

Historical bays

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Since the existence of the law of nations there has always been opposition to prescription as a mode of acquiring territory. Oppenheim International Law (1955) 575.

One of the subjects to be discussed at the proposed Third Law of the Sea Conference which - according to present indication - will be held during 1974, is that of historic bays. It is a subject which has been the cause of great dissension in the past and on which no consensus could be found during the 1958 Geneva Conference on the Law of the Sea. It is sincerely hoped that this issue will be solved by the coming conference.

This lack of unanimity by the international community can be found in the usual causes leading to legal dissension in international law, *viz* the varying practice of states and the varying interests states may have in such bays, *eg* strategic and economic.

This article is an attempt to look at state practice, judicial decisions and the opinions of publicists on the issue. It is hoped that by using this approach, some common features which can be welded into an acceptable principle can be put forward.

It is now generally agreed that the navigable waters of the world may be classified under three heads. There is as yet no absolute uniformity in the use of technical terms, but the words which I shall use are "internal waters", "territorial waters", and "the high seas". This classification begins from the land outwards and obviously requires the determination of two lines - the line which divides internal from territorial waters, and the line between the territorial belt and the high seas.

Before any measurements can be made seaward however a baseline must be determined.

Generally, the problem of baselines is not crucial unless a coastline deviates from what is considered "normal", that is, unless the coast is

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rugged and uneven. When it does happen that the coast has no special configuration, where it curves but gently and is not marked by relatively acute indentations for bays and rivers or by an offshore island, coastal states commonly claim to delimit the baseline from the shoreline, generally at the low-water mark rather than at the high tide line. Since the area between the low-water mark, whatever the method of determining this point, and the high-water mark ordinarily is not extensive, nor useful for purposes other than navigation in internal waters, this claim has excited no notable controversy. Some discussion has been provoked about the location of the low-water line, since several low-water marks are possible, and states claim to use various of the different low-water marks which can be established. In most instances the use of the low-water line along a coast does not result in creating any significant area of internal waters nor in measurably extending the territorial sea. The sole consequence is to determine the points from which the breadth of the territorial sea is to be measured. Despite this general adoption of the low-water line for delimitation purposes, it apparently is a fact, curious as it may seem, that the charts normally used for navigation do not, in some instances, accurately depict the location of a line so determined.

As soon as one departs from this relatively simple situation to consider coasts with special configurations, however, both the facts and the claims become incredibly complex. It is inevitable because of the richness in variations of coastal features that attempts to discuss these problems in a systematic way create the misleading impression that neat categories exist into which all these features can be compressed. The fact is, of course, that the neat categories do not represent the details accurately and cannot be expected to do so.

Traditionally, the most important and controversial claim to identify the base points for delimiting the territorial and internal waters from special coastal configurations has involved indentations into the coastline. For a long period of time indentations were significant only because the claim was that they affected the *outer* limit of the territorial sea. In this early conception the "line" across the indentation was not conceived as separating an area of internal waters on the landward side from an expanse of territorial sea measured seaward of the line. All of the waters on both sides of the "line" was regarded as part of the territorial sea. Later, states generally came to claim, as they continue to do, that the closing line in the indentation marks the baseline from which the territorial sea begins and that the waters on the landward side are internal waters. Two kinds of claim are put forward when a state seeks to draw a line across an indentation: first, that the latter protrudes into the coast deeply enough to justify a departure from adherence to the low-water line in drawing a straight line across it and, secondly, that it is permissible to enclose the opening or part of

the waters within the indentation by a line of the necessary length. The former claim is opposed by the assertion that the baseline should be located on the low-water mark along the actual coastline. The latter claim is opposed by the contention that the length of the baseline claimed is too long and that, while some part of the indentation may be enclosed, the part so enclosable cannot be as great as that claimed. For example, a claim to enclose a bay with a line twenty miles across it might be countered by a claim that the baseline ought not to exceed fifteen miles. It is also sometimes declared that in the case of bays of a particular width of more than six or ten miles, the baseline must follow the contours of the indentation and no closing line is permissible.

Some claims to comprehensive authority over these indentations rest not on any contention about the relative width or depth of the area enclosed but on *historical title*. Some bays have been asserted to be a part of internal waters, irrespective of the width of the entrance, on the ground that the coastal state has always so regarded such areas and other states have acquiesced in the claim. Opposing claims here rest on the argument that whatever may have been the subjective attitude of the coastal state, other states have not in fact recognized or acquiesced in the claim. In what follows an attempt will be made to seek general principles which have emerged and which can be used to settle the continuing controversy on historical bays.

BAYS IN GENERAL

Before going into the legal problems pertaining to *historic bays*, it would be more pertinent to deal briefly with the definition of “bays” in general.

Article 7(2) of the 1958 Geneva *Convention on the Territorial Sea and the Contiguous Zone* (hereinafter referred to as the *Territorial Sea Convention*) defines a bay for the purposes of the article, as

“a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.”

Article 7(4) of the *Territorial Sea Convention* qualifies the above by declaring

“If the distance between the low-water marks of the natural entrance points of a bay does not exceed *twenty-four miles*, a closing line may be drawn between those two low-water marks, and the waters enclosed thereby shall be considered as *internal waters*.”

A logical extension of article 7(4) is found in paragraph 5 of article 7 which stipulates that

“where the distance between the low-water marks of the natural entrance points of a bay exceed twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.”

The meaning of this stipulation is that in those cases in which the entrance of a bay exceeds twenty-four miles, a straight baseline will be drawn at a point nearest to the entrance where the opposing coasts are not more than twenty-four miles apart, so as to confer on all the waters from the baseline landwards the status of internal waters.

