance e. g. Fauchille I. 2. p. 275—76, Oppenheim Mc. Nair I Sec. 196 (p. 414). It is also the official point of view in Denmark. It is thus stated in the Danish government's reply to the questionnaire sent out prior to the Conference for the Codification of International Law. (Bases de Discission II p. 22: “Le Traité est considéré par le Gouvernement danois, comme ayant eu pour but principal de supprimer les règles spéciales antérieurement appliquées dans ces parages notamment la perception du droit dit ‘péage du Sund’ — et de soumettre désormais ceux-ci aux règles générales du droit international relatives aux détroits unissant deux parties de la mer ouverte.”

- (1) Westlake's opinion (International Law I, pp. 201—202) is, however, that the treaty also refers to warships but the English official point of view is that it does not.
- (2) Matzen (S. I. p. 56 towards the end in dealing with the treaty only maintains that it does not restrict Denmark's powers as a belligerent, while Berlin (I p. 98) thinks that it neither does restrict Denmark's powers as a neutral. This is also, I think Moller's opinion see I. p. 224, note 2, where, however, he only speaks of the “law of war,” and it is at any rate Cohns (JT. 1927 p. 40).

as to give away her right to stop, visit and possibly seize merchant vessels in a part of her territorial waters. Even if the Straits are in the same position as the sea there would be no such restrictions upon Denmark's powers and shipping cannot claim to be better treated than if they were on the open sea. Next, if Denmark had agreed to such a considerable limitation on her rights as a sovereign state this would have been expressly stated in the treaty, all the more so since the Treaty sets out very carefully the obligations which Denmark thereby assumes. Yet the treaty says not one word about any restriction on Denmark's rights as a belligerent state. It would therefore seem that it must be interpreted subject to the law of war.

It is less certain whether the treaty is to be read as limiting the power of Denmark in time of war when Denmark is a neutral. The real grounds for assuming that Denmark is not bound as a belligerent by the treaty viz: the necessity of maintaining her right of visit and search etc. in the Straits do not apply here. On the contrary as far as the passage of merchant vessels is concerned — and we are only dealing with these here — it seems that the position must be the same as in the time of peace, all the more so since the maintenance of the interests of the neutral coastal state is not — as is the maintenance of those of the belligerent — incompatible with the maintenance of the provisions in the treaty — on the contrary it is consistent with this insofar as it does not need regulations for stopping merchant vessels (e. g. for visit and search etc.). In practice the treaty seems to have been followed in this way since merchant vessels have been able to pass through the Sound and Belts during all wars in which, since the conclusion of the treaty, Denmark has been neutral. This applies not merely to the Franco—German and the Russo—Japanese Wars when even the *warships* of the belligerent powers could pass through freely but also to the War of 1914—18, when the Straits were closed to the warships of belligerent powers, as to this see post Chapter II(1).

In dealing with the treaty of March 14th 1857 we may ask the further question whether Denmark has thereby undertaken any obligation to keep the navigable waterways open i. e. to dredge

(1) The importance of the view put forward here viz: — that the Sound Treaty prevents Denmark as a neutral closing the Straits to merchant shipping, which differs from the one usually held, is not so great if the view put forward in these pages cf. ante I, is accepted viz: that the ordinary rules of international law lead to the same result.

them if they threaten to silt up, break up the ice if they freeze in winter etc., or possibly even keep them open by force if other powers should try to blockade them. This cannot be assumed to be the case. In this connection it has been correctly pointed out(1) that the treaty only *pre-supposes* that the Straits are navigable waterways and that it does not impose upon Denmark any positive duty to take steps to maintain them as such(2), still less to keep them open by force if other powers try to blockade them. On the other hand, even if the treaty does not place upon Denmark any duty to maintain the Straits as navigable waterways the fact that it does pre-suppose them to be such raises the presumption, that Denmark cannot *actively deprive them* of their character as such e. g. by building embankments or bridges without openings wide enough for navigation, over all three navigable waterways.

If openings wide enough for navigation do exist in embankments or bridges of this kind the matter is more doubtful. Even this would be a breach of the treaty if ships could not pass through the openings without paying f. inst. bridge or embankment dues or if they were enforced to compulsory pilotage or towage through the openings at their own expense. If f. inst. pilotage or towage are made compulsory it must at any rate be without expense to shipping.

Bridges and embankments must be so constructed that practically all ships(1) can pass under, respectively through them without such difficulties in manoeuvring, that the strait ceases to be a navigable waterway(3).

In this connection it may further be asked whether the treaty pre-supposes that *all three* straits shall be available as passages or whether, irrespective of the treaty, Denmark cannot by means of a bridge or an embankment or in some other way close one or even two of them, so long as one is left open(4). If this view is taken —

(1) Cohn: *Færdselsretten i Stræderne*, Juridisk Tidsskrift 1927.

