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Historic Bays: Memorandum by the Secretariat of the United Nations

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HISTORIC BAYS

MEMORANDUM BY THE SECRETARIAT OF THE UNITED NATIONS

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Introduction

I. Object of the present study

1. This study is intended for the United Nations Conference on the Law of the Sea, to be held in pursuance of General Assembly resolution 1105 (XI) of 21 February 1957.¹

¹ Official Records of the General Assembly, Eleventh Session, Supplement No. 17 (A/3572), p. 54.

2. By the terms of that resolution, the General Assembly has referred to the Conference, as the basis for its proceedings, the draft articles concerning the law of the sea adopted by the International Law Commission at its eighth session. The Commission's draft article 7 deals with bays and reads as follows:

"1. For the purposes of these articles, a bay is 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 drawn on the mouth of that indentation. If a bay has more than one mouth, this semi-circle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

"2. The waters within a bay, the coasts of which belong to a single State, shall be considered internal waters if the line drawn across the mouth does not exceed fifteen miles measured from the low-water line.

"3. Where the mouth of a bay exceeds fifteen miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn that line shall be chosen which encloses the maximum water area within the bay.

"4. The foregoing provisions shall not apply to so-called 'historic' bays or in any cases where the straight baseline system provided for in article 5 is applied."²

3. As will be gathered from the provisions above, the Commission excluded the so-called "historic" bays from the scope of its general rules concerning ordinary bays. The question of this class of bays was, therefore, reserved by the Commission.

4. The object of this memorandum, prepared by the Secretariat of the United Nations, is to provide the Conference with material relating to "historic bays".

5. Part I describes the practice of States by reference to a few examples of bays which are considered to be historic or are claimed as such by the States concerned. Part I then proceeds to cite the various draft codifications which established the theory of "historic bays", and the opinions of learned authors and of Governments on this theory. Part II discusses the theory itself, inquiring into the legal status of the waters of bays regarded as historic bays, and setting forth the factors which have been relied on for the purpose of claiming bays as historic. The final section is intended to show that the theory does not apply to bays only but is more general in scope.

II. Definition of the subject

A. Bays and gulfs

6. Dictionaries differentiate between the terms "bay" and "gulf", applying the former to a small indentation of the coast and the latter to a much larger indentation; in other words, a bay would be a small gulf. The distinction is not, however, reflected in geography. A cursory glance at an atlas will show that certain maritime areas are designated as bays although they are of considerable size, while other relatively much smaller areas are described as gulfs. For example, despite its name, Hudson Bay is vast, whereas the Gulf of St. Tropez is not more than four kilometres across at its entrance.

7. This paper deals with both bays and gulfs, geographical terms being immaterial to the subject. The pages which follow contain numerous references to

penetrations of the sea inland, variously designated as bays and as gulfs without regard to their size. The usage of geographical nomenclature will be respected. In cases, however, where the text is not concerned with specific penetrations, the word "bay" will be used to denote both bays and gulfs.

B. "Historic bays" and "historic waters"

8. As indicated in part II of this paper, the theory of historic bays is of general scope. Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as "historic waters", not as "historic bays". The present memorandum will leave out of account historic waters which are not also bays. It will, however, deal with certain maritime areas which, though not bays *stricto sensu*, are of particular interest in this context by reason of their special position or by reason of the discussion or decisions to which they have given rise.³

III. Origin and justification of the theory of historic bays

9. The origin of this theory is traceable to the efforts made in the nineteenth century to determine, in bays, the baseline of the territorial sea. In view of the intimate relationship between bays and their surrounding land formations and in the light of the provisions of municipal law and of conventions governing the subject, proposals were made the object of which was to advance the starting line of the territorial sea towards the opening of bays. The intention was that, in bays, the territorial sea should not be measured from the shore—the method proposed in the case of more or less straight coasts—but should, rather, be reckoned as from a line drawn further to seaward. On this point agreement was virtually unanimous, though the exact location of the line from which the territorial sea was to be reckoned continued to be the subject of controversy. According to various proposals put forward, the territorial sea was to be measured from a straight line drawn across the bay at a point at which its two coasts were a specified distance apart (six miles, ten miles, twelve miles, etc.); the waters lying to landward of that line would be part of the internal waters of the coastal State.

10. This attempt to restrict, in respect of bays, the maritime area claimable by the coastal State as part of its internal waters conflicted with existing situations. There were bays of considerable size the waters of which

³ A case in point is that of the maritime areas created by the application of the "straight baselines" method which, as regards the Norwegian coast, was approved by the International Court of Justice in the Anglo-Norwegian Fisheries case (see *infra*, especially paras. 50-72) and which is the subject of article 5 of the draft articles concerning the law of the sea adopted by the International Law Commission at its eighth session (see *infra*, especially paras. 104-108).