While the above provisions eliminated many problems relating to the juridical status of a great number of hitherto “historic bays”, they certainly did not dispose of the problem altogether. The Geneva Conference was the first to recognise this fact, to which recognition it gave a twofold expression:

(a) Article 7(5) of the *Territorial Sea Convention* stipulates that

“the foregoing provisions shall not apply to so-called ‘historic’ bays or in any case where the straight base-line system provided for in article 4 is applied” .

thus expressly excluding the problem of the remaining historic bays from the scope of the convention’s provisions;

(b) The conference at Geneva also adopted a joint Indian-Panamanian draft resolution, submitted by the first committee, in which the United Nations General Assembly was requested “to arrange for the study of the juridical régime of historic waters, including historic bays . . .” Following the adoption of this resolution, the Sixth Committee of the United Nations General Assembly on December 4, 1959, unanimously recommended to the General Assembly the adoption of a resolution which requested the International Law Commission “as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays . . .”¹ This work is still not complete and the subject of “historical waters” is to be discussed at the proposed Third Law of the Sea Conference in 1973.

HISTORIC BAYS

Terminology

Historic bays are a *species* of the *genus* historic waters. In other words historic waters are the category of which historic bays form a part. In the practice of international law both terms are nearly always descriptions of the *same notion*, namely of waters with the characteristics of a bay. The possibility remains, however, that waters, not being

¹On December 7, 1959, the General Assembly unanimously adopted this draft resolution.

bays, can possess the status of historic waters. The term “historic bay” has however been more frequently used than “historic waters” and this is due to the fact that claims on an historic basis have been made more often with respect to what was called or considered to be bays than regarding other waters. In principle, therefore, the theory of historic maritime title applies also to other maritime areas than bays. For purposes of this memorandum the term historic bay is our object of study. All references to historic waters thus are impliedly just as applicable to historical bays.

The concept

We have seen that, for the purposes of ascertaining when in international law a bay exists, and when the littoral state has the right to claim as her internal waters some or all of the area of the bay, certain criteria have been formulated and generally agreed upon. We have also noted that article 7(5) of the *Territorial Sea Convention* reads

“The foregoing provisions shall not apply to the so-called ‘historical bays’ . . .”

It is with this historic bay clause that we will now exclusively deal. Generally speaking, a bay whose entrance breadth is greater than that contemplated by the general rules, or whose configuration is such that it fails to fulfil the requirements of the evolved rules, but which is held to be in the national territory of the littoral state, falls into the category of historic bays. The waters falling into the historical bay are waters over which the coastal state - contrary to the general applicable rules of international law - exercises sovereign rights. *Put more simply historic bays are well recognised exceptions to the rules applicable to ordinary bays and neither the semi-circular rule nor the twenty-four mile limitation applies.* The legality of the claim does thus not depend on the size of the area affected.

The main consequence of the existence of historic bays is that the waters no longer fall under the régime of the high seas, but belong to the *internal waters* of the coastal state. Even the right of innocent passage is absent, because the waters do not possess the status of territorial sea.

It is quite clear that when one compares ‘true’ bays with historical bays, the latter confronts us - as has been noted - with the additional problem that the state concerned pleads exception to the rules in the case of a specific bay on the grounds of historic claim or possession. In order to keep such claims within reasonable bounds there would appear to exist the necessity of some agreed upon criteria. To examine the relevant criteria it is necessary to use the international law method of ‘finding’ the law, namely (i) the opinions of authors (or publicists as they are more often called in this connection); (ii) judicial decisions;

and (iii) the practice of states. Lastly an analysis of the *historical* concept of historic bays must be made.

AN EXAMINATION OF THE RELEVANT CRITERIA

The writings of publicists

The writings of the publicists are important in that they are an accepted - albeit secondary - source of international law. When looking at the publicists' comments on historic bays we can distinguish between three groups: those which deal with the historic bay in general; those in which the publicist on his own initiative advises that a certain bay should be regarded as an historic bay; and those in which the author's opinion is nothing more than an official vehicle for supporting a certain government's position. Many publicists also appear to do nothing more than compile from the writings of others comments on historic bays and allied subjects. This category consequently adds nothing in the way of original thought and research. For the reasons stated above we will attempt to cite only those publicists to whom for one reason or another, some importance can be attached by reason of their standing in international law and general acceptance. (It may be of interest to mention here that the term *historic bay*, descriptive of an exceptional situation, is a relatively modern one. According to MP Strohl² - who has made quite an extensive study of the topic - the term dates back no further than 1910.)

In reviewing the writings of publicists we will not follow any specific chronological order, but will rather attempt to follow an order in which the writings may have contributed to an understanding of the concept of the *historic bay*.

Lawrence

"The claims of States to large tracts of marginal waters - claims which are themselves relics of yet wider dominion over oceans and seas - increase the difficulty of the question. Some of them are dead or dormant; *but when a valuable fishery is retained for native fishermen by the assertion of sovereignty over a bay of considerable size, or when considerations of self-protection or political advantage are prominent*, we find that States insist upon and often obtain recognition of their demands, *some of which are based upon very ancient precedent.*"³

Gidel

This French writer who is generally accepted as being an authority on the subject of historic bays demands for the establishment of a title to historic waters: (1) a claim to *sovereignty* by the state which seeks to

²*The International Law of Bays* (1963) 269.

³TJ Lawrence *The Principles of International Law* (1913) 143.

establish its territorial competency over a certain area of water; (2) long usage; (3) acquiescence by other states.⁴

Westlake

“Many of these are recognised by *immemorial usage* as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit for such appropriation . . . it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to *any other test than that of accepted usage.*”⁵

Westlake, after noting the exception to the general rule, attempts to establish a geographical criterion to explain the linkage between a bay and land if a claim to sovereignty over a large bay is to be valid. Mindful of the variation of geographical forms that exist he concludes that “*accepted usage*” is the only test. His reference to “*immemorial usage*” would appear to mean that such *usage*, tacitly accepted, confers upon the littoral state the right to exclusive sovereignty over a particular bay by a process similar to the ripening of usage into a rule of customary international law.