(2) The deepening of Drogden, which has already been mentioned, is considered in *La Conciliation internationale*, Parts 8—9 1934 p. 703 to be an "exécution loyale" of the Sound Treaty but this is placing too much emphasis on the treaty.

(3) This was not observed in the building of the Little Belt Bridge since it was given a height of only 33 metres over the surface of the sea which prevented not merely large warships (although as we are here dealing with merchant vessels this is immaterial) but also large merchant vessels e. g. motor vessels engaged in overseas trade from passing through the Belt at all. As to this see post in Chapter III.

(4) This is Matzen's view S. I. p. 57. Dornonville de la Cour p. 576—77.

in spite of the fact that it may present a certain interest of traffic to have several ways to choose from — then the strait which is left open must at all events be passable *by all* ships i. e. only the Great Belt could be considered as fulfilling this condition since the construction of the Little Belt bridge.

The question if Denmark is entitled to close *one of more channels within the same strait* provided another channel in the same strait remains open must be answered in the affirmative. Denmark has undoubtedly the right to close f. inst. Vesterrenden in the Great Belt, if she leaves Österrenden open (or vice versa). The inconveniences to shipping in this event are not so great as to justify a claim that *all* channels within a strait should be left open(1) if the interests of Denmark require otherwise. But this also must be on the basis that the channel which is left open is just as suitable as a passage as that which is closed, as would be the case with Vesterrenden and Österrenden in the Great Belt, and also that it possesses the closed channel (i. e. subject to the treaty of March 14th 1857 or at any rate under Danish sovereignty).

Finally it may be asked whether the very categorical provision in the treaty of March 14th 1857 that no ship may be stopped or seized on its way through the Sound or The Belts means that Denmark is prevented from making arrests under civil law on board ships passing through as freely as she would be entitled to do apart from the treaty. Although he interprets the treaty strictly according to its object Matzen takes the view that the right of arrest is excluded(2), while Moller in stating(3) that “the treaty certainly goes further than ordinary international law with respect to the exclusion of arrest” starts from a “quod erat demonstrandum” viz: that the treaty does exclude any right to arrest. When writers such as these desire to interpret the treaty strictly in accordance with its object viz: the abolition of the passage dues on merchant shipping and take the view that it does not deprive Denmark of any right over the Straits which it would possess according to the ordinary rules of international law, it seems illogical to say that it prevents Denmark carrying out civil arrests. What the treaty prevents are measures which force *all* vessels to stop, especially those which have no connection whatever with the land but are merely passing by. The right to make arrests, even apart from

(1) This is the view of Matzen and Dornonville de la Cour loc. cit.

(2) Matzen S. I. p. 56.

(3) I. p. 161 Note 2.

the fact that the question will hardly arise in one out of 10,000 ships, affords no opportunity for evading the provisions of the treaty: It therefore seems compatible with the principle of the freedom of passage which is laid down in the treaty.

If the main characteristic of the legal status of international straits is as it should be that the coastal state preserves its customary rights in all cases where those are compatible with the freedom of passage, then Denmark should be recognised as possessing a right to make civil arrests on board vessels which are passing through, cf. ante I, Chapter XII.

Finally, the scope of the Sound treaty may in short be said to be that it carried into effect "the final establishment of the principle of free navigation as regards territorial waters constituting a necessary channel of communication between parts of the open sea"⁽¹⁾.

Since the conclusion of the treaty the right of passage of merchant vessels in time of peace — and also in time of war if the usual view is taken that the treaty does not apply to conditions in time of war — is subject to the general rules of international law dealing with the right of passage of such ships in international straits, cf. as to this ante I.

Section 7.

The right of passage through the Straits III. The right of passage of warship during the period up to the termination of the League of Armed Neutrality.

In principle the passage of warships was absolutely forbidden as far as the Sound was concerned until the cession of the Scanian provinces in 1658 and as far as the Belts were concerned until the beginning of the present century — without the permission of the King of Denmark which naturally could be given subject to conditions⁽²⁾. In addition the passage of troops and necessities of

(1) Pitt Cobbett: *Leading cases of international Law*, 4th Edition. London 1922 p. 153. As to the importance of the treaty when the Straits are closed as a link in sanctions under Article 16 of the Covenant see post Chapter III and as to the more general aspect of this question ante I. Section 24.

(2) E. g. at the conclusion of peace at Malmö in 1512 when the Hanseatic Cities were given the use of Danish waters on condition that during their war with the Netherlands, which was still going on no hostilities should be carried on in the waters between Skagen and Falsterbo or in the neighbourhood of Skaane, Bleking or Gotland. *Hanserecesse 1477—1530* VI. p. 61—63.

war were also prohibited not merely when Denmark was at war but also when she was neutral(1).