² *Ibid.*, Supplement No. 9 (A/3159) p. 15.

were wholly the property of the coastal States concerned—the territorial sea being accordingly reckoned, in these cases, from the opening of the bay in question towards the sea. Hence, for the purposes of codification, the choice lay between two possible courses, viz. allowing for these cases by means of an exception to the general rule to be formulated; and ignoring them by making the rule apply to all bays, regardless of their *de facto* status. The second course was felt to be arbitrary, and capable, if applied in practice, of causing international difficulties. Most of the draft codifications which dealt with bays endorsed the first solution. There remained, however, and there still remains, the question which bays are covered by the exception. The mere fact that a State claims the ownership of a bay which is not already territorial by virtue of the general rule does not *per se* ensure acceptance of the claim. The claim would have to be substantiated by reference to a specific criterion. And, according to the theory as originally conceived, this criterion was to be essentially historic. The modern view, however, has gone beyond this conception. According to one school of thought (which is more particularly discussed elsewhere in this paper), the proprietary title may be founded either on considerations connected with history or else on considerations of necessity, in which latter case the historical element might be lacking altogether.

PART I

The practice of States; draft international codifications of the rules relating to bays; opinions of learned authors

I. THE PRACTICE OF STATES : SOME EXAMPLES OF HISTORIC BAYS

11. The undermentioned bays, which are cited for the purpose of illustration, are regarded as historic bays or are claimed as such by the States concerned. They are grouped under two headings, namely, bays the coasts of which belong to a single State, and bays the coasts of which belong to two or more States.

A. Bays the coasts of which belong to a single State

Sea of Azov

12. The Sea of Azov is ten miles across at its entrance. It is situated entirely within the southern part of the territory of the Union of Soviet Socialist Republics and extends a considerable distance inland, its dimensions being approximately 230 by 110 miles. De Cussy⁴ mentions the Sea of Azov among the gulfs

⁴ *Phases et causes célèbres du Droit maritime des Nations*, 1856, pp. 97-98: In addition to the Sea of Azov the writer mentions "among the gulfs... which may be regarded as part of the territorial sea, subject to the jurisdiction and control of the State by virtue of the right of self-preservation inherent in its independence" the Sea of Marmara, the Zuyder Zee and the Dollart, the Gulfs of Bothnia and Finland, the Gulf of St. Lawrence in North America, part of the Gulf of Mexico (to the extent indicated in respect of each of the coastal States of that Gulf), the innermost part of the Adriatic Gulf in the vicinity of Venice, Trieste, Rijeka (Fiume), etc., the Gulf of Naples, Salerno, Taranto, Cagliari, Thérmai (Salonica), Coron, Lepanto, etc.

"which may be regarded as part of the territorial sea". P. C. Jessup⁵ states that this contention "seems reasonable and any such Russian claim would not be contested". A. N. Nikolaev regards the Sea of Azov as part of the "internal waters of the USSR" (see *infra*, para. 92). Gidel⁶ is of the opinion that certain maritime areas—of which the Sea of Azov is one—should not be treated as falling within the category of historic waters "because, pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters" (see *infra*, paras. 32-34).

Bay of Cancale (or Granville Bay)

13. This bay (in the north-western part of France) is about seventeen miles across at its entrance. In its reply to the inquiries advanced to Governments by the Preparatory Committee of the Conference on the Codification of International Law, 1930, the French Government stated that "Granville Bay is recognized to consist of territorial waters by the Fisheries Convention of 2 August 1839, concluded with Great Britain (article 1) and by article 2 of the Fisheries Regulations concluded on 24 May 1843 with Great Britain."⁷ Gidel⁸ states that "the waters of Granville Bay are recognized as French [territorial waters], even though the bay is about seventeen miles across at its entrance". According to Jessup,⁹ the bay "seems to be claimed by France without objection. This may be due to the practical appropriation of the bay through the exploitation of its oyster fisheries over a long period. By treaties of 1839 and 1867 Great Britain recognized the exclusive French fisheries in those waters".

Bay of Chaleur

14. This bay (between the Provinces of Quebec and New Brunswick in Canada) does not exceed twelve miles in width; it is about 100 miles long. Its entrance into the Gulf of St. Lawrence is sixteen miles across. In its decision concerning the status of the bay, given in the case of *Mowat v. McFee* (1880), the Supreme Court of Canada held that the Bay of Chaleur was included in its entirety "within the present boundaries of the Provinces of Quebec and New Brunswick, and within the Dominion of Canada".¹⁰

15. "The arbitral award in the North Atlantic Fisheries case, 1910, upheld the British contention concerning the Bay of Chaleur".¹¹ In that award, the tribunal appointed by the Permanent Court of Arbitration recommended that the limit of the bay should be constituted by "the line from the light at Birch Point on Miscou Island to Macquercau Point

⁵ *The Law of Territorial Waters and Maritime Jurisdiction*, 1927, p. 383.

⁶ *Droit international public de la Mer*, 1930-1934, vol. III, p. 663.

⁷ Ser. L.O.N.P. 1929, v. 2, p. 160.

⁸ *Op. cit.*, p. 657.

⁹ *Op. cit.*, pp. 385-386.

¹⁰ Reports of the Supreme Court of Canada, vol. 5 (1880), p. 66.

¹¹ Gidel, *op. cit.*, p. 659.