Fauchville

“ . . . there exists certain gulfs or bays which despite their great width, must be declared under the sovereignty of the State which surrounds them. These gulfs and bays are what are called historic or vital bays, as distinct from others which are referred to as common or ordinary bays. What exactly is the correct definition of a *historic* or *vital* bay? It is one of the large gulfs or bays the territorial character of which *has been recognised by long-established usage and undisputed custom.*”⁶

Jessup

“It is believed that . . . no established rule of International Law exists as to bays except to the effect that bays not more than six miles wide are deemed territorial waters as well as those to which a nation has established a *prescriptive claim*. Such a prescriptive claim may be established over bays of great extent; the legality of the claim to be measured, not by the size of the area affected, *but by the definiteness and duration of assertion* and the *acquiescence* of foreign powers.”⁷

⁴G Gidel *Le Droit International Public de la Mer* (1932-4) vol III 651: “Il ne suffit pas que l’État riverain émette la prétention de considérer telles ou telles eaux comme lui étant “propres” pour que les autres États aient le devoir de s’incliner devant cette prétention; la consécration de ces prétentions ne peut dériver que de l’acquiescement international; c’est l’usage prolongé qui, généralement, en fournira la manifestation; et telle est la part de vérité que contient le mot “historiques” à l’aide duquel la théorie est désignée.” All references to Gidel are those quoted by Bouchez.

⁵J Westlake *International Law* part I (1910) 191.

⁶Translated from Fauchille *Traité de droit international public* vol I (1925) 380.

⁷Phillip C Jessup *Law of Territorial Waters and Maritime Jurisdiction* (1927) 382.

This quotation is included because it introduces the notion of *prescription* and also because of the author's emphasis on the "definiteness and duration of the assertion and the acquiescence of foreign powers."

Hyde

Charles C Hyde places great emphasis on the geographical factor:

"Numerous instances where *general acquiescence* has long rewarded the assertion of dominion over certain broad expanses have begotten the term "historic bays" by way of explanation. The phrase signifies that in each case where it is applied the interested coastal State *at some earlier time* began to endeavour to possess itself as it were of the water of the particular bay, regardless of its magnitude, and to assert a right to control them as a part of its territory; and *it suggests also that the geographical relationship of those waters to that State* were generally deemed to be such as to justify assertion and to discourage foreign opposition to it. Thus, the situation, that made a bay geographically a part of its territory, was the decisive factor."⁸

Bourquin

In the opinion of Bourquin the essential elements of the concept of historic bays in international law are: (1) the effective exercise of sovereign rights by the claimant states; (2) the absence of opposition by the other states towards the claims of the coastal state; and (3) immemorial usage.⁹

Some publicists declare that immemorial usage would be sufficient to create sovereign rights over an historical bay, without mentioning the acquiescence of other states. Others again doubt the existence of historical bays or even deny it. As eminent a publicist as O'Connell declares that it is doubtful if such a doctrine exists.¹⁰ Be that as it may, the great majority of publicists generally agree with the quoted opinions of Gidel, Jessup and Bourquin.

Surveying the opinions of the publicists as generally expressed with reference to historic bays, three essential requirements appear to be required:

- (1) the coastal state must *claim* the water area involved as being within its *sovereignty*;
- (2) the coastal state must *effectively* exercise its sovereignty and during a rather *long period*;
- (3) there must be a peaceful and *continuous exercise* of sovereignty;

⁸Charles C Hyde *International Law Chiefly as Interpreted and Applied by the United States* (1947) 469.

⁹M Bourquin *Les Baies historiques* (1952) 43.

¹⁰DP O'Connell *Problems of Australian Coastal Jurisdiction* BYIL 1958 234.

In his major work *International Law* vol I (1970) 490 O'Connell refers to the "supposed criterion of historic bays."

in other words, the other members of the community of states must *acquiesce* in the claim of the coastal state.

Judicial decisions

Our purpose in reviewing some of the more notable case law on historic bays is to gain some perception of the bases upon which the courts have arrived at their conclusions. Our discussion will be brief as it is the intention merely to point out those points salient to the topic under discussion. Many of the following cases have been commented upon extensively elsewhere.

*Chesapeake Bay*¹¹

This case (1882) involved a claim concerning the destruction of a ship in Chesapeake Bay, the claimant contending that the act took place on the high seas. The United States maintained that the waters of Chesapeake Bay “are territorial waters of the United States and subject to the exclusive control and jurisdiction thereof.”

Chesapeake Bay has a closing line of about twelve miles. Inside the bay there is a width of twenty miles and a length of 200 miles. Most of the bay is thus land-locked. The court, in holding that the bay was entirely under the jurisdiction of the United States applied the following criteria:

“Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory . . . *that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned;* that it cannot become the pathway from one nation to another . . . We are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the ‘high seas’ . . .

What injustice can be done to any other nation by the United States exercising sovereign control over these waters? *What annoyance and what injury may not come to the United States through a failure to do so?*”

*Conception Bay*¹²

This bay lies on the eastern side of Newfoundland. The case involved two cable companies. The one cable company sought to prevent the other company from laying cables in Conception Bay declaring that Conception Bay was part of Newfoundland and that the former possessed a monopoly to lay cables in all places subject to the jurisdiction of Newfoundland. The cable company, whose presence

¹¹*The Alleganean, Stetson v United States* 1 Moore’s Digest (1906) 741.