This prohibition was especially troublesome for Sweden, when she became the leading Baltic power. It is quite true that when the Emperor's plans for supremacy in the Baltic made Denmark and Sweden realise their common interests they concluded a treaty in 1628 which gave Sweden the right to send munitions through the Sound, although only after prior notification together with an undertaking that the Sound should be closed to ships bringing troops or munitions to Sweden's enemies, but the treaty was never of any importance, and the position was taken as being what it had been before the treaty i. e. in the view of Denmark that the passage of necessities of war could be prohibited.

It was a prohibition of this kind which was one of the causes of the war between Sweden (in alliance with the Netherlands) and Denmark in 1643—1645 which was principally concerned with the right of passage. It is quite true that one of the objects of the war was stated to be the conquest of the Danish possessions east of the Sound but this should only be to guarantee that passage through it should not be hindered. The *casus belli* was that Sweden wished to "have commerce and navigation free" but "we do not dispute any rights of dominium". The Swedish point of view was that the Sound was a strait and that consequently the passage of vessels as such did not interest Denmark any more than the passage of vessels through the Straits of Gibraltar interested Spain.

To this the Danish representatives were able to point with pride to the fact that "no potentate had ever sent any armed man through the Sound or the Belt without either verbally or in writing asking for and obtaining the permission of His Majesty our gracious lord" and to assure them that the King of Denmark "would be equally king in the Sound and the Belts as in the smallest and largest places under his crown and that he would not allow any potentate to lay down what should be done in any of his lands or waters"(2).

(1) A prohibition of this kind was recognised by England both during the Scandinavian Seven Year's war and during the closing of the Straits to all vessels destined for Narva which Frederick II carried into effect in 1579. On the other hand during the war between England and Spain, Frederick II prohibited all ships carrying artillery or provisions destined for the Spanish forces passing through the Sound and this, as already indicated, caused Eraso the Spanish ambassador in Stockholm, to propose to Philip II of Spain that he should take possession of Helsingør and Helsingborg, as to this see Hill p. 71.

(2) Svenska Riksrådets Protokoll (edited by S. Bergh) X. pp. 346, 575—80, 582—83, 587.

But by the treaty of August 13th 1645 they had to concede to Sweden the right to allow up to 5 vessels of war at a time to pass through the Sound without the permission of Denmark. Even if this concession as an exception strengthened the general rule viz: Denmark's right to continue to prohibit the passage of warships through the Sound and Belts, a great breach had nevertheless been made in this right and this was shewn inter alia in the fact that Swedish warships were exempt from the obligation of saluting Kronborg Castle at Helsingör with flag or top sail and that the Swedish salute which was now to be given was, in contrast to what had been the previous practice, to be answered by the fortress(1). But the prohibition against the passage of warships was maintained against other powers and was for example enforced against England when the latter were at war with the Netherlands 1652—3, when Frederick III refused an English fleet access to the Sound to convey home some English merchant vessels which had sought asylum in Copenhagen(2).

As has already been pointed out Sweden tried in Article III of the Treaty of Roskilde to impose upon Denmark an obligation jointly with herself to prevent "*ut peregrina quaedam classis inimica cujuscumque etiam ille fuerit per fretum Oresundicum aut Balticum in Mare Balticum transeat*". This was "*ab utraque parte pro omnibus veribus impedituros et adversuros esse*"(3). That it was resolved to include only unfriendly powers and not *all* foreign warships, as desired by Sweden was due to the fact that England, who was acting as mediator, was afraid that the clause, which was aimed at Holland, might one day be turned against herself(4). On the other hand it must be inferred from the fact that Western powers agreed to a provision in that form that they recognised that Denmark possessed a right to close the Straits, to the extent allowed by the contemporary view of neutrality as being compatible with a benevolent attitude of one party.

But we must not infer too much from the fact that the powers recognised a right to close the Straits in the sense indicated. This

(1) The Netherlands obtained the same rights as Sweden with respect to the passage of warships by the so-called redemption treaty of 1649, which has already been referred to.

(2) Hill p. 158.

(3) The treaty its be found in Du Mont: Corps universel, Tome VI 2 p. 205 et seq.

(4) Meadowe: A Narrative of the principal Actions occurring in the Wars betwixt Sweden and Denmark before and after the Roschild Treaty. London 1716.

was clearly shown during the mediation which the Western Powers, constituted as "the Hague concerts" undertook after Charles X Gustavus second war against Denmark, when they energetically opposed the inclusion in the treaty of Copenhagen of May 27th, 1660 of any reference to the passage of foreign warships through the Sound(1).

