INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

BY

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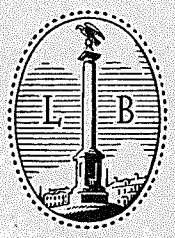

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tude enjoyed by the State possessed of batteries of the most advanced type when mounted on favorable elevations.

(ii)

§ 146A. Bays Bordered by Land Belonging to Two or More States. When the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single State, might not unlawfully claim the waters as a part of its territory, it is not apparent why a like privilege should be denied to two or more States to which such land belongs, at least if they are so agreed, and accept as between themselves a division of the waters concerned.[1] No requirement of international law as such deprives them of that privilege, notwithstanding the disposition of some who would leave little room for its application.[2]

In an opinion and decision of March 9, 1917, the Central American Court of Justice concluded that the Gulf of Fonseca was "an historic bay possessed of the characteristics of a closed sea";[3] and also that a right of co-ownership existed between the Republics of El Salvador and Nicaragua in the non-littoral waters of the Gulf and certain others thereof, without prejudice to the rights that belonged to Honduras in those non-littoral waters.[4] In a circular note of November 24, 1917, sent by the Government of Nicaragua to the other Central American Governments there was announcement of reasons for the rejection of the decision, embracing a denial of a co-dominion over the waters of the Gulf by the three interested republics.[5]

§ 146A. [1] It has been well said that "The power of two or more States should not be smaller than the power of one State in this respect if the States can reach an agreement." (Commentary on Art. 6 of Harvard Draft Convention of 1929 concerning the Law of Territorial Waters, George G. Wilson, Reporter, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 274.) According to that Article: "When the waters of a bay or river-mouth which lie within the seaward limit thereof are bordered by the territory of two or more States, the bordering States may agree upon a division of such waters as inland waters; in the absence of such agreement, the marginal sea of each State shall not be measured from the seaward limit but shall follow the sinuosities of the shore in the bay or river-mouth." (*Id.*)

See also, Art. 6, Project No. 10, concerning National Domain, from American Institute of International Law, *Am. J.*, XX, *Special Supplement*, July and October, 1926, 318.

Cf. Final paragraph of Draft Convention on the Law of Territorial Waters in P. C. Jessup's Law of Territorial Waters, 481.

See Thalweg, *supra*, § 138.

[2] See, for example Art. 4 of Draft Convention drawn up by Dr. Schücking, *Rapporteur* of the Committee of Experts for the Progressive Codification of International Law, League of Nations Document — C.196.M.70.1927.V. p. 72, published also in League of Nations Document — C.74.M.39.1929.V. p. 193; Art. 3 of Project of the Institute of International Law for the Régime of the Territorial Sea in Time of Peace, 1928, *Annuaire*, XXXIV, 755; Basis of Discussion No. 9 from the Preparatory Committee for The Hague Codification Conference, Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V. p. 45.

[3] The Republic of El Salvador *v.* The Republic of Nicaragua, *Am. J.*, XI, 674, 693.

[4] *Id.*, 694. The other waters were those "that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defense." It should be observed that Judge Gutiérrez Navas did not agree with his colleagues as to the right of co-ownership.

A majority of the court also concluded that there should be excepted from the community of interest or co-ownership "the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands respectively, and in which they have exercised their exclusive sovereignty." (*Id.*)

[5] Hackworth, Dig., I, 705. See also P. C. Jessup, Law of Territorial Waters, 398–410.