¹²*The Direct United States Cable Company v The Anglo-American Telegraph Company* Privy Council 1877 LR 2 App! Cas 394; 1 Moore’s Digest (1906) 470.

exception was taken to, had laid a cable to a buoy more than thirty miles within the bay, but at no point within three miles of the shore. The question raised was thus as to the territorial dominion over a body of water of the configurations and dimensions of Conception Bay.¹³

The court after examining the subject in the light of the common law and international law said:

“It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their lordships from attempting to fulfil it. But in their opinion it is not necessary to do so. It seems to them that in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important.”

North Atlantic coast fisheries arbitration of 1910

The roots of this controversy which came to a head in the 1910 arbitration are found in the economic consequences of the settlement of the American Revolution. Prior to the revolution, American colonial fishermen had fished in the coastal waters of Canada. With American independence such activities had to stop and many attempts were made to solve the endless problems which had suddenly arisen. Many treaties were signed but the “bays” off the coast were never defined and this was a continuous bone of contention. It would be tedious to recite the history of this controversy and the various attempts at negotiation. With respect to historic bays, only so much of the award as relate directly to this category of bays will now be considered:

“. . . the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than to those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce, and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay . . .

It has been recognized by the United States that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt . . .

¹³According to 1 Moore’s Digest (1906) 740 these are as follows: “Conception Bay lies on the eastern side of Newfoundland, between two promontories, the southern ending at Cape St. Francis and the northern at Split Point. The bay is well marked, the distance from its head to Cape St. Francis being about 40 miles, and from its head to Split Point about 50 miles. The average width is about 15 miles, but the distance from Cape St. Francis to Split Point is rather more than 20 miles.”

In this latter regard it is further contended by the United States that such exceptions only should be made from the applications of the three mile rule to bays as are sanctioned by conventions *and established usage*; that all exceptions for which the United States of America were responsible are so sanctioned; and that His Majesty's Government are unable to provide evidence to show that the bays concerned by the treaty of 1818 could be claimed as exceptions on these grounds either generally, or, except possibly in one or two cases, specifically.

But the tribunal, while recognising that conventions and *established usage* might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid in the absence of any principle of international law on the subject, nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to that three mile rule as desired by the United States;

(a) Because Great Britain has during this controversy *asserted a claim to these bays generally, and has enforced such claim specifically in statutes and otherwise . . .*

(b) *Because neither should such relaxations of this claim as are in evidence be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays as to which no controversy arose be so construed.* Such a construction by this Tribunal would not only be intrinsically inequitable, but internationally injurious, in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims to their fullest extent."¹⁴

It is of interest to note that the tribunal was of the opinion that the omission of any enforcement action should *not necessarily* justify the conclusion that no claim exists.

Dr Louis Drago in his dissenting judgment said the following about historical bays:

"... it may safely be asserted that a certain class of bays, which might properly be called the historical bays, such as Chesapeake Bay and Delaware Bay, in North America, and the great estuary of the River Plata, in South America, form a class distinct and apart, and undoubtedly belong to the littoral country, *whatever depth or penetration and the width of their mouths, when such a country has asserted its sovereignty over them, and particular circumstances, such as geographical configuration, immemorial usage, and, above all, the requirements of self defence justify such a pretension.* The right of Great Britain over the bays of Conception, Chaleur and Miramichi are of this description."¹⁵

*The Anglo-Norwegian fisheries case (United Kingdom v Norway)*¹⁶

This conflict is based on a difference of opinion between Norway and the United Kingdom as to the manner in which the territorial sea is to be measured along the coast of Norway. Only those points of conflicts which are connected with the problem of historic bays will be discussed here.

¹⁴As reported in Strohl *op cit* 297.

¹⁵*Ibid* 519.

¹⁶*ICJ Reports* 1951 138.

Firstly the International Court of Justice found in 1951 that the Decrees of 1869 and 1889 in which the territorial sea is measured from straight baselines were generally accepted by the other members of the community of states. In this way the court drew attention to one of the most essential elements for the existence of historic waters, namely, acquiescence by the other states. As to the above decrees the court observed:

“Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an *historical consolidation* which would make it enforceable as against all States.”¹⁷

In the opinion of the court the United Kingdom also showed its acquiescence during a considerable time, as it did not protest before its memorandum of 27 July 1933. The United Kingdom, however, argued that it was not well informed on the Norwegian system of straight baselines and therefore had no opportunity to protest before. This argument was rejected by the International Court of Justice by virtue of the fishing interests of the United Kingdom on the Norwegian coasts and its geographical position. The court further found that the refusal of Norway to accede to the North Sea Fisheries Convention of 1882 already indicated the attitude of the Norwegian government so far as the measurement of the territorial sea is concerned. Norway had officially proclaimed the straight baseline system thirteen years before. In 1869 this system was applied to the Sunnmøre district, while the Decree of 1889 proclaimed the application of the same system to the Romsdal and Nordmøre districts.

By reason of the above observations the court found that the United Kingdom during the last century was aware of the Norwegian system and failed to protest against it. Of great importance is the fact that the court directed attention to two conditions for the existence of territorial competency of a state over parts of the sea contrary to the generally applicable rules in force, namely (1) the awareness of the other states of such claims, and (2) the absence of negative reactions from the other states.

In this controversy the court attached great importance to the geographical position, the economic and social factors, and the historic development. Concerning the geographical configuration the court especially pointed to the close relation between the land-territory and the adjacent waters. The criterion should be: Are the sea-areas sufficiently linked to the land? With reference to the Norwegian coast the court stated:

¹⁷*ibid* 138.