After the cession of the Scanian provinces to Sweden it was natural to conclude that the right of closing the Straits which had earlier been held to belong to Denmark alone should now belong to Denmark and Sweden jointly. The conception of a joint right of closing the Straits of this kind was probably also at the back of the Dano-Swedish unions for the protection of the neutrality of the Baltic during the political unrest in Europe in 1691 and 1693(2). Gradually as the political conditions round the Baltic changed, the idea arose that *all* the coastal states of the Baltic had a right to keep foreign warships out of it and in this way the closing of the Straits to warships became from the legal point of view if not from the factual — since the most natural way to close the Baltic is by closing the Straits — a subsidiary matter which depended upon how far the principal matter — the closing of the *Baltic* to warships — was justified in international law or not.

This question will not be examined here in detail(3) but we may deal shortly with the legal reasoning which formed the basis of the Baltic states' claim to close their common sea to warships.

Nowadays it is recognised on alle sides that the Baltic cannot have any special status on the ground of its geographical separation from the ocean, but that it is a part of the open sea and as such is subject to the rules of international law applicable to this. The

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- (1) For this mediation see the work of Gihl, which has already been referred to *Sverige och Vastmakterna under Karl d. X. Gustafs andra krig med Danmark*. Uppsala 1913. On the other hand the treaty did contain a restriction on the number of ships (and troops) which *Denmark* and *Sweden* could send through it without prior notification to the other.
- (2) These unions were based on treaties which will be found in Du Mont: *Corps Universel* Vol. VII. 2 p. 325, were concluded only some thirty years after the bitter wars between the two countries in 1657—8 and 1659—60 and long before the new frontier between them can be said to have been politically stabilised and are a good example of how even in earlier times pressure from outside has forced Scandinavian countries to recognise that their common interests are stronger than the interests which divide them.
- (3) An excellent summary of this is to be found in Gunther Müller: *Die Schliessung der Ostsee*, Pritzwalk 1929.

position was however different in the 18th century. The principle of the freedom of the sea from the exclusive sovereignty of each state was certainly on the way to being recognised, as far as the great open areas of the sea which form the oceans were concerned, but in the case of areas of the sea which owing to their geographical situation were either close up to the coast or enclosed by land and so were more intimately connected with the latter, traces still remained of the earlier legal point of view according to which the state could exercise exclusive control over parts of the sea(1). Apart from historical considerations this was partly due to the fact that arguments could be adduced for the maintenance of supremacy by the coastal state or states which would not apply in the case of the open sea and particularly to the fact that the rights asserted could be more easily upheld. Considerations of the latter kind led, in the case of areas of the sea which the individual state could control from the land, to the recognition that it had a right of sovereignty over the part of the sea lying nearest the shore, the so-called territorial waters, and to the recognition that where a sea area was completely surrounded by the territory of one state and where the latter was also master of the shores of all passages leading into it and so in fact controlled it from shore to shore ("closed sea") it was included in its national waters(2). From this it was not a far step, in the case of limited areas of sea, surrounded and controlled, in the manner indicated, by *several states* to grant to these *jointly* a similar kind of control to the extent to which they could agree. A glance at the map is sufficient to show how natural it was to apply considerations of this kind to the Baltic where they found support in the centuries-old view that the Baltic was subject to sovereignty (originally Denmark, later Denmark and Sweden's) while in particular the prohibition against allowing foreign warships to enter this sea had a certain tradition behind it. Such is roughly the background against which we must consider and judge the attempt which was made by the

(1) The slowness with which the claims of the state to exercise exclusive mastery over sea areas of this kind gave way to the new order in a struggle which is still continuing is a good example of what might be called the inertia of the legal system i. e. the stubborn adherence to the customary which has found its classical expression in Goethe's "Es erben sich Gesetz und Rechte sie schleppen vom Geschlecht sich sum Geschlechte."

(2) As to this see ante I. Section 6, where the correctness of this view is disputed in cases where the areas are so large that they may be described as seas in the sense in which this expression is ordinarily used.

Baltic States during the major naval wars of the 18th century to keep foreign warships (and privateers) out of it, and which was legally based upon the Baltic being a closed sea.

Apart from the two Dano-Swedish agreements of 1691 and 1693, which have already been referred to, the agreement between Denmark and Sweden, concluded on July 12th 1756(1) i. e. at the beginning of the Seven Years War and at a time when not merely Denmark but also Sweden was still neutral, must be considered as forming an introduction to the agreements which have become known in history under the common name of "the Leagues of Armed Neutrality"(2). This agreement does not expressly forbid the access of foreign warships to the Baltic but merely provides that the parties will not proceed to reprisals against belligerents in it and that it shall remain free and safe both during that war itself and during all future wars. But the Swedish view at any rate was that the warships of non-Baltic powers, in this particular case England could not enter the Baltic for when Sweden was brought into the coalition against Russia in 1757 and England wished to send a fleet to the Baltic to help her Sweden demanded that Denmark should unite with her in keeping the English fleet out of the Baltic. The Danish foreign minister, Bernstorff, refused Denmark's co-operation in this step, because Denmark was neutral, while Sweden held the view that such a step would be compatible with her neutrality because she considered it would be an unlawful act if England allowed her fleet to enter a closed sea and so infringed the dominium of the Baltic states(3). Sweden then wished to close the Sound herself in union with Russia and with this object to station a Russo-Swedish fleet in Drogden(4). Bernstorff protested strongly against this and since he induced England to give up her attempt the question of Denmark's right as a neutral to participate in closing the Sound ceased to be a practical one(5).