“This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the *geographical configuration* of which is as unusual as that of Norway.”¹⁸

In addition the court emphasized the economic interest, stating:

“Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of *certain economic interests peculiar to a region*, the reality and importance of which are clearly evidenced by a long usage.”¹⁹

As to the historical character of the Norwegian claims the court observed:

“The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was *consistently applied* by Norwegian authorities and that it *encountered no opposition* on the part of other States.”²⁰

The court found that the straight baselines along the Norwegian coast have to follow “the general direction of the coast”, but that there is no necessity to restrict them to a fixed distance. It expressly rejected as a general rule of international law the application of the 10-mile limit for baselines in bays.

The court recognized the Norwegian claims and explained its opinion by saying:

“Such rights, founded on the *vital needs* of the population and *attested by very ancient and peaceful usage*, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.”²¹

The following further quotations from the judgment of the court are all more or less directly concerned with historic bays:

“By ‘historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.”²²

“The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of the sea which the general law would deny; *it invokes history together with other factors*, to justify the way in which it applies the general law. This conception of an historic title is in consonance with the Norwegian Government’s understanding of the general rules of international law.”²³

“The *notoriety of the facts*, the *general toleration* of the international community, Great Britain’s position in the North Sea, her own interest in the question,

¹⁸*ibid* 133.

¹⁹*ibid* 133.

²⁰*ibid* 136-137.

²¹*ibid* 142.

²²*ibid* 130.

²³*ibid* 133.

and *prolonged abstention* would in any case warrant Norway's enforcement of her system against the United Kingdom."²⁴

The court found that "prolonged abstention" was for a period of over sixty years.

The practice of states with preference to historic bays

Because sufficient data is not available it is impossible to give a complete enumeration of all historic bays. Our intention is however to attempt to give a broad view of the practice of states with reference to historic bays. Although the Geneva Convention of 1958 on *Territorial Waters and the Contiguous Zone* extends the length of a bay's closing line from 10 to 24 miles, this fact will be disregarded in our following discussion wherein are mentioned specific bays over which states have made exclusive claims to sovereignty. It must be observed here that it is often difficult to know what the practice of states on this question is. Most states abstain from declaring a formal delimitation of their maritime territory unless some particular circumstances pushes them to do so. Strohl, *eg*, declares that his research into Hudson Bay shows that only once, and in 1906, has the Canadian government given a positive indication concerning sovereignty over Hudson Bay.

Waters which have been claimed as being historic bays and over which there is still much dispute will not be discussed. The Gulf of Aqaba, the Bay of Vladivostock and the sea areas situated within the Russian sector of the Arctic are examples of these.

Varangerfjord

The entrance of this fjord extends about 30 miles. In 1881 a Norwegian decree was issued to the effect that whaling was prohibited within a certain distance out to sea from a straight baseline drawn across the entrance of the fjord. Norway justified its claim by invoking *immemorial usage* and the *economic interests* of the local population. In 1911 the captain of a British trawler was found guilty by a Norwegian court for fishing within the straight baseline measured between the entrance of the fjord. On account of this incident the Norwegian government appointed a commission which was charged with the investigation of the boundaries of Norwegian coastal waters. The report of this commission declared that the Varangerfjord is on *historic grounds* a part of exclusive Norwegian fishing waters and that, moreover, other interested states had demonstrated their *acquiescence*.

In 1934 a German fishing vessel was arrested within the three mile limit, measured from the aforesaid straight baseline. The Norwegian Supreme Court declared:

²⁴*ibid* 139.

“There is no doubt . . . that the limits of the territorial sea must in the present case be drawn as the lower Court has done it, namely, so as to include the whole Fiord of Varanger within Norwegian territorial waters. *This is in accordance with the established and frequently voiced Norwegian legal view of the matter.*”

Gulf of Riga

The distance between the headlands of this bay is about 28 miles. The Soviet Union considers the Gulf of Riga as an historic bay forming an integral part of its territory. The government of the Soviet Union motivates its claim by reason of the *geographical configuration* and of certain *historic factors*.

The Gulfs of Tunis and Gabes

The widths of the entrances to these bays are 23 miles and 50 miles respectively. Both bays are especially important for sponge- and coral-fisheries.

From the middle of the 19th century the Bey of Tunis granted concessions to his subjects relating to sponge-fisheries and the sovereignty of the Bey over these two bays was recognised by other interested states in a convention of 1870. On these grounds the above bays are regarded as being historical bays.

Palk Bay and the Gulf of Manaar

These water areas are situated between Ceylon and India and are connected with each other by means of a series of small islands, called Adam's Bridge. Palk Bay is situated north of Adam's Bridge and the Gulf of Manaar south of it. These waters are especially important for pearl-fishing which has been carried on from the 6th century and since this time the rulers of the surrounding territories have considered these bays as their property. In the case of *Annakumeru Pillai v Muthupayal*²⁶ the Supreme Court of Madras in 1904 gave a judgment in favour of the view that these waters belong to the surrounding territories and referred to two main arguments: (1) *the centuries-old exercise of exclusive fishing rights in these waters*, and (2) *the general acquiescence by the other states*.

It may be of interest to note here that the Gulf of Manaar can hardly be considered as a bay and is an example of a claim to historic waters which do not possess the characteristics of a bay.

Shark Bay

This bay is situated on the coast of West Australia and has an entrance width of 46 miles and a penetration of 70 miles. In 1887 the law officers reported about this bay as follows:

²⁶ *Indian Law Reports*, Madras Series vol XXVII 551 as reported in *Bouchez op cit* 224.

“... a much wider range of exclusive dominion may be established not only by treaty, *but by long acquiescence or recognition by other nations*. Further, against its own subjects a State can, by its own particular laws, exercise command at any distance from its shores. In our opinion the whole of Shark Bay, as defined by the Shark Bay Fishery Act of 1886, would be recognised internationally as territorial waters of Her Majesty’s dominions.”²⁶

Hudson Bay

It is generally understood that the Canadian claim to title over Hudson Bay includes also Hudson Strait, the bay’s only connecting link with the Atlantic Ocean. Hudson Bay has a length of about 900 miles and its greatest width is 520 miles. Hudson Strait is about 430 miles long. The Atlantic entrance to Hudson Strait is 38 miles wide.

The historically interested nations so far as Hudson Bay is concerned are Canada and the United States. In 1906 the Canadian government stated that these waters were a part of the territory of Canada; it pointed out that the Hudson Bay Company had already exercised exclusive rights over these waters during a century and a half. In 1670 the British government conferred a right over this bay on the Hudson Bay Company. France gave up its claims to this area in the Treaty of Utrecht of 1713. No one challenged the exclusive rights of the Hudson Bay Company in the period from 1713 to 1859. From 1859 foreigners such as the Americans, and later Scottish fishermen, practised whaling in these waters without opposition from the Hudson Bay Company. It appeared that the foreigners had permission to do so from the British authorities.

In 1870 the whole territory around the Hudson Bay and Hudson Strait, was sold by the Hudson Bay Company to Canada. In 1894 the Canadian Prime Minister declared that Hudson Bay fell under Canadian sovereignty. In 1907 it was stated that aliens could practise whaling on payment of licence-fees.

ThW Balch in an article entitled “Is Hudson Bay a Closed or Open Sea”²⁷ went to great lengths to deny Canadian claims to sovereignty over Hudson Bay. He drew attention to the large size of the water area; to the dissident opinions of the majority of the publicists; the opposition of the United States and the fact that American nationals have fished in these waters for a considerable time.

In opposition to Balch a Canadian lawyer, V Kenneth Johnston, wrote an article “Canada’s Title to Hudson Bay and Hudson Strait”²⁸ He sought to demonstrate that through specific Canadian or British acts of sovereignty, as well as acts of American acquiescence, Canada

²⁶DP O’Connell *Problems of Australian Coastal Jurisdiction* BYIL 1958 242.

²⁷6 *AJIL* 1912 409.

²⁸*BYIL* 1934 1.

has indisputable title to Hudson Bay. Bouchez in his cited work is not prepared to take sides between Balch and Johnston. Strohl tends to favour Johnston but very half-heartedly at that. He sums up the issue as follows:

“In the 1906 era, there seemed to exist in Canadian eyes some commanding reasons for claiming title to Hudson Bay as internal waters. Today, on *military or economic grounds*, the necessity for such title is debatable. But on those same grounds, *there is little legitimate and material reason for any other State to wish Hudson Bay were a part of the high seas.*”²⁹

The importance of Hudson Bay in a study of historic bays is the emphasis put on *declarations and exercise of sovereignty, acquiescence, and the geographical situation*. The Canadian view as recently as 1966 however remains adamant:

“. . . the entire body of waters generally known as Hudson’s Bay is regarded by Canada as part of its territorial waters.”³⁰

Delaware Bay

This bay is situated between the American states of Delaware and New Jersey. The width of the entrance is about 12 miles.

In 1793 as a result of a French frigate seizing a British ship within the bay the question of the bay’s jurisdiction was raised. By virtue of the following facts Delaware Bay was considered part of American national waters:

- (1) the shores of the bay belong to one and the same state;
- (2) the waters do not form a communication with another state; and
- (3) Delaware River and Delaware Bay fall under the same and exclusive jurisdiction, first exercised by Great Britain and later by her successor, the United States.

Santa Monica Bay

The entrance to this bay is 29 miles wide. In 1939 one Adams and others were charged with keeping and operating a gambling ship Rex anchored in the waters of Santa Monica Bay. The Supreme Court of California declared:

(1) The Fundamental Law (Constitution Art XXI sec 1) has declared that the territorial bounds of the state shall include the bays and harbours along the coast.

(2) The usage and custom appear to be established to the effect that the bay is not and cannot become a pathway between nations.

²⁹Strohl *op cit* 250.

³⁰Reply of Under Secretary of State for External Affairs of 19 November 1965. *Canadian Yearbook of International Law* (1966) 282.

(3) Exclusive jurisdiction has been asserted under both the present and former governments.

(4) “We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that *historically* for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the State is in conformity with the law of nations; therefore, the Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the State by the Constitution. It follows that the jurisdiction of the State extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vincente and Point Dume, and at least for a distance of three miles oceanwards from that line, and that such jurisdiction may be exercised by the State for all proper purposes including the prosecution of violators of the penal laws of the State.”³¹

An analysis of the historical concept of historic bays

It is clear from the preceding survey of publicists, decisions and state practice that the existence of claims to - and acceptance of - historical waters is beyond all doubt. A precise and comprehensive definition, agreed on among authors or states, as to the concept of historic bays is still lacking. Generally speaking, however, much has been achieved, and it is possible to attempt a definition which will satisfy the majority. The two publicists who have gone to great lengths to compile the views of publicists and states on our subject are Bouchez and Blum³² and what follows is mainly based on their deductions including deductions by us based on readings outside the scope of the works of Bouchez and Blum.

We will now (i) commence to define the term historic waters, (ii) break down our definition into separate components, and (iii) attempt to illustrate what precisely the contents of the various components consist of.

Definition

Historic waters are waters over which the coastal state, *contrary to the generally applicable rules of international law, clearly, effectively, continuously*, and over a *substantial period of time*, exercises *sovereign rights* with the *acquiescence* of the community of states.

The above definition defines all those areas of water the legal status of which differs - with the consent of other states - from what it ought to have been according to the generally recognised rules of law. The main consequence of the existence of historic bays is that the

³¹*The People v Stralla and Adams* 98 California Decisions 440. As reported in AJIL 1940 143.