(1) Danske Traktater 1751—1800 p. 80, Sveriges Traktater VIII p. 679 et seq. Reference in Boye p. 97—8.

(2) Among the extensive literature dealing with these see in particular Bernbohm: *Die bewaffnete Neutralität*, Berlin 1883. The Boye: *De væbnede Neutralitetsforbund*, Christiania 1912, Brown-Scott: *The armed Neutralities of 1780 and 1800*, Wash. 1918, Paul Fauchille: *La diplomatie française et la Ligue des Neutres*, Paris 1893.

(3) Gihl: *Utredning* 1930: 6 p. 80. Here the older idea of dominium was combined with the newer one of the closed sea.

(4) Not at "Dragö" as stated in Boye: *De væbnede Neutralitetsforbund*, p. 121.

(5) The situation offers a striking parallel with that existing in August 1914 when

On March 17th, 1760 Denmark adhered to the treaty between Sweden and Russia of 9/20 March 1759(1) because Bernstorff had the impression that England was not really interested in sending warships into the Baltic, so that there was no risk for Denmark in closing the Straits. The latter treaty quite generally forbade any foreign i. e. non-Baltic belligerent power to send warships or privateers into the Baltic(2) in quite general terms. Even if this provision did in fact affect England most it was not in form aimed against her and Denmark as a neutral could therefore adhere to it, although Bernstorff held himself ready to resist even by force, the entry of English warships into the Baltic. However the war ended in 1763 without this question arising(3). During the American War of Independence 1776—83 and the war between England and France which went on at the same time Russia's adherence to the Scandinavian countries' policy of neutrality gave the latter a much wider scope and led to the conclusion of the famous League of Armed Neutrality of 1780. The principles upheld by the League and which were laid down in a series of bilateral treaties(4) are based, as far as the exclusion of warships from the Baltic is concerned, upon the desire of the parties to "veiller a la sureté et à la tranquillité de la mer Baltique" and "la mettre à l'abri des troubles de la guerre et des courses des armateurs" which is all the more natural since they all

neutral Denmark was asked by Germany to close the Great Belt under conditions which showed that if Denmark wouldn't do so, Germany herself would close it. See as to this post.

- (1) Müller: Die Schliessung der Ostsee, p. 17 describes this as the origin of the Leagues of Armed Neutrality but it is submitted that the treaty, just referred to, of July 12th 1856 between Denmark-Norway and Sweden is the origin. As also Gihl loc. cit. p. 80. The treaty of March 9th, 1759 will be found in Martens RGT, Suppl. Tome III. p. 36 et seq. Denmark's adherence ibid p. 42.
- (2) By adhering to the treaty Denmark did not feel that she could take steps against warships fitted out in the Baltic itself.
- (3) This situation also offers striking similarities to the situation in 1914—18. In both cases there existed an alliance between a Baltic power (in 1759 Russia, in 1914 Russia) and a non-Baltic power England, which in reality had no interest in entering the Baltic and which therefore Denmark as a neutral could close, cf. post Chapter III.
- (4) Denmark-Russia, 9th July 1780 (not Russia and Sweden as stated by Müller p. 17), Sweden-Russia, 1st August 1780, Prussia-Russia, 8th May 1781. The principles laid down in these treaties had already been put forward in a unilateral declaration by Denmark-Norway in May 1780 (Martens RGT. Vol. 2, p. 84. Here will be found the Russo-Danish treaty at p. 103 et seq., the Russo-Swedish at p. 110 et seq. and the Russo-Prussian at p. 130 et seq).

“jouissent de la plus profonde paix”. They are therefore unanimous in laying it down that the Baltic is “une mer fermée incontestablement telle par sa situation locale” in which the ships of all nations may sail in peace and they will take the necessary steps to secure their common sea and its shore against all “hostilités, pirateries et violences”.