³²YZ Blum *Historic Titles in International Law* (1965).

waters no longer fall under the régime of the high seas, but belong to the internal waters of the coastal state. Even the right of innocent passage is absent, because the waters do not possess the status of territorial sea.

It is important to note here that the term “historic” when used in the context of “historic bay”, must not be misinterpreted. It is not the bay as such that has a history - all bays have their histories. The state advancing “historic” claims over a bay means to indicate thereby that, owing to some peculiar circumstances, it is entitled to HISTORIC RIGHTS or TITLE over that given bay.

Components of the definition

The following would appear to be the requirements for the existence of historic bays:

- (a) The claimed water area must be adjacent to the coast of the claimant state.
- (b) The waters must be claimed by the coastal state by an explicit claim of sovereignty.
- (c) The pretended sovereignty has to be exercised effectively and for a sufficiently long period.
- (d) The above created situation ought to be a matter of common knowledge - at least for the directly interested states.
- (e) The international community of states, and certainly the directly interested states must have acquiesced in the claimed territorial rights.

The contents of the above components

The claimed water area must be adjacent to the coast of the claimant state: This aspect speaks for itself.

The water must be claimed by the coastal state by an explicit claim of sovereignty: When a state wants to create exclusive territorial competencies contrary to the generally applicable rules of international law, the exercise of sovereignty must be effectively demonstrated. It is usually stated that a state must establish its sovereignty by a claim *à titre de souverain*. The meaning of this principle is that the manifestations of state authority relied upon in support of the acquisition of a territorial title must be such as to imply a claim sovereignty. Since in international law it is only states and not private individuals who are endowed with the rights of sovereignty, it necessarily follows that the manifestations of state sovereignty relied upon in support of a territorial title must be the acts of the *state*. Activities of private individuals acting on their own, however numerous and extensive, cannot confer on their states a title of sovereignty over the areas in which such

activities were carried out. A positive attitude by the state towards the claims of its nationals by, *eg*, an act or decree, can of course be interpreted to mean that the state has adopted the acts and attitude of the individuals. In other words an act *à titre de souverain* must either have been carried out under a prior commission from the state or must have been adopted subsequently by the state.

This principle - which is of general application as regards the acquisition of a territorial title in international law - is of particular significance in the establishment of an historic title, the legal validity of which rests on the assumption that other states, affected by the formation of such title, have acquiesced in that claim. Such acquiescence - which is inferred from the exercise of sovereign rights by the claimant state without encountering opposition from other states - can, however, not be presumed unless the manifestations of authority emanate from the claimant state and can be imputed to it.

As stated by Judge McNair in the *Anglo-Norwegian Fisheries* case:

“A rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of *State* jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their *Governments* or that in some other way their *Governments* have asserted jurisdiction through them.”³³

The pretended sovereignty has to be exercised effectively and for a sufficiently long period: In all fields of international law the concept of effectiveness plays an important part. The mere invocation of a territorial claim is not of great value for the creation of territorial rights. A further *effective exercise* of the pretended rights is required.

The principle of “effective exercise of sovereign rights” is not one which can easily be given *per definitionem*. On the contrary, the question whether there is effective exercise of sovereign rights depends upon the prevailing circumstances. It is impossible to formulate a generally applicable criterion for determining whether there is effective exercise of sovereign rights or not. It indicates a certain degree of political, military or administrative power deemed appropriate in the given conditions and varying from case to case according to the circumstances. The effectiveness of the authority of a state can manifest itself by means of all kinds of legislative and administrative measures from which it clearly appears that the state considers the area involved as an integral part of the territory. For example, the effective exercise of sovereignty may appear from the collection of taxes, the making of topographical surveys, the grant of concessions for exploitation, regular control of police and military patrols, *etc*. Sovereignty over a water area can reveal

³³*ICJ Reports* 1951 184.

itself in decrees regulating fishery, navigation, pollution, security and other matters relating to the waters. The exercise of all such regulations can be alleged in support of effective authority over the water area. *However, the coastal state must leave no doubt about its intention to claim the water area as a part of the national territory.*

This effective display of sovereignty must be exercised for a sufficiently long period. The determination of a “sufficiently long period” is a difficult one and will vary according to the facts. What can be stated with certainty however is that the exercise of effective sovereignty must be manifested continuously and must not be of a mere incidental character. The views of Oppenheim and Lauterpacht can be regarded as being fairly representative of what a “sufficiently long period” is:

“The acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it *during such a period as is necessary* to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.”³⁴

The situation ought to be a matter of common knowledge - at least for the directly interested states: The awareness and reaction by other states to territorial claims are very important aspects of determining claims to historical title. Reactions by third states are only possible in so far as they are aware of the territorial claims. If state A claims territorial rights to a bay, the fact that other states had knowledge of this fact and their reaction thereto is highly important. When can other states be said to have been well-informed? This is a difficult question to answer. It is accepted that such knowledge may be presumed to be available to a state where the latter could *reasonably* have been aware of the claim. The situation must have achieved a degree of notoriety or publicity, the existence of which is a prerequisite for the presumption of knowledge. Publicity is essential because acquiescence is essential - and without knowledge there can be no acquiescence. It has been repeatedly stated in international law that the proof of knowledge is a prerequisite for the presumption of acquiescence.

The outcome of the *Anglo-Norwegian Fisheries* case turned to a very large extent on this type of consideration. There the court subjected the question of the validity of the Norwegian system of delimitation, *inter alia*, to the test of the notoriety of the system; and it was common ground between the disputing parties that the Norwegian system could be held enforceable against the United Kingdom only if it could be proved that the United Kingdom had in fact acquired knowledge of this system and its methods of application.

³⁴L Oppenheim and H Lauterpacht *International Law* vol I (1961) 576.