In the League of Armed Neutrality of 1780, which is distinguished from the alliances of 1758—60 by the fact that *all* Baltic powers were this time neutral, an attempt is made for the first time to base the legal arguments for closing the Baltic to warships upon its geographical nature i. e. its sharp delimitation from the sea outside. This reasoning which confuses fact and law and overlooks the fact that the Baltic *legally becomes* a closed sea only, if at all, when the contracting parties declare that it is(1), was accepted by a great number of non-Baltic powers and also it must be said, to a certain extent by writers on international law. England never accepted it although she did refer to it in her privateering regulation(2). Even if the treaty system formed the zenith of the League of Armed Neutrality in the *political* sense, its legal foundation was more clearly expressed in the less extensive league which was concluded between Denmark-Norway and Sweden on March 27th, 1794(3) during the War of the First Coalition. For as far as the exclusion of warships from the Baltic is concerned this treaty, which contains provisions similar to those in the treaty of 1756, bases the exclusion of ships from the Baltic upon the fact not that it *is* but that it *ought to be considered* a closed sea whereupon it is again *declared* in the treaty by the contracting parties that it is a closed sea(4).

Since developments in politics led to a rapprochement between Russia and France, it now became to the interest of England to be able to enter the Baltic. In this way the possibility of carrying through the exclusion of warships from the Baltic came to an end. It is true that on the initiative of Russia in December(5) 1800

(1) This was sharply pointed out by the French ambassador at St. Petersburg, Vergennes; as to this see Ortolan: *La diplomatie de la mer*, 1864 II. p. 290.

(2) Perels: *Das internationale öffentliche Seerecht der Gegenwart*, II Ed. 1903, p. 161.

(3) Martens: *RGT*. Vol. 5 p. 274 et seq.

(4) “La Baltique devant toujours être regardée comme une mer fermée et inaccessible à des Vaisseaux armés des Parties en guerre éloignées, est encore déclarée telle de nouveau par les Parties Contractantes décidées à en préserver la tranquillité la plus parfaite.”

(5) Not in September as stated by Boye at p. 266.

conventions were concluded between her and Denmark-Norway and between her and Sweden(1) which declared in special articles that the Baltic was a closed sea. The conclusion of the alliance aroused great resentment in England who sent a fleet into the Sound in March 1801 and forced Denmark to cease helping to keep foreign warships out of the Baltic (the battle of the roadsteads of Copenhagen, April 2nd, 1801) and in 1807 after the seizure of the Danish fleet, following the bombardment of Copenhagen, Denmark, was no longer in a position to be the "guardian of the Baltic" for Russia and France as Napoleon and the Tsar had agreed at Tilsit. In her reply to the note of protest sent by Russia on the occasion of the bombardment of Copenhagen England stated that the attempt to keep foreign warships out of the Baltic was contrary to international law, and further that she had never acquiesced in the principle on which it was attempted to base the inviolability of the Baltic and even if she had omitted, for special reasons, to act in opposition to this principle, this had only been when no Baltic power had been a belligerent. When this was the case in 1807 (when France had appeared as a Baltic power) the closing of the Baltic to warships meant supporting the belligerent Baltic power; this was consequently unneutral and contrary to international law(2).

This explanation did not satisfy Russia, who on the contrary utilised the English attack on Denmark to break with England, and it thus may be said that she went to war to maintain the principles proclaimed by the Leagues of Armed Neutrality, including the one which is of special interest to us viz: the closing of the Baltic to warships(3). After Russia had herself become the leading Baltic power through the conquest of Finland 1809 she gave up these principles. In this way any idea of closing the Baltic to the warships of non-Baltic powers through agreement between the coastal states became a thing of the past. The question of the right of warships to pass through the Straits once more ceased to be secondary to the wider question of the justification of the closing of the whole of the Baltic to warships and became an independent question, which had to be decided in accordance with the general rules of international law relating to the right of warships to pass through international straits if not any special rule relating to the

(1) Martens: RGT. Supplement II. p. 389, 397.

(2) As the these documents see Martens: La neutralisation de Danemark, Revue des deux mondes 1903 p. 323.

(3) As to this see Martens NRG. Suppl. Vol. III. p. 8 et seq.

passage of warships particularly in the case of the Straits leading into the sea known as the Baltic existed. In the following section we shall see whether this was the case or not.

Section 8.

The right of passage in the Straits IV: Were there any special international rules dealing with the right of warships to pass through the Danish Straits at the outbreak of the War?

Even when the coastal states could no longer be said to have any right to close the Straits as a step in closing the Baltic it might be imagined that special rules had developed dealing with the right of warships to pass through the Straits as such. Such rules might have been included in the Treaty of March 14th 1857, they might have been rules of customary law formed out of the practice followed by Denmark and Sweden after the termination of the Leagues of Armed Neutrality or they might have been set up by the unilateral regulations which the two coastal States had issued on the subject. As to the Treaty of March 14th 1857, it has been shewn that it does not refer to warships at all. Consequently it is of no importance to the question being dealt with here.