Since formal notification is not a necessary prerequisite to knowledge, international law is satisfied to resort to the concept of constructive knowledge, thus substituting an inference based on the conduct of states and the general circumstances surrounding a situation for an express proof of actual knowledge. An illustration of this is the view expressed by the court in the *Anglo-Norwegian Fisheries* case that

“as a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom *could not have been ignorant* of the Decree of 1869 which at once provoked a request for explanation by the French Government.”³⁵

Acquiescence: The precise meaning of the term “acquiescence”, the very pillar of historic rights, has not been free from controversy. The problem arises as to whether acquiescence is a *positive* or a *negative* concept. In other words: must there be some *positive* acts indicating consent and capable of being construed as such, or is a *passive* toleration by other states sufficient?

It is not necessary for our purposes to enter into an exposition of the controversy. It suffices to say that modern practice accepts that, when used in connection with the formation of an historic title, *acquiescence* may be interpreted as a purely negative concept, indicating the *inaction* of a state which is faced with a situation constituting a threat to or infringement of its rights; a *silence* or *absence* of protest in circumstances which generally call for positive reaction signifying an objection.

This interpretation - which is also a rule of commonsense - is that states will not look on idly and without any reaction whilst their alleged rights are being infringed and violated. The silence of the affected states in these circumstances cannot be regarded as devoid of any meaning, and from their conduct an inference of their acquiescence in the new situation may properly be drawn. It is common ground that long silence, without any valid reason, is equivalent to consent. Toleration may be a better term to express fully the meaning of acquiescence in relation to historic title. Schwarzenberger³⁶ uses the term “passive toleration”. A study on the *Juridical Regime of Historic Waters Including Historic Bays* prepared by the UN Secretariat for the 14th Session of the International Law Commission, comments on the negative concept of acquiescence in the following words:

“If the proponents of the necessity of acquiescence really have in mind only the negative aspect, i.e. toleration on the part of foreign States, it would be preferable to use the term ‘toleration’ which better expresses their thoughts.”³⁷

³⁵ *ICJ Reports* 1951 139.

³⁶ “Fundamental Principles of International Law” 87 *Hague Recueil* (1955) 257.

³⁷ UN Document A/CN.4/143 of 9 March 1962. ILC Yearbook (1962) vol II 16.

More recently, the role and function of silence in the establishment of new territory was again discussed at some length in the judgment delivered by the International Court of Justice in the *Temple of Preah Vihear* case.³⁸ Here the court was faced, *inter alia*, with the question whether Thailand's lack of reaction to the publication by the French authorities of various maps showing the disputed area of the Temple of Preah Vihear as falling within the domain of French Indo-China might be construed as acquiescence on her part to the French claims. The court said:

"It is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced."

A further question which arises here is the following: Must one take into account reactions of all members of the community of states, or is it permissible to restrict oneself to the reactions of certain states? The answer to this is that when claims to historic bays are under discussion, nearly all states will be interested because the key problem is the limitation of the freedom of the seas. When the freedom of the seas is in issue, reactions from all states are in principle to be considered as relevant. One must be careful, however, not to push this argument too far as there are states, *eg* those that are not seafaring nations, that are not interested in the freedom of the seas or states that are not interested in the freedom of the seas in a certain part of the world. An international tribunal thus, in deciding whether a certain status exists, has to decide what states were so unimportant or so little interested that their recognition or non-recognition can be ignored.

Effective protest will, of course, deprive claims to historic bays of one of their essential elements, namely, acquiescence. The problem now is to determine what kind of protest can constitute a bar to the growth of an historic title. Here the authorities are not unanimous. From a perusal of the authorities it seems to emerge that a single and simple protest - which is not followed up by further action - cannot be regarded as an adequate remedy for preventing indefinitely an historic title from maturing. By further action here is meant those appropriate and available remedies which are recognised by international law and which are aimed at preventing the claimed historic title from coming into being. These means will usually comprise the active prosecution of the objection through diplomatic negotiations, or the seeking of a solution by enquiry, mediation or conciliation. The dispute may also, *eg*, be referred to the United Nations General Assembly or to the Security Council in accordance with the provisions contained in

³⁸*ICJ Reports* 1962 6.

chapter VI, articles 33-37, of the United Nations Charter, laying down the rules for the pacific settlement of disputes.

CONCLUSION

The term “historical bay” - the emphasis being on the qualifying adjective “historical” - clearly brings out the distinctive feature which distinguishes this international title to territory from the other accepted modes of acquisition of territory. This difference is marked by the fact that, where all other titles to territory rest on an instantaneous act having an immediate effect, to which acts the origins of such titles can be traced, *the historic title is the outcome of a lengthy process comprising a long series of acts, omissions and patterns of behaviour which, in their entirety, and through their cumulative effect, bring such title into being and consolidate it into a title valid in international law.*

Before the title becomes absolute in a legal sense a prior *process* is clearly discernable:

- (a) the acquisition of the historic title is a gradual process;
- (b) during the period of the initiation of the title the claimant state aspires to transform it into an absolute title *erga omnes, ie* against the whole world;
- (c) the more absolute the title becomes, the firmer the legal foundations become;
- (d) eventually the absolute validity of the title is achieved;
- (e) the determination of the absolute validity of the title to an historic bay is determined, on the one hand, by the acts and attitude of the claimant, on the other hand, by the reactions of the community of states.

It appears - after taking into account the opinions of the publicists, judicial decisions and state practice - that the definition of Bouchez of the historical bay is the most representative one, and should in my opinion be used to fill the existing gap in article 7(6) of the *Geneva Convention on the Territorial Sea and Contiguous Zone*. I repeat this definition in conclusion:

“Historic Bays are bays over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time exercises sovereign rights with the acquiescence of the community of States.”