If we next consider whether any special rule dealing with passage of warships through the Danish Straits was created as a result of the practice followed by the coastal states we must come to the conclusion that this was not the case as far as *peace-time* is concerned. Regulations concerning the passage of warships in peace-time were issued on January 15th, 1913 renouncing the claim which had always been maintained in theory — but which had been more and more evaded in practice — that these ships could only pass through Danish territorial waters in the Straits if permission had been obtained(1). By these regulations the warships of foreign powers were given the right without obtaining permission to touch at or sail in Danish waters, with the exception of internal waters, the roadstead of Copenhagen or closed waters and it was expressly provided that the parts of Danish territorial waters in the Kattegat, the Sound, the Great Belt and the Little Belt which form the natural traffic routes between the North Sea and the Baltic, were not considered as Danish internal waters. The importance of these liberal rules is, however, lessened by the provision that no-

(1) The Ministry of Marines Kundgørelser for Søværnet B for the year 1913 (Copenhagen 1914).

tification through diplomatic channels was necessary even in the case of ships merely passing through the Hollaenderdyb and the Drogden *Sweden* was more liberal as she never claimed that passage through Swedish territorial waters in the Sound should be notified, neither with regard to its northern entrance nor with regard to Swedish territorial waters in Flinterenden.

The position in time of war, when the coastal states are neutral.

By the rules, in all essentials the same, which the three Scandinavian countries issued on January 5th, 1854 immediately prior to the outbreak of the war between the Western powers and Russia ("the Crimean War") with respect to the manner in which they intended to uphold their neutrality during this war(1) the three states declared that they would allow all their harbours with the exception of a few naval ones to remain open to the warships of the belligerent powers. This applied *a fortiori* to their territorial waters (including the Straits). In the notes by which Denmark notified these rules it was stated that the King of Denmark flattered himself that they would be recognised as being in accordance with international law. This hope was realised insofar as none of the belligerents protested and a great number of the other powers approved the rules(2). In addition to being recognised officially in this way they had a favourable reception in the press(3) and as the criticism which did appear came equally from English and Russian sources, the comment in the newspaper "Fædrelandet", that the Scandinavian countries "seem to have arrived almost at the correct result" in issuing the rules appears to be justified(4).

(1) As to these rules and the neutrality of the Scandinavian countries as a whole during the Crimean War see Frederik Bajer: *Norden, særlig Danmarks Neutralitet under Krimkrigen*, Copenhagen 1914 where the rules are set out on p. 103.

(2) As to the way in which the declaration of neutrality was received abroad see Bajer p. 115 et seq.

(3) See e. g. "The Times" for January 5th 1854.

(4) "Fædrelandet" 12/1/1854. The Western powers, and in particular England attempted in February 1854 to get the Sound and the port of Copenhagen closed to warships on the ground that otherwise by allowing her fleet, which did not draw so much water, to come out through the Sound at the same time as the fleet of the Western powers went in through the Belts, Russia could cut off their retreat and possibly acquire points d'appui on the Danish islands and attack them in the rear. But Denmark replied that it was in fact impossible for her to close the Sound as the guns at Kronborg could not reach ships keeping close in to the Swedish shore, and the attempts were given up. In the note to this effect H. M. Government stated that their request for Copenhagen and the Sound to be closed was based upon usual rights being given to the belligerents and was in no way

In fact not merely individual English and French warships but also large squadrons passed through the Straits(1).

During the *Franco-German War* 1870—71 the neutrality of the Scandinavian countries was upheld in accordance with rules similar to those in force during the Crimean War, and the Straits were again left open.

During the *Russo-Japanese War* 1904—1905 the Straits were again left open. The warships of belligerent powers were allowed to touch at all Danish and Swedish harbours with the exception of a few naval ports and as far as Denmark was concerned Danish pilots were permitted to pilot them in the waterways through the Kattegat, the Sound and the Belts(2). During this war the Russian Baltic fleet passed through the Great Belt via Österrenden on October 19th, 1904 on its way to the Far East. The fleet took Danish pilots on board in Langelandsbelt and put them ashore at Frederikshavn. Japan did not protest against the *passage*(3) of the fleet as such through the Belt but she did protest against the fleet being *piloted* by Danish state pilots(4).

opposed to the interests of Denmark as a neutral power and assurances were given that England would respect Denmark's independence, cf. 1914, when Germany also maintained that her claim for the closing of the Straits against both belligerents was compatible with Denmark's neutrality while accompanying her statement with assurances that she would respect it.

- (1) An English fleet under Admiral Sir Charles Napier passed through the Great Belt via Vesterrenden on March 26th 1854 and was later joined by a French squadron with transports and landing troops. The result of the Western powers large expenditure of ships and men was however small. It was perhaps her unfortunate experience in the Crimean War which made England chary in the War 1914—18 of attacking Germany in the Baltic where the Baltic power would ordinarily be in a relatively strong position as compared to an assailant entering the sea far from its base.
- (2) Royal decree No. 94 of April 27th 1904 (LA. 1904 A. p. 487 et seq.)
- (3) The relevant documents are not yet available. But M. Erik Scavenius, the Danish chargé d'affaires in Berlin and later Danish foreign minister, is said to have stated in 1907 in a conversation with the English ambassador dealing with the passage of warships through the Straits in accordance with the decree referred to in the previous note that at the time when the Russian fleet passed through the Belt, Denmark had "received a peremptory note from that country" (i. e. Japan) couched in the most undiplomatic language ordering them (i. e. the Danes) to close the passage, Br. Doc. VIII No. 105.
- (4) This protest was acceded to by Denmark as for as she took advantage of the option given to neutral powers by the Hague Convention XIII to elect whether pilotage should be permitted or not, to lay down that the warships of belligerent powers were *not* entitled to use Danish state pilots except in cases of need in order to avert an impending maritime danger and when sailing into and out of Danish harbours and roadsteads. cf. Article 6 of the neutrality rules of 1938.

The question whether the practice followed by Denmark and Sweden in the 19th and at the beginning of the 20th century created any customary rule of international law compelling these two states to leave the Danish Straits open in wars in which they were neutral must on the basis of the practice just described, be answered in the negative.

In the first place it is doubtful whether the practice followed by the two countries was followed *ex opinione obligationis*. The statement, in the notes by which the neutrality rules of 1854 were notified to the powers, that the King of Denmark flattered himself that they would be recognised as being in accordance with international law might perhaps signify that this was so, but the general phrase "international law" seems to refer to the general rules of international law only. In the next place it seems doubtful whether only 3 cases enables us to say that the conduct of Denmark and Sweden was followed so constantly, for so long and so uniformly as to form the basis of a rule of customary international law. On the other hand the practice of the two countries has naturally created a presumption that the Straits would be left open in wars in which the two countries were neutral, and this presumption is undoubtedly strengthened by the unilateral regulations concerning the neutrality of the Scandinavian States in the event of war between foreign powers, which were issued by the Scandinavian States immediately before the war(1).

By these regulations, which concern "The neutrality rules of 1912" Denmark declares(2) that in those parts of Danish territorial waters in the Kattegat, the Sound, and the Belts which form the *natural traffic routes* (which are defined in the decree) between the North Sea and the Baltic only harbours and the entrances to harbours can be included in Danish internal waters (the right to close which to the warships of belligerent powers is reserved). Sweden declares(3) that in the Sound only harbours and entrances to harbours will be included in Swedish internal waters (the right to close which is similarly reserved).

These declarations at any rate when coupled with the practice

(1) In the case of Denmark the decree of December 20th 1912 relating to certain rules dealing with Denmark's neutrality in case of war between foreign powers (in the following pages referred to as the decree of 1912) and in the case of Sweden the decree of the same date.

(2) Section 1 (c) 3rd paragraph.

(3) Sv. Förf. Saml. 1912 No. 346.

followed by the two States for about 100 years, gives a certain presumption that the Straits will not be closed but they by no means bind the two States to leave the Straits open to the warships of belligerent powers.

The declarations made in the neutrality rules of 1912 were unilateral acts which could at any time be changed by Denmark and Sweden. Nevertheless they have a certain effect in international law since they were issued pursuant to the desire expressed in the preamble to the Hague Convention XIII relating to the rights and duties of neutral states in maritime warfare that neutrals should issue in peace-time specific enactments regulating the legal consequences of the status of neutrality adopted by them, which rules should not, in principle, be altered in wartime except in the case where experience has shewn the necessity for such change for the protection of the neutral power's own rights. In this case, however, the rules *can* be altered even in time of war and they are therefore not absolutely binding⁽¹⁾ even though they, as already indicated, create a strong presumption that the Straits will be left open.

In view of what has been said, we may now state that no special rules existed at the outbreak of war in 1914 dealing with the right of warships to pass through the Danish Straits except the claim that prior notification should be given in the case of vessels passing through Hollaenderdyb and Drogden and Denmark's reservation of her right to close these channels. The question of the passage of warships must therefore be decided according to the general rules of international law relating to the right of passage of warships in international straits. As to these see ante in I(2).

(1) The argument of Wieth-Knudsen: Danmark under Verdenskrigen. Copenhagen, 1914, which is based upon the assumption that the decree of that 1912 is absolutely binding is therefore incorrect.

(2) At the outbreak of war there was no general rule dealing with the right of passage of *aircraft* and the matter, at least in the Scandinavian countries, had only to a limited extent been the subject of legal regulation. The attitude of the governments was that they were entitled to forbid foreign aircraft to pass over their territory and this was the attitude followed during the war, see as to this post.